Does Title VII Allow for Liability Against Individual Defendants?

Kendra Samson
University of Kentucky

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Does Title VII Allow for Liability Against Individual Defendants?

INTRODUCTION

In 1988, after working for Allied Signal for a decade, Lucille Kauffman took medical leave to have breast enlargement surgery to enhance her appearance and self-esteem. She told only a few people, but when she returned to work, her supervisor, Don Butts, whom she had not told about her surgery, touched her left breast and asked her, "Why didn’t you tell me you were getting new tits? When do I get to see them?" Kauffman complained and Butts was fired. After suffering a nervous breakdown, Kauffman sued Allied Signal, but not Butts, for sexual harassment. However, Allied Signal was protected from liability for the harassment because its response to Butts' behavior was "adequate and effective."

The Civil Rights Act of 1964 makes it unlawful for employers to discriminate against employees based on the employees' race, color, sex, national origin, or religion. However, a problem has arisen in determin-

2 Id.
3 Id. However, Butts had been rehired as a temporary full-time employee through a temporary employment service after his original retirement from Allied Signal, and there is no indication that his employment with the temporary service was adversely affected by his treatment of Kauffman. Johnson v. University Surgical Group Assocs., 871 F. Supp. 979, 986 n.3 (S.D. Ohio 1994).
4 Kauffman, 970 F.2d at 185.
5 42 U.S.C. § 2000e-2 (1988) [hereinafter "Title VII"]. It has been held that this statute applies to sexual harassment like that which Kauffman experienced. Harris v. Forklift Sys., 114 S. Ct. 367, 370-71 (1993) (holding that severe or pervasive conduct that creates an objectively hostile or abusive work environment, including conduct that impairs job performance, discourages workers from remaining on the job, or inhibits career advancement, is actionable under Title VII); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986) (holding that sexual harassment exists and is actionable under Title VII when the harassment results in a hostile environment).
ing what is included in the definition of "employer." In Lucille Kauffman’s case, it is clear that Allied Signal was an employer, but it is not as clear whether Butts could be included in the definition of employer and sued in his individual capacity. The United States Supreme Court has not ruled whether Title VII’s "and any agent of such a person" language allows individuals to be held liable for their behavior, and the lower federal courts have split on the issue. If Lucille Kauffman and similarly situated people cannot hold the individuals who commit harassing and discriminatory acts liable, they are left without meaningful recovery under Title VII. Additionally, there is some question as to whether disallowing individual liability will effectively deter discrimination and harassment.

Part I of this Note discusses the statutory scheme of Title VII and its purposes. Part II examines the split among and within the circuits and the arguments advanced by each side on the issue of individual liability. In particular, the Note examines Miller v. Maxwell’s International, Inc., the leading case on the subject of individual liability under Title VII. Finally, Part III argues that courts that find individual liability under Title VII have the better position in light of the statutory language and the purposes behind it. This Note concludes that the goals of compensation and deterrence are best served by allowing individual liability, particularly in sexual harassment cases where corporate employers are often found not liable.

I. THE REMEDIAL SCHEME OF TITLE VII

The Civil Rights Act of 1964, commonly referred to as Title VII, makes it unlawful for an employer to discriminate against employees on the basis of race, color, religion, sex, or national origin. With the

6 The statute defines “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person . . . .” 42 U.S.C. § 2000e(b) (1988).
7 See infra notes 37-113 and accompanying text.
8 See infra notes 171-95 and accompanying text.
9 See infra notes 201-24 and accompanying text.
10 See infra notes 16-36 and accompanying text.
11 See infra notes 37-113 and accompanying text.
12 991 F.2d 583 (9th Cir. 1993), cert. denied, 114 S. Ct. 1049 (1994).
13 See infra notes 37-48 and accompanying text.
14 See infra notes 114-229 and accompanying text.
15 See infra notes 230-37 and accompanying text.
enactment of Title VII, Congress attempted to mandate a "national policy of nondiscrimination" in employment.\textsuperscript{17} In fact, Title VII has been called one of the most significant pieces of civil rights legislation ever enacted by Congress.\textsuperscript{18} Unfortunately, Title VII has managed to breed voluminous amounts of interpretive litigation, hindering its lofty goals.

A large portion of the litigation involves who constitutes an "employer" for the purposes of the statute. Title VII 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 . . . ."\textsuperscript{19} Two other antidiscrimination statutes, the Americans with Disabilities Act ("ADA") and the Age Discrimination in Employment Act ("ADEA"), contain almost identical definitions of "employer."\textsuperscript{20} As a result, courts use the same analysis for all three statutes and treat the cases dealing with the issue of whether the statutes include individual liability interchangeably.\textsuperscript{21}

The inclusion of the "and any agent of such a person" language has posed a mystery for courts in their attempt to determine whether individual liability exists under Title VII. The mystery exists because "agent" is not defined anywhere in Title VII. The absence of a definition has prompted one court to wonder why nothing is said in the statute

\begin{quote}
It shall be an unlawful employment practice for an employer —
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .
\end{quote}

\textsuperscript{17} 110 CONG. REC. 13,169 (1964).
\textsuperscript{20} The Americans with Disabilities Act ("ADA") defines "employer" as "a person engaged in an industry affecting commerce who has 15 or more employees . . . and any agent of such person." 42 U.S.C. § 12111(5)(A) (Supp. V 1993). The Age Discrimination in Employment Act ("ADEA") defines "employer" as "a person engaged in an industry affecting commerce who has twenty or more employees . . . The term also means (1) any agent of such a person." 29 U.S.C. § 630(b) (1988).
\textsuperscript{21} See, e.g., EEOC v. AIC Sec. Investigations, 55 F.3d 1276, 1279-80 (7th Cir. 1995) (following the example of other courts and using the interpretations of "employer" under the ADEA, ADA, and Title VII as interchangeable).
about why “agent” is listed as an “employer” (a “principal”) in the first place.\textsuperscript{22}

The issue of individual liability under Title VII did not pose too much of a problem prior to 1991 because until that time the only remedy available under Title VII was injunctive relief, including reinstatement and back pay.\textsuperscript{23} Most courts reasoned that since that was the type of relief only a corporate employer could provide, individual liability was completely inappropriate.\textsuperscript{24}

In 1991, Congress amended Title VII to allow for compensatory and punitive damages.\textsuperscript{25} This amendment undercut the reasoning of many courts because compensatory and punitive damages are damages that individuals, as well as employers, could expect to pay.\textsuperscript{26} Despite the change in damages, Congress did not change the definition of “employer” in 1991. However, Congress did make one significant change to Title VII. Section 1981a does not refer to an action brought against an “employer,” but to an action being brought against a “respondent.”\textsuperscript{27}

The United States Supreme Court noted that the decision to amend the damages provisions “signals a marked change in its conception of the
Unfortunately, there has been no real indication from either Congress or the Supreme Court whether such a marked change in perspective includes permitting individuals to be held liable for discriminatory or harassing conduct under Title VII.

To make matters even more confusing, in 1991 Congress placed limitations on the amount of compensatory and punitive damages available according to the number of the respondent’s employees. Congress also made clear that compensatory and punitive damages are limited to instances of unlawful intentional discrimination and recovery of punitive damages requires a showing that "the respondent engaged in a discriminatory practice or discriminatory practices with malice or reckless indifference to the federally protected rights of an aggrieved individual."

Initially, there was uncertainty as to whether the 1991 amendment allowed for compensatory and punitive damages only for discrimination occurring after its effective date of November 21, 1991. This issue was resolved by the United States Supreme Court in Landgraf v. USI Film Products, which held that compensatory and punitive damages are not available under Title VII for cases pending on appeal before the effective date of the 1991 amendment. In the court of appeals decision in the same case, the court explained that it would be unjust to require employers to pay damages they could not have anticipated. Consequently, the additional damages would constitute "an additional or unforeseeable obligation" contrary to the well-settled law before the amendments. It is also well-settled that the 1991 amendments do not apply to any conduct occurring before the effective date, regardless of when the case is brought.

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28 United States v. Burke, 504 U.S. 229, 241 n.12 (1992) (holding that Congress's broadening of damages under Title VII cannot be used in an analysis of Title VII as it existed before the 1991 amendments).
30 Id. § 1981a(a)(1).
31 Id. § 1981a(b)(1).
33 Landgraf, 114 S. Ct. at 1488.
34 Landgraf v. USI Film Prods., 968 F.2d 427, 433 (5th Cir. 1992), aff'd, 114 S. Ct. 1483 (1994).
36 See, e.g., Luddington v. Indiana Bell Tel. Co., 966 F.2d 225, 227-28 (7th Cir.
II. THE NINTH CIRCUIT'S HOLDING IN MILLER V. MAXWELL'S INTERNATIONAL AND THE CIRCUIT SPLITS

One of the first circuits to hold that there is no individual liability under Title VII as amended was the Ninth Circuit in Miller v. Maxwell's International, Inc. In fact, Miller is the most frequently cited case on this issue and is often relied upon by courts holding that individual liability does not exist under Title VII. Conversely, courts which hold that individual liability exists under Title VII either severely criticize Miller or simply do not find it persuasive.

1992) (concluding that Title VII is not retroactive under the traditional rule that requires the law to limit its “prohibitions and regulations” to future conduct so that individuals can “conform their conduct” to the law, rather than punishing them for conduct “they had no reason to think unlawful.”), cert. denied, 114 S. Ct. 1641 (1994); Johnson v. Uncle Ben's, Inc., 965 F.2d 1363, 1372 (5th Cir. 1992) (holding that the 1991 amendments do not apply to claims pending at the time of enactment), cert. denied, 114 S. Ct. 1641 (1994); Fray v. Omaha World Herald Co., 960 F.2d 1370, 1378 (8th Cir. 1992) (holding that, when applying the presumption of nonretroactivity, § 101 of the Act does not apply to pending claims on pre-enactment conduct); Vogel v. City of Cincinnati, 959 F.2d 594, 598 (6th Cir.) (holding that since the legislative history does not indicate an intent to apply the act retroactively, it is to be applied prospectively), cert. denied, 506 U.S. 827 (1992).

37 991 F.2d 583, 588 (9th Cir. 1993).


39 See, e.g., Schallehn v. Central Trust & Sav. Bank, 877 F. Supp. 1315, 1333 n.16 (N.D. Iowa 1995) (agreeing with the court in Jendusa v. Cancer Treatment Ctrs., 868 F. Supp. 1006 (N.D. Ill. 1994), that Miller went too far by construing Congress's intent to protect small entities to include protecting individuals from liability); Johnson v. University Surgical Group Assocs., 871 F. Supp. 979, 982 (S.D. Ohio 1994) (refusing to follow the Miller court's analysis that the statute should be construed to preclude individual liability); Jendusa, 868 F. Supp. at 1014 (criticizing the Ninth Circuit in Miller for "seizing" on the intent to protect small business to protect individuals); Bishop v. Okidata, Inc., 864 F. Supp. 416, 423 (D.N.J. 1994) (declining to follow Miller and instead considering supervisory employees agents of an employer who may
In *Miller*, an employee filed sex and age discrimination claims against six individual defendants in addition to her corporate employer. The court first noted that it was bound by an earlier decision which held that individuals could not be liable for back pay. The court then opined that the purpose of the agent provision was to incorporate respondeat superior into the statute. The court further observed: "The statutory scheme itself indicates that Congress did not intend to impose individual liability on employees." The court reasoned that the limits to liability of employers with fifteen or more employees indicated that Congress intended to avoid burdening small businesses with the costs of litigating claims. The court felt that "if Congress decided to protect small entities with limited resources from liability, it is inconceivable that Congress [simultaneously] intended liability to run against individual employees." The court rejected the notion that disallowing individual liability would promote employee violation of Title VII. Instead, the court felt that employers wishing to avoid liability would see to it that employees follow the dictates of Title VII.

It is ironic, considering the importance of *Miller* and how frequently it is relied upon, that the decision was not unanimous. The dissenting judge in *Miller* urged the court to limit its holding by exempting individuals only from back pay, and expressed her concern that the "overbroad language [used by the majority] may unnecessarily cloud also be sued); Lamirande v. Resolution Trust Corp., 834 F. Supp. 526, 528 (D.N.H. 1993) (refusing to follow *Miller* because of the Ninth Circuit's failure to cite authority for its determination).

40 *Miller*, 991 F.2d at 584. The plaintiff worked in a restaurant and sued the chief executive officer of the corporate owner of the restaurant, two general managers of the restaurant, and three "lower level employees." *Id.*

41 Padway v. Palches, 665 F.2d 965, 968 (9th Cir. 1982) ("Back pay awards are to be paid by the employer."). The plaintiff asked for compensatory and punitive damages rather than back pay. *Id.* at 968. At the time *Padway* was decided, damages were not available under Title VII. However, the *Miller* court felt that *Padway* expressed the better rule with respect to Title VII, even as amended. *Miller*, 991 F.2d at 587.

42 *Miller*, 991 F.2d at 587.

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.* at 588. However, this reasoning is questionable. See *infra* notes 201-30 and accompanying text. Furthermore, this reasoning ignores the very real possibility that the employer may be either not liable or unable to satisfy a judgment. See *infra* notes 171-95 and accompanying text.
decisionmaking under the Civil Rights Act of 1991.”47 The dissent further remarked: “What can be said, and all that should be said, is that under Title VII prior to its amendment, an employee could not be held individually liable for back pay.”48

The Ninth Circuit has clearly decided that there is no individual liability under Title VII.49 Although almost every other case deciding the issue cites Miller, the holdings are not always as clear and have created a split between the circuits. Additionally, more severe splits have occurred within circuits where a court of appeals has not ruled on the issue.

A number of the courts of appeals which have held that there is no individual liability under Title VII have nevertheless held that the individual can be named as a defendant in his or her “official capacity.”50 The result is that although the individual is named as an agent of the larger employer, relief can only be obtained against the larger employer. One of the first courts to so hold was the Eleventh Circuit in Busby v. City of Orlando.51 The court in Busby found that individual

47 Miller, 991 F.2d at 589 (Fletcher, J., dissenting).
48 Id. Interestingly, all the behavior of which the plaintiff complained occurred prior to the Civil Rights Act of 1991, where compensatory and punitive damages were first allowed. In fact, Miller was argued and submitted to the court of appeals on November 8, 1991, before the 1991 amendment became effective, and it was not decided until April 19, 1993. In light of the fact that the 1991 amendment does not apply to conduct occurring before November 21, 1991, see supra notes 32-36 and accompanying text, it seems that the court in Miller could have relied solely upon the holding in Padway and avoided a decision on whether to allow individual liability under the 1991 amendment.

49 The court in Miller held that “Miller’s claims against the defendants in their individual capacities were properly dismissed for failure to state a claim.” Id. at 588. The Ninth Circuit has never disturbed Miller’s holding of no individual liability under Title VII.


51 931 F.2d 764, 772 (11th Cir. 1991) (holding that claims must be made against public officials in their official capacities). Busby was decided before Miller and before the 1991 amendment took effect. However, the Eleventh Circuit later followed Busby in Cross v. Alabama, 49 F.3d 1490, 1504 (11th Cir.
capacity suits under Title VII were "inappropriate" and that the proper method for recovery was a suit against the employer — either directly or by naming the supervisory employee as an agent of the employer.  

Similarly, the Court of Appeals for the District of Columbia Circuit, although admitting that a construction which imposes individual liability is "facially plausible," agreed with Miller that the purpose of including the agent provision was to incorporate respondeat superior liability into the statute. The court then cited Busby and said that a supervisory employee may be joined as a defendant, but only as an agent of the employer, who is alone liable for the violation.

In Harvey v. Blake, the Fifth Circuit found that immediate supervisors could be "employers" when they were delegated an employer's "traditional rights." Nevertheless, the court went on to hold that the individual defendant, despite being an "employer," could only be liable in her official capacity. The Fifth Circuit later upheld the lack of individual liability in Grant v. Lone Star Co. There, the court held that individual liability is only imposed upon an individual who meets the statutory definition of "employer." In Garcia v. Elf Atochem North America, the court cited Grant for the proposition that Title VII liability only attaches to individuals acting in their official capacity. Although Grant and Garcia are the latest holdings from the Fifth Circuit on this issue, both cases involved conduct that occurred before the effective date of the 1991 amendment.

1995).

52 Busby, 931 F.2d at 772.
53 Gary v. Long, 59 F.3d 1391, 1399 (D.C. Cir.) (holding that when an individual is sued in his or her official capacity, the claim merges into a claim against the larger employer and the individual is properly dismissed), cert. denied, 116 S. Ct. 569 (1995).
54 Id.
55 913 F.2d 226, 227 (5th Cir. 1990) (holding that since the individual's liability was based on her role as an agent of the city, she can only be liable in her official capacity).
56 Id. at 227. The court said that such rights include hiring and firing. Id.
57 Id.
59 Id.
60 28 F.3d 446 (5th Cir. 1994).
61 Id. at 451. Although the complaint did not make clear whether the individual defendants were sued in their individual or official capacities, the court assumed that they were sued in their official capacities. Id. at 451 n.2.
62 Garcia, 28 F.3d at 450; Grant, 21 F.3d at 653. See also Zatarain v.
Most recently, in *Sheridan v. E.I. DuPont de Nemours and Co.*, the Third Circuit has considered the issue of individual liability. In *Sheridan*, a hotel restaurant employee filed suit against her corporate employer and the hotel general manager under Title VII, alleging sex discrimination and retaliation. The district court dismissed the claims against the manager based on the absence of individual liability under Title VII. The Third Circuit panel recognized that “reasonable arguments” in favor of individual liability could be made, but elected to “follow the great weight of authority from other courts of appeals and hold that an employee cannot be sued.” The full Third Circuit, however, vacated the panel’s decision and scheduled the case for rehearing en banc.

Another recent decision from a court of appeals on the issue of individual liability came from the Second Circuit in *Tomka v. Seiler Corp.* The plaintiff sued the individuals for various instances of sexual harassment, culminating in a rape. The court held that the remedial provisions of Title VII show that Congress never intended individual liability.

The Seventh Circuit first reached the question of individual liability in *EEOC v. AIC Security Investigations*. In that case, the plaintiff sued his employer and its sole shareholder under the ADA, claiming that she fired him because he had lung cancer. The court found that there was no individual liability under the ADA for individuals who do not independently meet the statutory definition of “employer.” The court noted that although its holding only applies directly to the ADA, it affects

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63 74 F.3d 1439 (3d Cir.), withdrawn, vacated, and reh'g en banc granted, 74 F.3d 1459 (3d Cir. 1996).
64 Id. at 1443.
65 Id. at 1452.
66 Id. at 1454.
68 66 F.3d 1295 (2d Cir. 1995).
69 Id. at 1301-02.
70 Id. at 1314.
71 55 F.3d 1276 (7th Cir. 1995).
72 Id. at 1279.
73 Id.
In fact, the Seventh Circuit later applied the ruling in *AIC Security* directly to Title VII in *Williams v. Banning*. In *Williams*, a secretary sued only her supervisor under Title VII for harassment consisting of unwanted physical contact.

Despite the holding in *AIC Security*, a district court in the Seventh Circuit allowed an individual to be sued under Title VII under an “alter ego” theory in *Curcio v. Chinn Enterprises, Inc.* The four plaintiffs were restaurant employees and filed suit against their corporate employer and the individual who was the president and controlling shareholder. The court denied the individual defendant’s motion to dismiss because he was “more than a mere supervisor, but was in all respects the actual employer.”

While the Eighth Circuit has not ruled on the issue of individual supervisor liability under any of the federal discrimination statutes, it has indicated the direction it would take if faced with the question. The Eighth Circuit has refused to find individual liability against coworkers because “liability under 42 U.S.C. § 2000e(b) can attach only to

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74 Id. at 1282 n.10.
75 72 F.3d 552 (7th Cir. 1995).
76 Id. at 552-53. The plaintiff did not sue the corporate employer because, as the court noted, the employer “investigated promptly and took swift and decisive action.” Id. at 555. An additional reason was likely the fact that the plaintiff continued to work for the corporate employer. Id. at 553.
78 Id. at 191-92.
79 Id. at 193-94. The court noted that the Seventh Circuit’s holding in *AIC Security* did not expressly address the “alter ego” theory. Id. at 193. However, the Seventh Circuit did express an inclination to reject the “alter ego” argument. *AIC Security*, 55 F.3d at 1282 n.11. The *Curcio* court dismissed this as dictum and followed its own holding allowing liability under the “alter ego” theory set forth in Fabiszak v. Will County Bd. of Comm’rs, No. 94 C 1517, 1994 WL 698509, at *2-3 (N.D. Ill. Nov. 28, 1994). *Curcio*, 887 F. Supp. at 193-94. Although *Williams* did not mention the “alter ego” argument, another district court felt that *Curcio* would have been decided differently if the court had the benefit of the *Williams* decision. Coulter v. Irmco Properties and Management Corp., No. 94 C 7480, 1996 WL 111897, at *3 n.2 (N.D. Ill. Mar. 12, 1996). The *Coulter* court declared that *AIC Security* and *Williams* “completely foreclose individual liability under Title VII, regardless of the particular facts presented in any given case.” Id. at *2.
employers." The court in *Lenhardt v. Basic Institute of Technology* was faced with a similar question, it found no liability under the Missouri Human Rights Act.

The Fourth Circuit was one of the earliest courts to hold that an individual can qualify as an "employer" for the purposes of Title VII in *Paroline v. Unisys Corp.* In *Paroline*, the court held that an individual qualifies as an "employer" for the purposes of Title VII if "he or she serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment." However, in *Birkbeck v. Marvel Lighting Corp.*, the court refused to find individual liability under the ADEA.

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80 Smith v. St. Bernards Medical Ctr., 19 F.3d 1254, 1255 (8th Cir. 1994) (holding that when the only individuals sued were four former coworkers and the plaintiff was only seeking reinstatement, the individuals were properly dismissed). At least one district court in the Eighth Circuit does not read Smith as a holding on the issue of individual liability for supervisory employees. Schallehn v. Central Trust & Sav. Bank, 877 F. Supp. 1315, 1329-30 (N.D. Iowa 1995) (finding that although Smith presented a similar issue, it is not controlling because the court was not faced with the issue of supervisory employees).

81 55 F.3d 377, 380 (8th Cir. 1995) (applying Title VII analysis to a state statute and finding no individual liability).


83 879 F.2d 100 (4th Cir. 1989), vacated on other grounds, 900 F.2d 27 (1990).

84 Id. at 104. The court further held that the supervisor need not have ultimate authority to hire or fire to be an employer and an employee may exercise supervisory authority for Title VII purposes even if another person is designated as the plaintiff's supervisor. *Id.*

85 Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 510-11 (4th Cir.) (finding no individual liability for discrimination under the ADEA), cert. denied, 115 S. Ct. 666 (1994). It has been suggested that *Birkbeck* is the law of the Fourth Circuit, except for sexual harassment cases, where *Paroline* may still be viable. Howard v. Board of Educ., 876 F. Supp. 959, 970 n.8 (N.D. Ill. 1995). This may be a fair reading of *Birkbeck* in light of its statement that an employee is not shielded as an agent in all circumstances and that the case only addresses "personnel decisions of a plainly delegable character." *Birkbeck*, 30 F.3d at 510 n.1. In fact, one district court in the Fourth Circuit found a "distinction between the relatively benign age discrimination and more egregious sexual harassment." *Frye* v. Virginia Transformer Corp., No. CIV.A.95-0399-R, 1995 WL 810018, at *2 (W.D. Va. Nov. 29, 1995). The *Frye* court found that *Birkbeck* was not applicable to sexual harassment cases.
The state of the law on this issue in the Tenth Circuit is far from clear. In *Sauers v. Salt Lake County*, the Tenth Circuit held that individual capacity suits are inappropriate under Title VII. However, just six months later, the court in *Brownlee v. Lear Siegler Management Services Corp.* held that "a principal's status as an employer can be attributed to its agent to make the agent statutorily liable for his own age-discriminatory conduct." The court in *Ball v. Renner* seized upon that apparent inconsistency to criticize the reasoning of the *Miller* court. Yet, the court stopped short of finding individual liability under Title VII because there were insufficient allegations that the defendant was the plaintiff's supervisor.

The Sixth Circuit has not ruled directly on the issue of individual liability under Title VII. The closest the Sixth Circuit has come to ruling on the issue is dictum from *Jones v. Continental Corp.* In *Jones*, the plaintiff alleged race and sex discrimination against both her employer and some individual employees. After the plaintiff lost her case on the merits, the court assessed attorneys' fees and costs against the plaintiff and attorneys' fees against plaintiff's counsel for "unreasonably and vexatiously multiplying the litigation." One of the grounds for

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86 Ball v. Renner, 54 F.3d 664, 667 (10th Cir. 1995) ("[T]he waters [in the Tenth Circuit] are not entirely clear.").
87 1 F.3d 1122 (10th Cir. 1993).
88 *Id.* at 1125. However, the court did hold that individuals may be sued under Title VII in their official capacities. *Id.*
89 15 F.3d 976 (10th Cir.), *cert. denied*, 114 S. Ct. 2743 (1994).
90 *Id.* at 978.
91 Ball v. Renner, 54 F.3d 664, 667-68 (10th Cir. 1995).
92 *Id.* at 668.
93 *Wilson v. Nutt*, 69 F.3d 538, 1995 WL 638298, at *2 (6th Cir. Oct. 30, 1995) ("The Sixth Circuit has not directly addressed this issue, and we need not do so in this case.").
94 789 F.2d 1225 (6th Cir. 1986).
95 *Id.* at 1227-28.
96 *Id.* at 1228. The Court of Appeals previously affirmed this judgment on the merits. *Id.*
97 *Id.* Attorneys' fees may be assessed against the losing party under 42 U.S.C. § 1988(b) (1988).
98 *Id.*
granting fees against plaintiff’s counsel was the “failure to specify under which statute the individual defendants (as opposed to the employer) were being sued.”

In reversing the grant of fees against counsel, the court said: “Similarly the law is clear that individuals may be held liable . . . as ‘agents’ of an employer under Title VII.”

Despite this rather strong statement from the court of appeals, subsequent district court rulings from the Sixth Circuit have largely ignored the implication of Jones and held that there is no individual liability under Title VII, presumably because the implication in Jones was not central to the holding of the case. On the other hand, one district court conducted a more thorough analysis of Sixth Circuit decisions and found individual liability. The court, although recognizing that the holding in Jones was mere dicta, found it to be the strongest available assertion of the Sixth Circuit’s position. However, another district court in the Sixth Circuit also did a more thorough analysis and reached the conclusion that the Sixth Circuit cases “support the proposition that individuals may only be found liable under Title VII in their official capacity and not their individual capacity.”

99 Id. at 1231.
102 Johnson v. University Surgical Group Assocs., 871 F. Supp. 979, 983-85 (S.D. Ohio 1994) (believing that although the Sixth Circuit favors individual liability, the court should conduct its own analysis of the question in the absence of a definitive holding from the Sixth Circuit).
103 Id. at 984.
104 Shpargel v. Stage & Co., 914 F. Supp. 1468, 1478 (E.D. Mich. 1996). The Shpargel court examined the Sixth Circuit’s holdings in Jones and York v. Tennessee Crushed Stone Ass’n, 684 F.2d 360 (6th Cir. 1982) (reviewing Title VII cases and suggesting that an agent could be sued in his or her official
The Sixth Circuit has not taken the opportunity to directly address the imposition of individual liability to which it alluded in Jones. The issue came before it in the recent case of Wilson v. Nutt, but the court avoided the issue by holding that the defendant, a county sheriff, could be sued in his “official capacity.”

The First Circuit has received no guidance from its court of appeals and has an intracircuit split. In the First Circuit, the major case is Lamirande v. Resolution Trust Corp. The plaintiff believed she had been wrongfully discharged because she had claimed to have more experience and seniority than the two male employees who had been retained. The court criticized the Ninth Circuit’s holding in Miller and said the plain language of the statute “clearly impose[s] individual liability upon ‘any agent of’ an ‘employer.’” The court’s reasoning in Lamirande was persuasive and was relied upon in the absence of a First Circuit holding in Douglas v. Coca-Cola Bottling Co. However, the reasoning of the Miller court was also persuasive to at least one district court in the First Circuit. In Hernandez Torres v. Intercontinental Trading, the plaintiff claimed he was harassed because of his religious beliefs, and the court found that Title VII “neither intends nor effectuates the imposition of individual liability.”

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108 Id. at 527.

109 Id. at 529. In criticizing Miller, the court observed that Miller cited no authority for its conclusion that § 2000e(b) was intended to protect individuals. Id. at 528.

110 855 F. Supp. 518, 520 (D.N.H. 1994) ("Absent a First Circuit case defining the term employer, this Court has found Lamirande persuasive.").

111 No. 94-1057 (HL), 1994 WL 752591, at *6 (D.P.R. Dec. 22, 1994) (following the “primary reasoning of most courts”).

112 Id. at *1.

113 Id. at *6.
III. TITLE VII DOES ALLOW FOR THE IMPOSITION OF INDIVIDUAL LIABILITY

A. A Strict Reading of the Statute Is Appropriate and Allows Individuals to Be Held Liable

The first rule of statutory analysis is that courts should begin with the plain language of the statute, which is ordinarily dispositive.\(^{114}\) In fact, the general rule of statutory construction is that courts should defer to the plain meaning of the statute’s language unless there is a “clearly expressed legislative intention to the contrary.”\(^{115}\) Unfortunately, “[p]lain meaning, like beauty, is sometimes in the eye of the beholder.”\(^{116}\)

The plain language of § 2000e(b) states that an employer is defined as a “person . . . who has fifteen or more employees . . . and any agent of such a person . . . .”\(^{117}\) A number of courts have relied on this plain language in holding that individual liability is imposed under Title VII.\(^{118}\) For example, in Jendusa v. Cancer Treatment Centers, Inc.,\(^{119}\) the court said: “By incorporating ‘agents’ within the definition of ‘employers,’ the plain language of the statute appears to subject individuals to liability for engaging in unlawful employment discrimination.”\(^{120}\) As was noted in Schallehn v. Central Trust & Savings Bank,\(^{121}\) individual liability is imposed under the statute only when two conditions are met: (1) when the individual is an “agent” of the employer, and (2) when the employer already falls within the statutory definition of “employer” by virtue of the number of employees it has.\(^{122}\)

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\(^{119}\) 868 F. Supp. 1006 (N.D. Ill. 1994).

\(^{120}\) Id. at 1010.

\(^{121}\) 877 F. Supp. 1315 (N.D. Iowa 1995).

\(^{122}\) Id. at 1333.
The fact that Congress included the agent provision in its definition of "employer" is significant.\textsuperscript{123} One court that found no individual liability under Title VII even observed that the statutory definition of "employer" is broader than the word's ordinary and natural meaning.\textsuperscript{124}

Another court focused on the inclusion of the conjunctive "and" rather than the disjunctive "or" in finding that Title VII does not allow for individual liability.\textsuperscript{125} The court observed that if Congress had said "or" "any agent of such a person," the language could stand alone and would allow for individual liability, but that the use of the word "and" ties the agent provision to the previous language, suggesting that it was not intended to stand alone.\textsuperscript{126} This court placed too much emphasis upon one word without considering the broader purposes and intent of the statute.\textsuperscript{127}

As an exception to the plain meaning rule, the United States Supreme Court has recognized the need to look beyond the usual meaning when a literal application would produce a result at odds with the intentions of Congress.\textsuperscript{128} Although a number of courts have interpreted individual liability under Title VII to be at odds with the intentions of Congress, those courts have arguably misinterpreted Congress's intentions in passing Title VII.\textsuperscript{129}

Finally, Title VII and other antidiscrimination statutes are strongly remedial in nature. It is a principle of construction that such statutes, because of that remedial nature, should be construed liberally to give full effect to their remedial purposes.\textsuperscript{130} In fact, in Armbruster v.

\textsuperscript{123} Griffith v. Keystone Steel & Wire Co., 858 F. Supp. 802, 806 (C.D. Ill. 1994). Courts finding no individual liability argue that the inclusion is to incorporate respondeat superior liability into the statute. See infra notes 150-63 and accompanying text.


\textsuperscript{126} Id. at 469.

\textsuperscript{127} In fact, the Johnson court recognized the warning of its court of appeals "not to rely too heavily on disjunctive form versus conjunctive form when deciding difficult issues. Id. (citing Kelly v. Wauconda Park Dist., 801 F.2d 269, 270 n.1 (7th Cir. 1986)).


\textsuperscript{129} See infra notes 135-49 and accompanying text.

\textsuperscript{130} See, e.g., Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451 (5th Cir. 1994) (giving a liberal construction to the phrase "any agent"); Harvey v. Blake,
Quinn, the court gave a broad interpretation to the definition of "employer" in Title VII to find that parent and subsidiary corporations could be considered a "single employer" so as to allow the plaintiffs to meet the statutory minimum number of employees. The court further noted that Title VII "defines 'employer' with substantial breadth and generality." The court concluded that when Congress amended Title VII in 1972 to lower the statutory minimum from twenty-five to fifteen employees, it broadened the reach of Title VII and consequently intended all of Title VII to be "broadly construed."

B. Congressional Intent Does Not Eliminate the Imposition of Individual Liability

One of the most frequently advanced arguments for not allowing individual liability under Title VII is that by limiting liability to employers of more than fourteen employees, Congress intended to protect small entities and an individual is the smallest entity of all. The court in Miller said: "If Congress decided to protect small entities with limited resources from liability, it is inconceivable that Congress intended to allow civil liability to run against individual employees."

However, the legislative history of Title VII indicates a desire to protect small businesses, rather than small entities. One court has noted: "A fair reading of Title VII's legislative history suggests that the

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913 F.2d 226, 227 (5th Cir. 1990) (according liberal construction to all Title VII provisions); Schallehn v. Central Trust & Sav. Bank, 877 F. Supp. 1315, 1332-33 (N.D. Iowa 1995) (requiring liberal construction because of the remedial nature of antidiscrimination statutes).

131 711 F.2d 1332 (6th Cir. 1983).

132 Id. at 1336.

133 Id.

134 Id. at 1336-37.

135 See, e.g., Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 587 (9th Cir. 1993) (finding that a logical inference from the Congressional protection of small entities is the protection of individuals); EEOC v. AIC Sec. Investigations, 55 F.3d 1276, 1281 (7th Cir. 1995) (individual liability contrary to Congressional intention to balance between protecting small business and ending discrimination).

definition of ‘employer’ was limited . . . not simply, or even predominately, out of a concern for . . . litigation costs . . . but also to limit the federal government’s intrusive reach into the associational rights of small employers.”¹³⁷ Many of the remarks made by members of Congress in debating where to place the size limitation on the definition of employer support that interpretation.¹³⁸ An additional justification for limiting the size of the employer may have been to avoid overwhelming small employers with administrative expenses.¹³⁹ Furthermore, when Title VII was enacted, small businesses made up ninety-two percent of the country’s employers and Congress justifiably wanted to protect that large sector of the national economy.¹⁴⁰

Courts finding individual liability under Title VII have seized upon this legislative history to demonstrate that Congress intended to protect very small employers for reasons extending beyond their size or their available resources and that those same policies do not apply to individuals.¹⁴¹ One court countered the argument that Congress intended to protect small family-run businesses by stating that “Congress . . . excluded a category of employers on the basis of their size — ‘small entities’ — and not on the basis of whether a business was family-run.”¹⁴² This argument ignores the fact that limiting the definition of employer by size is the best way to protect the small, family-run business. If Congress had expressly excluded “family-owned” or

¹³⁷ Jendusa, 868 F. Supp. at 1013.
¹³⁸ See, e.g., 110 CONG. REC. 13,085-86 (1964) (statement of Sen. Norris Cotton) (the personal relationship in small businesses is predominant and such employers should be able to “pick and choose employees congenial” to themselves); 118 CONG. REC. 3171 (1972) (statement of Sen. Samuel J. Ervin) (when employers get below a certain size most of the hiring is done by employing friends).
¹³⁹ 118 CONG. REC. 2410 (1972) (statement of Sen. Paul J. Fannin) (“Men and women who are very able and eager to run small businesses find that they are overwhelmed by paperwork and regulations and redtape.”).
¹⁴⁰ Jendusa, 868 F. Supp. at 1014-15 (citing 110 CONG. REC. 13088 (1964) (statement of Sen. Hubert Humphrey)).
"family-run" businesses, it would have also exempted employers that, although family-owned or run, have become so large as to lose their "family quality."

When Congress provided for compensatory and punitive damages under Title VII, it placed limits, according to the size of the employer, on the damages allowable. A number of courts have seized upon the omission of a cap for individuals to conclude that individual liability was not contemplated by Congress. The court in Miller found that because "Congress specifically limited the damages available depending upon the size of the respondent employer," it could not have intended individual liability under this section. However, this assumes that only employers are "respondents" when the definition of "respondent" includes "employer" and the definition of "employer" includes agents of those with fifteen or more employees. As one court pointed out, the Miller analysis in this respect begs the question: "It is just as logical to assume that the statute caps damages against employers of certain sizes and their agents, while exempting smaller employers and their agents."

Furthermore, allowing individual liability does not make the statutory damages caps unworkable. The maximum amount of compensatory and punitive damages which each plaintiff can collect is clear from the statutory language. The only possible difficulty would arise when a court had to apportion damages between the individual defendant and the institutional employer, but that problem is not unknown to courts or unique to Title VII claims, and it should not form the basis for rejecting individual liability.

144 See, e.g., EEOC v. AIC Sec. Investigations, 55 F.3d 1276, 1281 (7th Cir. 1995) (cap omission implies no Congressional intent for individual liability); Schaffer v. Ames Dep't Stores, Inc., 889 F. Supp. 41, 45 (D. Conn. 1995) (failure to address issues of applying caps to individuals proves no Congressional intent for individual liability); Vodde v. Indiana Mich. Power Co., 852 F. Supp. 676, 680-81 (N.D. Ind. 1994) (degree of individual liability based upon size of employer would not have been intended by Congress); Lowry v. Clark, 843 F. Supp. 228, 231 (E.D. Ky. 1994) (compensatory damage limits based on employer size indicates Congressional intent against recovery from an individual).
145 Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 587 n.2 (9th Cir. 1993).
147 Id. § 2000e(b) (1988).
C. Congress Did Not Intend the Inclusion of the Agent Provision Merely to Incorporate Respondeat Superior Liability into the Statute

The Miller court attempted to explain away the agent provision as simply incorporating respondeat superior liability into the statute.\textsuperscript{150} This explanation was expanded by the court in Vodde v. Indiana Michigan Power Co.\textsuperscript{151} when it said that Title VII includes the agent provision because "it underscores the notion that the employer is to have some derivative liability for the deliberate discriminatory acts of its employees."\textsuperscript{152} The court in Birkbeck v. Marvel Lighting Corp.,\textsuperscript{153} read the agency provision in the ADEA as "an unremarkable expression of respondeat superior" which meant "that discriminatory personnel actions taken by an employer's agent may create liability for the employer."\textsuperscript{154}

However, these courts are reading too much into the statute. There was no need for Congress to specifically provide for respondeat superior liability as it is already built into the statute. Since a corporation or organization can act only through its agents, the very "prohibition against discrimination by an employer" necessarily embodies respondeat superior principles on its own.\textsuperscript{155} In fact, the United States Supreme Court recognized this when it observed that "the courts 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."\textsuperscript{156} Furthermore, agency principles hold that "[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment."\textsuperscript{157}

It seems clear that Congress could not have intended merely to incorporate respondeat superior liability into the statute by the inclusion of the agent provision because respondeat superior liability is already present. As one court noted, it would be a "peculiarly odd congressional

\textsuperscript{150} Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 587 (9th Cir. 1993).
\textsuperscript{151} 852 F. Supp. 676 (N.D. Ind. 1994).
\textsuperscript{152} Id. at 679.
\textsuperscript{153} 30 F.3d 507 (4th Cir. 1994).
\textsuperscript{154} Id. at 510.
\textsuperscript{155} Ball v. Renner, 54 F.3d 664, 667 (10th Cir. 1995).
\textsuperscript{157} \textsc{Restatement (Second) of Agency} § 219(1) (1958).
choice of language if Congress' purpose was merely to impose respondeat
superior liability."\textsuperscript{158} In fact, if Congress's intention had been to
incorporate respondeat superior liability, there were better ways to
accomplish that goal. This was explained by the court in \textit{Cassano v.
DeSoto},\textsuperscript{159} when it asked: "[I]f that really were Congress' limited
intention, it surely chose an odd and roundabout way of doing so — why
would it enact a provision that defined such employees as "agents"
coming within the definition of "employer," instead of including a direct
statement of respondeat superior liability in the statute?"\textsuperscript{160}

Reading the agent provision to merely incorporate respondeat superior
liability into the statute when that liability is present naturally "reduces
the agent clause to surplusage."\textsuperscript{161} This was explained further:

Absent this clause, Title VII would nevertheless permit respondeat
superior liability against employers for the acts of their agents under
common law liability principles. Indeed, respondeat superior liability is
so fundamental to the employment context that the term "employer" is
commonly defined to include acting on the employer's behalf.\textsuperscript{162}

There is no good reason to assume that Congress intended to insert
that which was already included. Consequently, the inclusion of the agent
provision must mean something more than imposing respondeat superior
liability. That something more can only be that Congress intended the
individual agents of those who have more than fourteen employees to be
liable for their own discriminatory acts.\textsuperscript{163}

\textbf{D. Agency Principles Do Not Allow the Individual Agent to Escape
Liability}

Since Congress included the agent provision in the definition of
employer, there can be no question "that Congress wanted courts to look

\textsuperscript{158} Schallehn v. Central Trust & Sav. Bank, 877 F. Supp. 1315, 1333 n.15
(N.D. Iowa 1995).
\textsuperscript{159} 860 F. Supp. 537 (N.D. Ill. 1994).
\textsuperscript{160} Id. at 539. \textit{Accord Schallehn}, 877 F. Supp. at 1333 n.15; Jendusa v.
Cancer Treatment Ctrs., 868 F. Supp. 1006, 1012 (N.D. Ill. 1994) (quoting
\textsuperscript{161} Tomka v. Seiler Corp., 66 F.3d 1295, 1319 (2d Cir. 1995) (Parker, J.,
dissenting).
\textsuperscript{162} \textit{Id.}
\textsuperscript{163} \textit{Id.}
Several courts have followed the Supreme Court's lead and utilized agency principles to determine whether a supervisor may be held individually liable for discriminatory conduct.\textsuperscript{165}

Agency is defined as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."\textsuperscript{166} Although this definition obviously includes employees, especially supervisory employees, it is broader than that.

Agency principles further hold that an agent is not immune from liability simply because of his or her status as an agent.\textsuperscript{167} The only exceptions which would relieve the agent from liability are when (1) "he is exercising a privilege of the principal;" (2) he is exercising a "privilege held by him for the protection of the principal's interests;" or (3) "the principal owes no duty or less than the normal duty of care to the person harmed."\textsuperscript{168}

Nothing in this principle appears to allow an agent of an employer under Title VII to escape liability. The principal (the employer) certainly possesses no privilege to discriminate which can be exercised by the agent. Furthermore, the agent possesses no privilege to discriminate to protect the employer's interests. Finally, the principal owes a duty to not discriminate and that duty cannot be ignored by the agent.

A final agency principle notes: "Principal and agent can be joined in one action for a wrong resulting from the tortious conduct of an agent or that of agent and principal, and a judgment can issue against each."\textsuperscript{169}

Applying this agency principle to Title VII, it becomes clear that

\textsuperscript{164} Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986). However, the Supreme Court did note that agency principles might not be applicable to Title VII in their entirety. \textit{Id.}


\textsuperscript{166} \textit{RESTATEMENT (SECOND) OF AGENCY} § 1(1) (1958). Subsection (2) defines the "principal" as "\textit{the one for whom action is to be taken}" and subsection (3) defines the agent as "\textit{the one who is to act}.”

\textsuperscript{167} \textit{Id.} § 343.

\textsuperscript{168} \textit{Id.}

\textsuperscript{169} \textit{Id.} § 359C(1).
individual employees who qualify as agents of larger employers can be held individually liable along with the larger employer and each can have compensatory and punitive damages issued against them. In fact, in some instances, agency principles require that judgment issue against the agent because "if the action is based solely upon the tortious conduct of the agent, a judgment on the merits for the agent and against the principal, or a smaller judgment for compensatory damages against the agent than against the principal, is erroneous." In many discrimination cases the action is indeed based solely upon the conduct of the agent and at least the spirit of agency principles would be circumvented by allowing the agent to escape individual liability.

E. A Finding of No Individual Liability Could Allow Many Instances of Discrimination to Go Unpunished and Could Preclude Plaintiffs from Obtaining a Remedy

An additional reason to impose individual liability under Title VII is that otherwise many instances of discrimination will go unpunished and undeterred and deserving plaintiffs may be left without a realistic remedy. If the defendant company is bankrupt or otherwise unable to pay any judgment, the plaintiff may be left without a remedy absent individual liability. Such a situation occurred in Falbaum v. Pomerantz. The employer in that case, a clothing manufacturer, was in bankruptcy proceedings. Consequently, five former employees filed suit against four current employees and the company's outside counsel as individuals for age discrimination. After finding that the individuals could not be held personally liable under the statute, the court said that the employees were not without recourse because "if an employer is engaged in bankruptcy proceedings, an aggrieved employee may seek relief in the bankruptcy court, as plaintiffs in this case have done." Although such plaintiffs could technically seek relief from a bankrupt employer, that remedy is not very realistic. It is far more likely that such plaintiffs will receive nothing. This was apparently recognized by a court in the same district as the Falbaum court when it limited its finding of no individual liability to situations in which "a solvent organizational party

170 Id. § 359C(2).
172 Id. at 987.
173 Id.
174 Id. at 991.
is liable for any acts done on its behalf." The problem of a bankrupt employer was also recognized by the court in \textit{EEOC v. AIC Security Investigations}. However, while recognizing that such employees will be without a remedy, the court stated that was "not enough for us to upset the structure Congress has set up."  

Admittedly, in most situations, individual liability is not of great consequence to a plaintiff because the institutional employer is still liable. However, in those cases where the plaintiff must seek recovery from supervisory employees if he or she is to gain any recovery at all it makes a very big difference. As the court noted in \textit{Vakharia v. Swedish Covenant Hospital}, "if the people who make discriminatory decisions do not have to pay for them, they may never alter their illegal behavior and the wrongdoers may elude punishment entirely, while the victim may receive no compensation whatsoever."  

An additional problem occurs when an institutional employer is found not liable for the agent's conduct. This most frequently occurs in sexual harassment cases. As seen above, a corporate employer can escape liability in sexual harassment cases if the response is "adequate and effective." A further example of this was provided in \textit{Lynam v. Foot First Podiatry Centers}. The plaintiffs sued the corporate employer and individuals for sexual harassment. The court remained convinced that individual liability under Title VII was essential, but was compelled to find no individual liability due to the Seventh Circuit's holding in \textit{EEOC v. AIC Security Investigations}. The court predicted that the corporate defendants would undoubtedly argue that the sexually harassing conduct occurred outside the scope of the supervisors' authority and that they were consequently not liable. The court observed that if that happened, then the victims would be left without relief and the objectives of Title VII, deterrence and securing justice for victims, would be subverted.

\begin{footnotes}
\footnotetext[175]{Bramesco v. Drug Computer Consultants, 834 F. Supp. 120, 123 (S.D.N.Y. 1993). The court held that there could be no individual liability where no unique claims are brought against the individual and no other special circumstances exist. \textit{Id.}}
\footnotetext[176]{55 F.3d 1276, 1282 (7th Cir. 1995).}
\footnotetext[177]{\textit{Id.} at 1282 n.9.}
\footnotetext[178]{824 F. Supp. 769, 786 (N.D. Ill. 1993).}
\footnotetext[179]{\textit{See supra} note 4 and accompanying text.}
\footnotetext[180]{886 F. Supp. 1443 (N.D. Ill. 1995).}
\footnotetext[181]{\textit{Id.} at 1446. \textit{See supra} notes 71-73 and accompanying text.}
\footnotetext[182]{\textit{Lynam}, 886 F. Supp. at 1447.}
\footnotetext[183]{\textit{Id.}}
\end{footnotes}
A similar situation occurred in Williams v. Banning.\textsuperscript{184} The plaintiff in that case did not even attempt to sue her corporate employer, apparently realizing that such action would be, as the court of appeals said, "futile."\textsuperscript{185} Although the issue of the employer's liability was not before the court, it stated that the company's "prompt action constitutes all the redress to which Williams is entitled under Title VII."\textsuperscript{186} The court also declared: "This is precisely the result Title VII was meant to achieve."\textsuperscript{187} The court also proposed that the plaintiff could turn to traditional tort remedies for additional compensation, suggesting that Congress intended such remedies be used.\textsuperscript{188}

At least two courts have recognized this possibility in holding that there is no individual liability under Title VII. In Lowry v. Clark,\textsuperscript{189} the court said: "A mere showing that a plaintiff may be without a federal remedy, however, cannot support imposing Title VII liability if the statute does not create such liability.\textsuperscript{190} The court in Redpath v. City of Overland Park\textsuperscript{191} was slightly more sympathetic when it similarly acknowledged that "this limitation regrettably may leave some victims of employment discrimination without any meaningful remedy, but it [the court] cannot impose liability where Congress has chosen not to do so."\textsuperscript{192} However, these courts summarily dismissed the notion of a plaintiff being left without a remedy because they had already decided that there was no liability.\textsuperscript{193}

In a similar vein, the court in Johnson v. University Surgical Group Associates\textsuperscript{194} addressed the suggestion that a plaintiff could sue a

\begin{footnotes}
\item[184] 72 F.3d 552 (7th Cir. 1995).
\item[185] Id. at 555.
\item[186] Id.
\item[187] Id. However, this statement largely ignores the goals and objectives which the United States Supreme Court has held Title VII was designed to achieve. See infra notes 196-99 and accompanying text.
\item[188] Id. However, one of the objectives of Title VII itself is to provide compensation. See infra note 198 and accompanying text. There does not seem to be any reason to assume that Congress intended compensatory remedies to be used in lieu of the ones provided by Title VII. See infra notes 194-95 and accompanying text.
\item[189] 843 F. Supp. 228 (E.D. Ky. 1994).
\item[190] Id. at 231.
\item[192] Id. at 1456 n.10.
\item[193] Supra notes 189-92 and accompanying text.
\end{footnotes}
supervisor directly under a common law tort, such as battery. The court said that while that may be true, it is beside the point because “[t]he purpose of Title VII is to protect workers from certain kinds of prejudicial treatment on the job, not to federalize common law torts.”

F. The Purposes of Title VII Are Thwarted Without a Finding of Individual Liability

When it enacted Title VII, Congress’s goal was “the elimination of discrimination in the workplace.” The United States Supreme Court has remarked that “Congress designed the remedial measures in these statutes to serve as a ‘spur or catalyst’ to cause employers ‘to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges’ of discrimination.”

The Supreme Court has held in several cases that two objectives are served by antidiscrimination statutes: (1) deterrence, and (2) compensation for injuries caused by the discrimination. Furthermore, the private litigant who pursues a discrimination suit “not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices.”

Each of these goals advanced by Title VII is thwarted by disallowing individual liability. The goal of compensation is frustrated when a corporate defendant is bankrupt or not liable for the conduct. The accomplishment of the goal of eliminating discriminatory conduct has been more hotly debated.

The theory that the goal of deterrence is best served by finding individual liability focuses upon the likelihood that individuals who are never held accountable or liable for their conduct will not be deterred and will continue to engage in the discriminatory conduct. The Miller court dismissed that theory because employers are still liable.

195 Id. at 986.
200 See supra notes 171-95 and accompanying text.
201 See supra note 46 and accompanying text.
A number of courts agree with *Miller* in its analysis on this argument. For example, one such court said simply that "[e]mployer liability ensures that no employee can violate the civil rights laws with impunity ...." This logic was explained more fully in *Johnson v. Northern Indiana Public Service Co.* The court observed: "It may be presumed that employers do not wish to employ supervisors who discriminate and subject their employers to liability." The court further characterized this potential for termination as an "effective deterrent."

The court in *EEOC v. AIC Security Investigations* took notice of the plaintiff's argument that "the paramount consideration is stamping out discrimination and that through the loophole of no individual liability will pour a flood of unpunished and undeterrable discrimination." However, the court rejected that argument as "Chicken Little-esque" in light of the continuing liability of the employing entity and its incentives to adequately discipline employees who discriminate. Another court observed that the legislative history of Title VII envisioned such a deterrent effect on the employers rather than on individuals.

Another court advanced the idea that "the employer will be acutely sensitive to any suggestion of discrimination and will be committed to its eradication." That court held that the "deep-pocketed and publicity-conscious employer (in general contrast to the ordinary supervisory employee bent on pursuing some private agenda) can be counted upon to be the most effective guardian of the marketplace."

However, these courts have ignored the broader goals of Title VII. Title VII does not merely have the goal of finding the single most effective way of eradicating workplace discrimination. Its goals are simply to completely eradicate employment discrimination by deterring

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203 844 F. Supp. 466 (N.D. Ind. 1994).
204 *Id.* at 469.
205 *Id.*
206 55 F.3d 1276 (7th Cir. 1995).
207 *Id.* at 1282.
208 *Id.*
211 *Id.*
the conduct and compensating victims of discrimination.212 These goals were dismissed by the court in Hudson v. Soft Sheen Products.213 That court said that it "cannot reverse course in the face of some vague, aspirational broad intent."214 That argument was directly answered by the court in Lynam v. Foot First Podiatry Centers.215 The court observed that perhaps such a statement dismissed the broad remedial purposes and objectives of antidiscrimination statutes too easily.216 The court asserted that “[w]here such critical issues as race, gender, and disability discrimination — which are inextricably interconnected with this Nation’s history of disturbed race and gender relations — are presented to the court, we believe that the broad aspirational goals of Congress, at the very least, ought not to be disregarded.”217

An excellent analysis of why individual liability is necessary to effectuate the deterrent purposes of Title VII is provided in Jendusa v. Cancer Treatment Centers.218 The court began with the proposition that individual liability is essential if the antidiscrimination statutes are to have their full deterrent effect.219 The court rejects the notion that deterrence will function “through indirect reliance on the marketplace assumptions concerning the actions of rational economic actors/employers after incurring a civil penalty . . . .”220 The court very logically reasoned that failing to hire or promote the most qualified candidate for discriminatory reasons is not rational economic action, yet it is the very conduct which motivated Congress to enact Title VII.221 Consequently, the court found it “inconceivable . . . that Congress intended to delegate the deterrence function of these statutes to the rational economic actors in the marketplace.”222

212 See supra notes 196-99 and accompanying text.
214 Id. at 136. That statement was cited with approval by the Seventh Circuit in EEOC v. AIC Sec. Investigations, 55 F.3d 1276, 1282 (7th Cir. 1995).
216 Id. at 1447.
217 Id.
219 Id. at 1011.
220 Id.
221 Id. This reasoning is further supported by a decision that found the employer a sufficient deterrent, despite the fact that an employee may be “bent on pursuing some private agenda.” See supra note 211 and accompanying text.
222 Jendusa, 868 F. Supp. at 1011.
The *Jendusa* court also rejected the *Miller* court's suggestion that deterrence will occur because liable employers will discipline wayward employees. The *Jendusa* court reasonably suggested that frequently, employers who lose a discrimination suit leave the courthouse feeling they have been done an injustice at the hands of a jury sympathetic to the plaintiff.\(^{223}\) Consequently, these employers will feel they did nothing wrong and will not automatically terminate or discipline the offending employee.\(^{224}\)

### G. The Necessity of Individual Liability Is Particularly Compelling in Sexual Harassment Suits

The need for individual liability to fully realize the goals of Title VII is even more urgent in cases of sexual harassment. Although respondeat superior liability may hold a corporate employer liable for the harassing acts of its employees, that liability is not absolute.\(^{225}\) Liability of a corporate employer can be rebutted if "adequate and effective action is taken."\(^{226}\) This action often consists of terminating or otherwise disciplining the offending employee.\(^{227}\) However, even if termination halts a particular offender's conduct in that place of employment, that action does not fully compensate the victim. Relieving a corporate employer from liability while denying recovery against the individual offender deprives victims of sexual harassment of the full range of remedies which Congress intended.

Furthermore, a lack of individual liability will not provide full deterrence to those who engage in sexual harassment. Congress implemented Title VII as a catalyst for self-evaluation of employment practices.\(^{228}\) An individual is naturally more likely to examine his or her conduct and refrain from engaging in unlawful conduct if he or she faces a lawsuit in addition to termination of employment. Consequently,

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223 *Id.* at 1012.

224 *Id.*


individual liability is necessary for Title VII to have its full deterrent effect.\textsuperscript{229}

**CONCLUSION**

In enacting the Civil Rights Act of 1964, Congress was attempting to eradicate discrimination from the workplace. In the thirty years since Title VII's original enactment, Congress has twice amended the Act to expand its scope and better achieve its twin objectives of compensating victims of employment discrimination and deterring discriminatory conduct. Despite the fact that these objectives are better achieved by allowing individual liability under Title VII, courts persist in reading Title VII as not contemplating such liability. Congress included agents in the definition of employer for a reason and a strict reading of the statute leads to the conclusion that agents of persons who employ more than fourteen people, along with corporate employers, are liable for violations of Title VII.\textsuperscript{230} Furthermore, despite the insistence by some courts that Congress intended to protect small entities from the costs of litigation, the legislative history of Title VII shows that Congress was more interested in protecting small businesses because of the way they are run, keeping in mind their huge impact on the economy.\textsuperscript{231} Additionally, the purpose of including "agents" in the definition of "employer" could not have been merely to incorporate respondeat superior liability into the statute because employers have always been held responsible for the acts of their employees taken in the scope of their employment.\textsuperscript{232} If Congress had really wanted to emphasize the existence of respondeat superior liability, it is more logical to think that it would have included a direct statement holding corporate employers liable under Title VII for the acts of their employees.\textsuperscript{233} This reasoning becomes even more persuasive when it is realized that established agency principles do not allow the agent to escape liability even when the principal is held liable and judgment is not limited to one or the other.\textsuperscript{234}

In light of Congress's twin goals of compensating victims and deterring discrimination, individual liability is vital to eradicate discrimi-
nation from the workplace. In many cases a victimized plaintiff is left without a remedy because a corporate employer is either unable to pay a judgment or is not liable. Furthermore, individuals who are immune from liability for their actions have no real incentive to cease the activity. Although many courts assert that the liable corporate employer will deter the discrimination through discipline of employees, that marketplace argument is at best speculation.

Obviously, the question of individual liability under Title VII is best answered either by Congress through another amendment to the statute or by the United States Supreme Court through a definitive interpretation of who is an “employer” under the statute. However, in the meantime, the goals of Title VII are best effectuated by allowing individual liability. Individual liability is necessary so that victims of discrimination, like Lucille Kauffman, who are precluded from proceeding in a sexual harassment claim against a corporate employer who takes “adequate and effective” action, can recover damages from the person who actually engaged in the harassment. Otherwise, victims of discrimination in the workplace, and victims of sexual harassment in particular, may be left without the compensatory and punitive damages Congress intended them to have.

Kendra Samson

235 See supra notes 171-95 and accompanying text.
236 See supra notes 201-24 and accompanying text.