ARTICLES

"IT'S NOTHING PERSONAL" — BUT SHOULD IT BE?: FINDING AGENT LIABILITY FOR VIOLATIONS OF THE FEDERAL EMPLOYMENT DISCRIMINATION STATUTES

DAVIDA H. ISAACS*

* J.D., 1995, New York University. This note is dedicated to my mother, who endowed in me the strength and confidence to allow me to fulfill my aspirations, including this article. It was her personal battle with sex discrimination in the workplace, prior to the enactment of Title VII, which provided me with first-hand knowledge of its impact, thus helping to inspire this article. In addition, I would like to express my appreciation to the rest of my family for their continual caring and support, which made this demanding process that much easier. Moreover, I owe an eternal debt of gratitude to Professor Sarah Burns, who shepherded me through most of this process and offered invaluable guidance and assistance. Finally, I thank the editors at New York University *Review of Law and Social Change*, especially Joshua Burstein, for their efforts on my behalf.

INTRODUCTION

Coramae Gary began working at the Washington Metropolitan Area Transit Authority (hereinafter "WMATA") in 1983. In 1987, Gary was promoted to the position of stock clerk. Shortly thereafter, according to the pleading in her case, her second-level supervisor, James Long, allegedly began the following several-years-long pattern of sexual harassment. Initially, Long attempted to procure sexual favors from Gary by promising employment advantages. After determining the futility of that method, Long progressed to threatening Gary with adverse employment consequences, including termination of her employment, if she failed to comply with his demands. In addition, he indicated that he would have her fired if

she told anybody of his sexual advances. Gary unremittingly rejected her supervisor's demands.

Once verbal attempts proved unsuccessful, Long proceeded to use the pretext of inspecting a company construction site to lure the plaintiff to a secluded location and rape her, after which he threatened reprisals against Gary if she informed anyone.

Gary later reported Long's sexual harassment to a WMATA counselor and filed both a formal grievance with the company and a charge of sexual harassment with the Equal Employment Opportunity Commission (hereinafter "EEOC").

WMATA alleged that, once put on notice of the allegations against Long, it conducted a detailed investigation of charges; it concluded that, as the charges were unsupported by corroborating evidence, no action would be taken.

After receiving her "right to sue" letter from the EEOC, Gary instituted a lawsuit against both WMATA and Long, claiming violations of Title VII. The trial court granted summary judgment for both defendants on the Title VII claims.

On appeal, the Circuit Court of the District of Columbia affirmed the district court's decisions concerning Title VII. Exonerating WMATA, it concluded that its "active policy against sexual harassment" and its indisputably well-publicized avenues for relief were "calculated to encourage victims of harassment to come forward" and precluded a claim that "Long was acting within the color of his authority."[1]

In addition, the Circuit Court declared that Long's acts did not violate Title VII and affirmed the dismissal of the plaintiff's claim against the supervisor. The Court noted that while it concluded that "Long qualifies as an employer under Title VII because he served in a supervisory capacity," he does so only in his official capacity.[2] Consequently, Gary was left without legal recourse under Title VII.

In 1964, Congress declared war against employment discrimination, an insidious enemy of both employment opportunity for millions of citizens and economic efficiency, by enacting Title VII of the Civil Rights Act of 1964.[3] This battle against discrimination based on race, national origin, and sex was to be waged in companies all across the country. Congress expanded the breadth of that campaign later that decade with the passage of the Age Discrimination in Employment Act (hereinafter "ADEA").[4] More recently, the passage of the Americans with Disabilities Act (hereinafter "ADA")[5] further increased the scope of the conflict.

1. Gary v. Long, 59 F.3d 1391, 1398 (D.C. Cir.), *cert. denied*, 133 L. Ed. 2d 493 (1995).
2. *Id.* at 1399.
3. 42 U.S.C. §§ 2000e-2000e-17 (1994) (effective July 2, 1964).
4. 29 U.S.C. §§ 621-634 (1994) (effective Dec. 15, 1967).
5. 42 U.S.C. §§ 12111-12112 (1994).

Unfortunately, while the institutional discriminatory forces ostensibly have surrendered, a guerilla war persists within commercial enterprises throughout America. Casualties continue to mount as workers continue to use the criteria of race, national origin, sex, age, and disability as bases for discrimination against other employees.[6] Accordingly, the effect of these federal statutes (leaving aside their state counterparts) appears to be inadequate, either in scope or application. To understand why this inadequacy may exist, one must examine the statutes' power, or impotence, to influence workplace behavior.

The impact of any anti-discrimination statute on workplace behavior is limited to the effectiveness of the obtainable relief; such effectiveness must be measured in two ways: first, the statute's ability to provide comprehensive relief to the victim, and second, the statute of ability to punish violators, thereby increasing its likelihood of discouraging future similar acts.[7]

Currently, there are several remedies available to victims of employment discrimination. The employees of an entity have long been recognized as its agents for the purpose of creating respondeat superior liability.[8] First, injunctive relief, such as promotion or rehiring, has been and continues to be available in response to a violation. Second, the entity-employer generally is liable for back pay, compensatory damages, and, in the case of a willful violation, punitive damages.[9]

While the above remedies provide some relief to the victim, they have no direct impact[10] on those supervisors and co-workers who perform the discriminatory acts. This article explores the ongoing judicial conflict as to whether the federal employment discrimination statutes hold supervisors[11]

6. This paper analyzes the existence and application of personal liability only in disparate treatment cases. Since disparate impact theory does not assume any intentional discrimination by any one person or group of employees, individual liability likely would not apply.

7. The author recognizes, of course, that these are not completely discrete categories; the strength of the first increases the power of the second, since a higher chance of recovery or increased compensation encourages victims' actions against discriminators, thereby discouraging offenders' behavior.

8. However, entities' liability in hostile environment cases has already been limited by recent circuit cases. *See infra* Part II.A.1.

9. In place of punitive damages, the ADEA provides for liquidated damages, which doubles the amount of the back pay award. 29 U.S.C. § 626 (1994).

10. As a result of inability or unwillingness on the part of the defendant entity, there may be no indirect impact as well. *See* discussion *infra* Part II.B.1.

11. As yet unresolved is the scope of action or inaction required to create liability in a supervisor. Generally, among courts which have concluded that individual liability exists under any of the discrimination statutes, the employee must have been personally involved in the decision to discriminate; where there has been a showing that a supervisor's response to a subordinate's discriminatory behavior was merely limited to non-feasance, courts have been reluctant to find liability. *See, e.g.*, Paroline v. Unisys Corp., 879 F.2d 100, 106 (4th Cir. 1989) (concluding that the defendant "may be held liable for any actionable sexual harassment in which he personally participated"); Hendrix v. Fleming Cos., 650 F. Supp. 301, 302-03 (W.D. Okla. 1986) (limiting individual liability under Title VII to where an employee is involved in a discriminatory managerial decision and refusing to find individual liability

or co-workers who discriminate personally liable for monetary damages, or whether those statutes limit liability to the employing business. I conclude that the statutes do indeed establish such liability.

Currently, the circuits are split as to the existence of individual liability[12] under Title VII, the ADEA, and the ADA.[13] The Eleventh and Ninth Circuits consistently have repudiated the imposition of such liability.[14] Similarly, the Eighth Circuit has thus far refused to create individual liability.[15] While one Second Circuit decision has implicitly ratified the use of agent liability by determining the admissibility of evidence against a

against defendants who merely failed to stop the discriminatory conduct); Smith v. Sentry Ins., 674 F. Supp. 1459, 1466 (N.D. Ga. 1987) (granting partial summary judgment for an individual defendant because of a failure to show any action by that defendant leading to the alleged Title VII violation); Brown v. City of Miami Beach, 684 F. Supp. 1081, 1085-86 (S.D. Fla. 1988) (holding that the doctrine of respondeat superior is inapplicable to individuals and does not make them vicariously liable for their subordinates and refusing to find liability against a supervisor where there was no showing of any discriminatory behavior by the supervisor).

A supervisor's intentional acquiescence to discriminatory action by a subordinate, however, has occasionally been considered sufficient to create personal liability. *See, e.g.*, Robson v. Eva's Super Market, Inc., 538 F. Supp. 857, 863 (N.D. Ohio 1982) (declaring that a supervisor's acquiescence to a harasser's actions, by laughing at the victim's complaints, creates liability in the supervisor); Kyriazi v. Western Elec. Co., 476 F. Supp. 335, 341 (D. N.J. 1979) (equating ignoring certain conduct with acquiescing to it and thereby holding a supervisor liable for his subordinates' actions).

This article does not concentrate on how much or what type of actions by the employee may be necessary to create individual liability; instead, it focuses the existence of such liability.

12. I use the adjectives "agent," "individual," and "personal" synonymously throughout this article simply to escape the potential monotony of the continuous use of any one description. However, the scope of the latter two characterizations is meant to be limited to employees of the entity-employers; while employers may be liable for acts of harassment by non-employees where the entity-employer knows or should have known of the conduct and fails to take immediate and appropriate corrective measures, *see, e.g.*, Menchaca v. Rose Records, No. 94 C 1376, 1995 WL 151847 (N.D. Ill. 1995) (refusing to grant summary judgment for an employer on an employee's Title VII claim based on harassing behavior by a customer), the use of these words do not imply an intention to expand the liability of the employment federal statutes to non-employees involved in the workplace.

13. For a good summary of the split, *see* Ball v. Renner, 54 F.3d 664, 666-67 (10th Cir. 1995) and Schallehn v. Central Trust and Savings Bank, 877 F. Supp. 1315, 1329-31 (N.D. Iowa 1995).

14. *See* Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 587-88 (9th Cir. 1993) (noting that the language and schemes of Title VII and the ADEA indicate that Congress did not intend to impose individual liability on employees), *cert. denied sub nom.*, Miller v. La Rosa, 114 S. Ct. 1049 (1994); Smith v. Lomax, 45 F.3d 402, 403 n.4 (11th Cir. 1995) (holding that members of the board of county commissioners were not a board clerk's employers under Title VII and the ADEA); Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991) (declaring that "the relief granted under Title VII is against the *employer*, not individual employees whose actions would constitute a violation of the Act").

15. *See* Smith v. St. Bernards Regional Medical Center, 19 F.3d 1254, 1255 (8th Cir. 1994) (declaring co-workers free from individual liability in their individual capacities under Title VII). The *Smith* court did not address the issue of personal liability of a supervisor.

corporate chief executive officer "in her individual capacity" on a Title VII claim,[16] more recent decisions have explicitly rejected such liability.[17]

In contrast, several circuits have vacillated on the issue, and occasionally have asserted the existence of individual liability. The Tenth Circuit, which previously had followed the opposing view,[18] recently asserted that personal liability existed under the ADEA.[19] Similarly, the Fifth Circuit, though reversing itself several times, has most recently established such liability.[20] Likewise, while the Eleventh Circuit previously had refused to recognize agent liability,[21] a recent decision has acknowledged such liability.[22] Similarly, in numerous decisions, the Seventh Circuit has split on the question.[23] The Fourth Circuit has distinguished claims based on hostile environment from those based on personnel decisions "of a plainly delegable

16. *See* Zaken v. Boerer, 964 F.2d 1319, 1323-24 (2d Cir.), *cert. denied*, 506 U.S. 975 (1992).

17. *See* Tomka v. Seiler Corp., 66 F.3d 1295, 1313-17 (2d Cir. 1995) (upholding the dismissal of a Title VII claim against a supervisor who had allegedly made many sexually explicit comments toward the plaintiff and, while on a business trip, raped her). *See also* Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235, 1237 (2d Cir. 1995) (following the *Tomka* decision and upholding the dismissal of Title VII claims against a supervisor who fired the plaintiff after allegedly commenting, among other things, that "women were 'on the earth for fucking purposes only'").

18. *See* Simms v. KCA, Inc., 28 F.3d 113 (10th Cir. 1994); Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993).

19. *See* Ball v. Renner, 54 F.3d 664, 667 (10th Cir. 1995) (noting that interpreting 'employer' to create individual liability is "eminently sensible as a matter of statutory structure and logical analysis"); Brownlee v. Lear Siegler Management Servs. Corp., 15 F.3d 967, 978 (10th Cir.), *cert. denied*, 114 S. Ct. 2743 (1994) (maintaining "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"). *But see* Lankford v. City of Hobart, 27 F.3d 477, 480 (10th Cir. 1994) (refusing to address the Title VII claim against the supervisor asserting that "Title VII applies only to an *employer*").

20. *Compare* Garcia v. Elf Atochem North America, 28 F.3d 446, 451 (5th Cir. 1994) (declaring that supervisors who exercise employer's traditional rights are liable under Title VII) *with* Harvey v. Blake, 913 F.2d 226, 227 (5th Cir. 1990) (holding that Title VII claims against public employees can be brought against them only in their "official capacity"); Grant v. Lone Star Co., 21 F.3d 649, 653 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 574 (1994) (applying the *Harvey* reasoning to Title VII suits against private individuals).

21. *See* Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991) (per curiam).

22. *See* Cross v. State of Alabama, No. 92-7005, 1994 WL 424303, at *13-14 (11th Cir. Aug. 30, 1994) (declaring that the Commissioner of the State Department of Mental Health & Mental Retardation was an agent of the Department, and therefore, was an employer for purposes of Title VII), *opinion superseded on denial of reh'g*, 49 F.3d 1490 (1995).

23. *Compare* EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1281 (7th Cir. 1995) (concluding that the ADA was meant only to create respondeat superior liability against employers, not personal liability against individual employees), *rev'd*, 92C7330, 55 F.3d 1276 (1995), *on remand*, No. CIV.A 92-C-7330, 1995 WL 642775 (N.D. Ill. Oct. 30, 1995); Williams v. Banning, 72 F.3d 552 (7th Cir.) (rejecting individual liability under Title VII) *with* Price v. Marshall Erdman & Assoc., Inc., 966 F.2d 320, 322-24 (7th Cir. 1992) (affirming the lower court's finding of individual liability against the head of a division under the ADEA since the ADEA's "employer" includes "agent"); Shager v. Upjohn Co., 913 F.2d 398, 404 (7th Cir. 1990) (determining that "the [ADEA's] statutory language . . . could mean nothing more than that . . . the agent is liable along with [the employer], or even possibly instead of [the employer]"); Gaddy v. Abex Corp., 884 F.2d 312, 318 (7th Cir. 1989) (upholding a Title

character";[24] it has found personal liability in the former, while refusing to do so in the latter.[25] The Sixth Circuit has not spoken directly to the issue; one decision, however, tacitly has approved of agent liability by approving a district court's use of a joint-and-several liability award against the employer and several individuals for Title VII violations.[26]

The significance of the debate over individual liability is evident by the number of recent articles on this topic,[27] all of which have concluded that the federal anti-discrimination statutes provide for individual liability. However, though providing useful support for this determination, each has failed to analyze comprehensively several related issues. This treatment both discusses those arguments and provides further justifications for their general conclusion.

As these other articles indicate, there are numerous compelling bases for finding agent liability. Fundamentally, the inclusion of the phrase "agent" within the definition of "employer" in the employment discrimination statutes necessitates individual liability.[28] Likewise, the goals of the statutes — to allow victims of discrimination to obtain relief for each act of discrimination and to deter future ones — would be strongly promoted by personal liability.[29]

VII judgment against a responsible individual as well as the formal "employer"). *See also* EEOC v. Vucitech, 842 F.2d 936, 943-44 (7th Cir. 1988) (analyzing other Title VII issues by assuming the existence of individual liability).

24. Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 510 n.1 (4th Cir. 1994) (distinguishing the types of cases), *cert. denied*, 115 S. Ct. 666 (1994).

25. *See Birkbeck*, 30 F.3d at 510 (declaring that, for claims that personnel decisions violated the ADEA, "§ 630(b) [should be read] as an unremarkable expression of respondeat superior"). *But see* Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989), *aff'd in pertinent part*, 900 F.2d 27 (4th Cir. 1990) (en banc) (declaring that "[a]s long as the company's management approves or acquiesces in the employee's exercise of supervisory control over the plaintiff," that employee will hold 'employer' status for Title VII purposes).

26. *See* Romain v. Kurek, 772 F.2d 281, 282-83 (6th Cir. 1985) (reversing the district court's summary judgment for one individual that had been based on an unrelated issue of the Title VII claim and remanding on the issue of the individual's liability).

27. *See, e.g.*, Steven K. Sanborn, *Employment Discrimination — Miller v. Maxwell's International, Inc.: Individual Liability for Supervisory Employees under Title VII and the ADEA*, 17 W. NEW ENG. L. REV. 143, 178 (1995) (declaring that the *Miller* court erred and that individual liability will create a "front line defense" against discrimination); Scott B. Goldberg, *Discrimination by Managers and Supervisors: Recognizing Agent Liability under Title VII*, 143 U. PA. L. REV. 571, 593 (1994) (concluding that failing to apply individual liability to Title VII "not only contravenes the American common-law tradition and basic principles of justice, but also hinges upon improper methods of statutory construction"); Phillip L. Lamberson, *Personal Liability for Violations of Title VII: Thirty Years of Indecision*, 46 BAYLOR L. REV. 419, 430 (1994) (determining that the language and the legislative intent supports imposition of personal liability under Title VII); Christopher Greer, *"Who, Me?": A Supervisor's Individual Liability for Discrimination in the Workplace*, 62 FORDHAM L. REV. 1835, 1846-48 (1994) (resolving that agent liability must exist in Title VII and the ADEA to follow the language and advance the goals of the statutes).

28. Sanborn, *supra* note 27, at 178; Goldberg, *supra* note 27, at 575-78; Lamberson, *supra* note 27, at 427-28; Greer, *supra* note 27, at 1847-48.

29. Sanborn, *supra* note 27, at 178; Goldberg, *supra* note 27, at 581-90; Greer, *supra* note 27, at 1849.

Recent court decisions have endangered the potency of these statutes by refusing to hold the entity-employer liable under certain circumstances for hostile environment harassment.[30] Furthermore, in addition to any judicially-created bar on recovery, many courts have noted the obstacle to relief presented by judgment-proof employers.[31] Allowing for relief against the individual harasser may provide the victim with her only remedy.[32]

Second, the deterrence goal of damage awards also may be weakened by either easily perceptible or more insidious psychological factors. For instance, the deterrence strategy most often hypothesized by those against personal liability — expecting to rely on the penalized defendant-entity to discipline its employees — fails to consider the problem arising if the discriminatory employee is no longer employed by the company.[33]

Likewise, factors of the latter variety make suspect Scott Goldberg's assertion that most employers possess sufficient motivation to deter their employees from discriminatory behavior. Several obstacles to such deterrence—the existence of bias at the top of the entity and the cognitive consequence of prolonged litigation — are presented in Part II. Recognition of the economically-irrational nature of discrimination allows for an appreciation of the dubiousness of expecting a possibly biased manager to punish a subordinate who is acting based on views similar to her own.[34] Furthermore, various well-accepted social psychological theories reveal the cognitive difficulties management would have in censuring an employee it had previously supported against a discrimination claim.[35]

Separate from the vocalized goals of the specific statutes at issue here, courts rejecting individual liability fail to recognize that such a view is antithetical to the common-law principles of both personal public accountability and personal liability for one's actions.

This paper also rectifies the absence of any critical analysis of the continuing judicial application of the § 1983 distinction between an employee's official and individual capacities adopted from § 1983[36] case law as a basis for rejecting personal liability for employment discrimination.[37] Use of

30. *See infra* notes 63-81 and accompanying text.

31. *See infra* note 84 and accompanying text.

32. *See Sanborn, supra* note 27, at 143 n.6 (noting the existence of a "liability gap" as a result of such situations).

33. *See infra* notes 87-91 and accompanying text.

34. *See infra* notes 92-93 and accompanying text.

35. *See infra* notes 94-102 and accompanying text.

36. "Every person who, under color of any statute, ordinance, regulation, custom or usage, or 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, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1994).

37. Goldberg mentions in passing that "[c]ourts occasionally use confusing nomenclature that obscures distinctions between suing agents personally and suing agents in their

such an analysis in evaluating the federal employment discrimination statutes ignores important differences in the rationales of § 1983 and these statutes, as well as unjustifiably applies § 1983 to private employment settings.

Moreover, this article questions Goldberg's conclusion that there should be no distinction between the interpretations of Title VII and the ADEA.[38] Certainly, both statutes operate based on the identical underlying axiom — that employment discrimination based on certain factors is wrong. In addition, their language is the same, and ADEA and Title VII claims are often brought in the same case. Many courts discuss Title VII when analyzing ADEA claims.[39] The same holds true for the ADA; many courts have dealt with the issue of interpreting this recent legislation by analyzing and applying ADEA and Title VII cases.[40] Consequently, many Title VII and ADA cases discuss ideas and arguments which are common to the analyses of all three statutes.

While the general premises of the statutes coincide, however, the ADEA has created a result different from that which would have occurred had Congress chosen to amend Title VII to include the word "age" along with race, national origin, religion, and sex,[41] or had included such a prohibition in the ADA.[42] Therefore, while an analysis of Title VII and ADA issues carries the discussion to a certain point, inquiry into the specific background and goals of the ADEA,[43] and the circumstances surrounding

official capacities." Goldberg, *supra* note 27, at 573 n.14. He failed to acknowledge that, rather than mere terminology, several courts have used these terms as the underpinning of their analyses. Additionally, and more importantly, he failed to evaluate the appropriateness of the application of § 1983 to Title VII, the ADA, and the ADEA.

38. *Id.* at 587-88 n.82 (stating that "[t]hose courts that have looked outside the Title VII framework . . . have not reasoned persuasively").

39. *See, e.g.*, House v. Cannon Mills Co., 713 F. Supp. 159, 161-62 (M.D.N.C. 1988) (assigning individual agent liability under both the ADEA and Title VII). In fact, some courts have actually used the reverse method of analysis — looking at interpretations of the ADEA in order to determine how to evaluate Title VII. *See* Bridges v. Eastman Kodak Co., 800 F. Supp. 1172, 1179-80 (S.D.N.Y. 1992) (using the existence of individual liability under the ADEA to find liability under Title VII).

40. *See, e.g.*, Bishop v. Okidata, Inc., 864 F. Supp. 416, 422-24 (D.N.J. 1994) (applying Title VII in interpreting provisions of the ADA); Jendusa v. Cancer Treatment Ctrs. of Am., Inc., 868 F. Supp. 1006, 1008-17 (N.D. Ill. 1994) (discussing Title VII and ADEA cases in formulating its views on individual liability under ADA).

41. In fact, Title VII was introduced in the House as "A Bill to Prohibit Discrimination in Employment in Certain Cases Because of Race, Religion, Color, National Origin, Ancestry *or Age*." Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 433, 435-36 (1966) (emphasis added). The decision not to include age within Title VII, therefore, was not one of mere oversight.

42. *See, e.g.*, House v. Cannon Mills Co., 713 F. Supp. 159, 160 (M.D.N.C. 1988) (citing differences in the scope of relief available under the ADEA vs. Title VII); Murphy v. American Motors Sales Corp., 410 F. Supp. 1403, 1405-07 (N.D. Ga. 1976) (noting Title VII to be helpful for deciding questions about the ADEA, but asserting such statutes are not entirely identical and so Title VII decisions are not wholly dispositive).

43. *See infra* Part V (discussion of the ADEA's unique correspondence to the Fair Labor Standards Act).

discrimination based on age,[44] as distinguished from those features concerning Title VII or the ADA, is crucial to determining its proper interpretation. As a result of both the legislative history and the scheme of the ADEA, much of the criticism of individual liability under Title VII and the ADA completely fails to apply to the ADEA.

In sum, while concurring with recently published articles recognizing individual liability, I examine several issues which previously had not been thoroughly addressed, and challenge some previously-accepted assumptions. I conclude, however, that the statutes, their legislative histories, and the developing case law require that agents of the employer who personally discriminate must be held individually liable under the federal employment discrimination statutes. The analysis in Part I reveals that the statutes' language requires finding agent liability. Part II explains how agent liability furthers those statutes' objectives. A discussion of the public policy concerning employment torts, including common law principles, establishes the societal support of individual liability for those directly responsible for discrimination in Part III. The flaws of the arguments against agent liability are the topic of Part IV. Finally, a demonstration of the ADEA's established correspondence to the Fair Labor Standards Act (hereinafter "FLSA"), and the additional support for finding personal liability under the ADEA, is discussed in Part V.

I.
THE LANGUAGE OF THE FEDERAL DISCRIMINATION STATUTES COMPELS INDIVIDUAL LIABILITY

Courts finding individual liability have declared that the employment statutes' language requires such an interpretation.[45] Title VII, enacted as

44. *See infra* Parts IV.B., and V, particularly notes 169-173 and accompanying text (explaining the increased risk that entity liability will be insufficient to discourage discrimination in the age context).

45. District cases finding agent liability: *ADEA claims*: Dirschel v. Speck, No. 94 Civ. 0502 (LMM), 1994 WL 330262, at *6 (S.D.N.Y. 1994); Strzelcki v. Schwarz Paper, 824 F. Supp. 821, 829 (N.D.Ill. 1994) (recognizing the potential personal liability of company president, holding that the Court's conclusion in *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583 (9th Cir. 1993) is inconsistent both with the Seventh Circuit law, and more generally, with the broad purposes of the ADEA); Koenig v. Board of Educ., No. 93-C2568, 1993 WL 532472, at *2 (N.D. Ill. 1993) (concluding that supervisors may be sued under the ADEA); Bobkoski v. Board of Educ., No. 90-C5737, 1991 U.S. Dist. LEXIS 1090, at *12, *19 (N.D. Ill. 1991) (concluding that agent liability is allowed under the ADEA); Wanamaker v. Columbian Rope Co., 740 F. Supp. 127, 135 (N.D.N.Y. 1990) (concluding that corporate officers and directors may be individually liable under the ADEA).
Title VII/ADA: Deluca v. Winer Indus. Inc., 857 F. Supp. 606, 607 (N.D. Ill. 1994), *aff'd*, 53 F.3d 793 (7th Cir. 1995) (permitting liability of individual defendants if they were decision-making employees or employers); Janopoulos v. Harvey L. Walner & Assocs., Ltd., 835 F. Supp. 459, 461 (N.D. Ill. 1993) (finding personal liability of a corporation's sole owner under Title VII and the ADA); Vakharia v. Swedish Covenant Hosp., 824 F. Supp. 769, 784-86 (N.D. Ill. 1993) (holding that supervisory employees could be personally liable under the ADEA and Title VII); Kennedy v. Fritsch, No. 90-C5446, 1993 WL 761979, at *5, *6 (N.D.

part of the Civil Rights Act of 1964, was the second major federal employment discrimination statute of the 1960's, following the Equal Pay Act of 1963. Three years later, Congress passed the Age Discrimination in Employment Act. More than twenty years later, the Americans with Disabilities Act was passed. Despite the time gap between these enactments, the definition of "employer" in all three statutes is practically identical, except for the number of workers needed in order for the entity to fall under each statute's authority. Consequently, I have chosen to use Title VII as the standard for discussion for this section. As described in the footnotes, the analyses of the other statutes largely parallel this analysis (though, as discussed in Part IV, not completely).[46]

In any determination of the correct interpretation of a provision, one must start by assessing the statutory language.[47] Prior to turning to legislative history to assist in the interpretation of a statute, a court must first determine whether the statute's language is ambiguous; if it is not, the court should apply the plain language of the statute without looking to statutory construction.[48] Here, the statute's language is clear; a simple substitution of words demonstrates that there is individual liability.

Title VII states:

> 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; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise

Ill. 1993) (holding that supervisory employees may be sued under Title VII as agents of employer); EEOC v. AIC Sec. Investigations, Ltd., 823 F. Supp. 571-72, 597, 581 (N.D. Ill. 1993) (upholding agent liability under the ADA), *rev'd*, 55 F.3d 1276 (7th Cir.) (rejecting the District Court's ruling on agent liability).

Johnson v. Univ. Surgical Associates, 871 F.Supp. 979, 987 (S.D. Ohio 1994) (allowing individual liability for sexual harassment under Title VII); Crihfield v. Monsanto, 844 F. Supp. 371 (S.D. Ohio 1994) (permitting a claim under Title VII against company and a supervisor who allegedly exposed himself to and fondled his subordinate); Munford v. James T. Barnes & Co., 441 F. Supp. 459, 466 (E.D. Mich. 1977) (holding that plaintiff's allegations stated a cause of action under Title VII against two supervisors).

46. *See infra* Part IV and accompanying text.

47. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989); Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) (declaring that "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive").

48. United States v. Oregon, 366 U.S. 643, 648 (1961).

> adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[49]

Title VII specifies that an "employer" is "a person engaged in an industry affecting commerce who has fifteen or more employees . . . *and any agent of such a person.*"[50] A "person" is defined as "one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers."[51] Thus, by including "agent" within the definition of employer, the plain language of the statute subjects individuals, as well as their entities, to liability.[52]

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49. 42 U.S.C. § 2000e-2(a)(1) (1994). The Age Discrimination in Employment Act states:

> It shall be unlawful employment for an employer—
> (1) to fail or refuse to hire or to discharge any individual or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's age;
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age;
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

29 U.S.C. § 623(a)(1)-(2) (Supp. 1995).

The Americans with Disabilities Act states, in pertinent part:

> (a) No covered entity shall discriminate against a qualified individual with a disability because of the disability of such an 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.

42 U.S.C. § 12112(a)-(b)(2) (1994).

50. 42 U.S.C. §2000e(b) (1994). The ADA defines an employer to be "a person engaged in an industry affecting commerce who has 25 or more employees . . . and any agent of such person." 42 U.S.C. §12111(5)(A) (1994).

The ADEA defines an employer to be "a person engaged in an industry affecting commerce who has twenty or more employees . . . [and] any agent of such person." 29 U.S.C. §630(b)-(b)(1) (1994).

51. 42 U.S.C. § 2000e(a) (1994). The ADA states:

> The terms "person," "labor organization," "employment agency," "commerce," and "industry affecting commerce" shall have the same meaning given such terms in section 2000e of this title [Title VII].

42 U.S.C. § 12111(7) (Supp. 1995). The ADEA states:

> A "person" is defined as "one or more individuals, partnerships, associations, labor organizations, corporations, business trust, legal representatives, or any organized groups of persons."

29 U.S.C. § 630(a) (Supp. 1995).

52. *See* Price v. Marshall Erdman & Assoc., Inc., 966 F.2d 320, 324 (7th Cir. 1992) (affirming the lower court's finding of individual liability against the head of a division under the ADEA since the ADEA's "employer" includes "agent"); Smith v. Sentry Ins., No. CIV.A.86-1176-A, 1986 WL 443, at *3 (N.D. Ga. Sept. 19, 1986) (holding that the ADEA's "employer" language indicates that "officials of an employer are not treated differently from the employer itself"); Schallehn v. Cent. Trust and Sav. Bank, 877 F. Supp. 1315, 1331 (N.D. Iowa 1995) (holding that personal liability under the ADEA does lie against supervisory employees).

This analysis has been accepted by Judge Posner, who has concluded that the most logical interpretation of such language required individual liability. In fact, he declared that the language may be read so as to exclude the entity from liability for its employee's actions.[53]

While it could be argued that only companies, and not individuals, are commonly referred to as employers and that, therefore, it is inappropriate to hold agents liable based on that term, note that even at the time of the Title VII's enactment, the common dictionary definition of the term "employer" included individual employees.[54] As one of the few illuminating statements on the interpretation of "employer" by those involved in Title VII's passage, Senator Joseph Clark declared that the term should be applied by its common dictionary meaning.[55]

Other courts have claimed that the purpose of having an employer encompass its agents is exclusively to "underscore[ ] the notion that the employer is to have some derivative liability for the deliberate acts of its employees."[56] There are two flaws in this reading of the language. First, there is no support in the legislative history for such an interpretation. Second, and more problematic for the propounders of this view, respondeat superior is a common-law doctrine and was established long before the enactment of any of the federal anti-discrimination statutes;[57] the statute's complicated language is unnecessary to create such liability.[58] Accordingly,

53. Shager v. Upjohn Co., 913 F.2d 398, 404 (7th Cir. 1990) (determining that "the [ADEA's] statutory language . . . could mean nothing more than that . . . the agent . . . is liable along with [the employer], or even possibly instead of [the employer]"). *See infra* Part II for discussion of entity liability in hostile environment harassment cases.

54. Employer is "one that employs something or somebody: as A (1): the owner of an enterprise (as a business or manufacturing firm) that employs personnel for wages or salaries (2): such an enterprise itself B: *an agent acting for such an enterprise in employing persons.*" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 743 (1965) (italics added).

55. 110 CONG. REC. 7216 (1964).

56. EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1281 (7th Cir. 1995) (concluding that the identical language in the ADA was meant "to ensure that courts would impose respondeat superior liability upon employers for the acts of their agents"); Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 587-88 (9th Cir. 1993), *cert. denied sub nom.*, Miller v. La Rosa, 114 S. Ct. 1049 (1994) (extending the reasoning of Title VII to the ADEA); Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 510 (4th Cir. 1994) (declaring that "§630(b) [should be read] as an unremarkable expression of respondeat superior"), *cert. denied*, 115 S. Ct. 666 (1994) ; Ryan v. Grae & Rybicki, P.C., No. CIV-94-3731, 1995 WL 170095, at *3 (E.D.N.Y. 1995) (maintaining that "derivative liability is the mechanism which Congress designed to achieve the goal of eliminating workplace discrimination"); Vodde v. Indiana Michigan Power Co., 852 F. Supp. 676, 679 (N.D. Ind. 1994) (holding that under Title VII, the employer has some derivative liability for the discriminatory acts of its employees); Ostendorf v. Elkay Manufacturing Co., No. 94-C-50170, 1994 WL 741425, at *6 (N.D. Ill. 1994) (holding such a reading to be the "more persuasive interpretation" of employment discrimination statutes).

57. *See* RESTATEMENT (SECOND) OF AGENCY §§228, 359c(1) (1957).

58. *See* Ball v. Renner, 54 F.3d 664, 667 (10th Cir. 1995) (commenting that "after all, by definition a corporate or other organizational employer can act only through its agents in any event. . . . [Thus, t]here is no need to define an agent of an employer as also being an

the description of the agent as an employer must have served another purpose — namely, to create individual liability. In sum, the clear inclusion of individual liability in the language of the statutes remains unblunted by the awkward interpretations of a few courts.

II.

THE GOALS OF THE FEDERAL DISCRIMINATION STATUTES ARE ADVANCED BY AGENT LIABILITY

Appropriately, many courts have held that federal discrimination statutes are to be interpreted liberally in order to effectuate the purposes of the statutes as completely as possible—to secure compensation for victims of discrimination and to deter future potential discriminators.[59] Specifically, the term 'employer' "has been construed in a functional sense to encompass persons who are not employers in conventional terms, but who nevertheless control some aspect of an individual's compensation, terms, [or] conditions or privileges of employment."[60] Finding individual liability is consistent with these purposes.[61] Such additional liability increases the

'employer' in order to accomplish what is already built into the substantive prohibition against discrimination."); Cassano v. DeSoto, Inc., 860 F. Supp. 537, 539 (N.D. Ill. 1994) (concluding that "it does not require a congressional enactment to render a corporation or other institutional employer responsible for its employees' actions taken on its behalf").

59. *See, e.g.*, Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (recognizing that Title VII "should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination"); Harvey v. Blake, 913 F.2d 226, 227 (5th Cir. 1990) (same); Lamirande v. Resolution Trust Corp., 834 F. Supp. 526, 528 (D.N.H. 1993) (same). *See also* H.R. REP. No. 102-40(I), 102d Cong., 1st Sess. 14 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 552 (listing the two goals).

60. Bostick v. Rappleyea, 629 F. Supp. 1328, 1334 (N.D.N.Y. 1985) (finding New York State assemblyman and staff liable as "employers" under Title VII); Spirt v. Teachers Ins. and Annuity Ass'n, 475 F. Supp. 1298, 1308 (S.D.N.Y. 1979), *aff'd in pertinent part*, 691 F.2d 1054 (2d Cir. 1982), *cert. denied sub nom.*, Teachers Ins. and Annuity Ass'n v. Spirt, 469 U.S. 881 (1984) (finding retirement annuity plans liable as "employers" under Title VII). *See also* Wanamaker v. Columbian Rope Co., 740 F. Supp. 127, 134 (N.D.N.Y. 1990) (same as *Spirt*).

61. *See* Schallehn v. Central Trust and Sav. Bank, 877 F. Supp. 1315, 1339-40 (N.D. Iowa 1995) (concluding that agent liability is supported by the ADEA's goal "to reach and remedy age discrimination"); Strzelecki v. Schwarz Paper Co., 824 F. Supp. 821 (N.D. Ill. 1993) (holding a supervisor liable under the ADEA and explicitly rejecting *Miller* as inconsistent with the broad purposes of the ADEA, one of which is to deter potential discriminators); Vakharia v. Swedish Covenant Hosp., 824 F. Supp. 769, 784-86 (N.D. Ill. 1993) (same); Griffith v. Keystone Steel & Wire Co., 858 F. Supp. 802, 805-06 (C.D. Ill. 1994) (finding that individuals may be held liable under Title VII in a serial harassment case based in part upon guidance from Seventh Circuit ADEA 'decisions'); House v. Cannon Mills Co., 713 F. Supp. 159, 162 (M.D.N.C. 1988) (finding individual liability under the ADEA, and asserting that doing so "comport[ed] with both the purpose of the ADEA to eliminate discrimination from the workplace . . . and the statement of Justice Blackmun in Oscar Mayer & Co. v. Evans, 441 U.S. 750, 765 (1979) (concurring) that remedial provisions of the ADEA should be construed liberally"). *See also* Jendusa v. Cancer Treatment Ctrs. of Am., Inc., 868 F. Supp. 1006, 1010 (N.D. Ill. 1994) (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) in recognizing, for the same issue under the ADA, that "such a reading of the

likelihood that the victim will recover her full monetary damages,[62] even where procurement of relief from the entity is impeded. One such obstruction is the current trend away from holding entities liable in hostile environment harassment cases in some circumstances. In addition, recovery may be thwarted by "judgment-proof" companies, those lacking the financial resources to pay the award.

Agent liability increases the level of deterrence in two ways. First, by directly affecting the discriminatory employee, agent liability is a potential threat to that person regardless of the ability or interest of the entity in punishing her. Second, the possibility of holding a discriminator personally liable may encourage more victims to sue than would otherwise be willing.

A. Agent Liability Helps Victims Secure Compensation

1. Agent Liability Fills the Gap Created in Hostile Environment Harassment Cases

Those courts that refuse to find personal liability generally either presume or explicitly state that the employer will be liable for its employees' actions based on respondeat superior.[63] Notwithstanding this assumption, the Supreme Court's decision in *Meritor Savings Bank v. Vinson*[64] suggests that there are limits to the imposition of employer liability under employment discrimination statutes, thus destroying the assurance that there will always be a method for recovery for discrimination.

In *Meritor*, the plaintiff was invited out to dinner by her supervisor. During the course of the meal, the supervisor suggested that they proceed to a motel to have sexual intercourse, to which the plaintiff acquiesced. According to plaintiff, the supervisor thereafter made repeated sexual demands upon her for sexual favors, both during and after business hours; she estimated that over the next several years she had intercourse with him approximately fifty times. In addition, plaintiff testified that the defendant fondled her in front of other employees and followed her into women's restrooms.

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statute [is] ... most consistent with Congress [sic] intent in enacting antidiscrimination legislation on *viz*, deterring discriminatory employment practices and ensuring that complete justice is secured by victims of discrimination").

62. Herein "recovery" is referred to in the pecuniary sense only. The author recognizes that, despite any damage award, the loss of the victim's dignity and sense of security cannot be so easily reimbursed.

63. *See, e.g.*, Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 588 (9th Cir. 1991) (commenting that the employer will be held responsible for its employee's acts under Title VII and the ADEA), *cert. denied sub nom.*, Miller v. La Rosa, 114 S. Ct. 1049 (1994); Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 510 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 666 (1994) (maintaining that Title VII's entity liability will safeguard employees' right not to be victims of discrimination); Crawford v. West Jersey Health Systems, 847 F. Supp. 1232, 1237 (D.N.J. 1994) (agreeing with *Miller*); Vodde v. Indiana Michigan Power Co., 852 F. Supp. 676, 681 (N.D. Ill. 1994) (maintaining that, under the ADA, "the normally deep pocketed" entity will be the most suitable defendant).

64. 477 U.S. 57 (1986).

Justice Rehnquist, writing for the Court, overturned the District of Columbia Court of Appeals's holding that an employer is strictly liable for a hostile environment created by a supervisor's sexual advances, regardless of the employer's cognizance, potential or actual, of the alleged misconduct.[65] Concluding that Congress wanted the courts to examine common-law agency principles for guidance in this area, he noted that the EEOC's characterization of those principles is that

> where a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them. [W]hen a sexual harassment claim rests exclusively on a "hostile environment" theory, however, the usual basis for a finding of agency will often disappear. . . . [A]gency principles lead to a rule that asks whether a victim of sexual harassment had reasonably available an avenue of complaint regarding such harassment, and if available and utilized, whether that procedure was reasonably responsive to the employee's complaint.[66]

Justice Rehnquist determined that "[w]hile such common-law principles may not be transferable in all their particulars to Title VII, Congress's decision to define 'employer' to include any 'agent' of an employer surely evinces an intent to place some limits on the acts of employees under Title VII for which employers are to be held responsible."[67]

This belief has been reinforced by subsequent discrimination cases that have absolved employers from respondeat superior liability for prohibited harassment;[68] Judge Posner has asserted that "[o]utrageous conduct by one employee to another unknown to the employer should not automatically

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65. *Id.* at 69-70.

66. 477 U.S. at 70-71.

67. *Id.* at 72 (internal citations omitted). Judge Posner noted that under this interpretation of the ADEA, "it is thus left to the courts to decide as a matter of federal common law whether to apply the doctrine of respondeat superior in age discrimination cases." Shager v. Upjohn Co., 913 F.2d 398, 404 (7th Cir. 1990). *See supra* Part I for Judge Posner's explanation of the ADEA's definition of "employer."

68. *E.g.*, *Shager*, 913 F.2d at 404-05 (commenting on RESTATEMENT (SECOND) OF AGENCY §228 (1958)). Posner explains that:

> Discrimination is an intentional tort and . . . an employer is liable for the intentional torts of an employee only if they are in furtherance (though possibly misguided) of the employer's business, implying some relation between the tort and the business. If one low-level employee makes sexual advances to another, his conduct is so unrelated to the employer's business that the employer will ordinarily be excused from liability under the doctrine of respondeat superior; the employer's own fault must be shown. But a supervisory employee who fires a subordinate is doing the kind of thing that he is authorized to do, and the wrongful intent with which he does it does not carry his behavior so far beyond the orbit of his responsibilities as to excuse the employer.

be ascribed to the employer."[69] Under this analysis, championed by several circuit courts, entity liability attaches only where the harassment is of a nature of which the employer must or should have known, and to which the employer responded ineffectively, thus demonstrating condonation of the employee's behavior and thereby becoming vicariously liable.[70]

Alternatively, one circuit court determined that employer liability for a discriminatory abusive environment may occur merely where "the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship."[71]

The Eleventh and Sixth Circuit split this analysis of entity-employer liability into two distinct tests, depending on whether the harassing coworker is a peer or a supervisor. To establish respondeat superior liability for the harassment of peers, "the plaintiff must prove 'that the employer, through its agents or supervisory personnel, knew or should have known of the . . . harassment and failed to implement prompt and appropriate corrective action.'"[72]

In contrast, the courts reject the possibility of applying respondeat superior liability to supervisor harassment, indicating that the "should have

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69. *Shager*, 913 F.2d at 404.

70. *See* Carr v. Allison Gas Turbine Div., General Motors Corp., 32 F.3d 1007, 1009 (7th Cir. 1994) (asserting that an entity is liable if it knows that harassment is occurring and responds ineffectively). *See also*, Hirschfeld v. New Mexico Corrections Dep't, 916 F.2d 572, 577 (10th Cir. 1990) (same for sexual harassment); Paroline v. Unisys Corp., 879 F.2d 100, 106 (4th Cir. 1989), *aff'd in pertinent part*, 900 F.2d 27 (4th Cir. 1990) (en banc) (declaring that the entity employer "is liable for one's employee's sexual harassment of another worker [only] if the employer had actual or constructive knowledge of the existence of a sexually hostile working environment and took no prompt and adequate remedial action") (internal quotation omitted); Brooms v. Regal Tube Co., 881 F.2d 412, 421 (7th Cir. 1989) (same for sexual harassment).

71. *See* Kariban v. Columbia Univ., 14 F.3d 773, 780 (2d Cir.), *cert. denied*, 114 S. Ct. 2693 (1994). The *Kariban* court concluded, however, that

> where a low-level supervisor does not rely on his supervisory authority to carry out the harassment, the situation will generally be indistinguishable from cases in which the harassment is perpetrated by the plaintiff's co-workers; [in such cases], the employer will not be liable unless "the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it."

(quoting Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59 (2d Cir. 1992)). *See also* Webb v. Hyman, 861 F. Supp. 1094, 1108 (D.D.C. 1994) (following the *Kariban* test).

72. Kauffman v. Allied Signal, Inc., Autolite Div., 970 F.2d 178, 183 (quoting Rabidue v. Osceola Refining Co., 805 F.2d 611, 621 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) (defining requirement for respondeat superior liability concerning a claim of hostile work environment sexual harassment)). *See also* Vance v. Southern Bell Tel. and Tel. Co., 863 F.2d 1503, 1512 (11th Cir. 1989) (entity liability attaches where "the plaintiff can establish that the employer knew or should have known of the [racial] harassment and failed to take remedial action"); Haysman v. Food Lion, Inc., 893 F. Supp. 1092, 1110-11 (S.D. Ga. 1995) (discussing standard of respondeat superior liability and, citing *Vance*, denying summary judgment on ADA claim of hostile work environment.).

known" aspect of that analysis would been inappropriate in such cases;[73] rather, the court must determine whether the supervisor's actions were within the scope of his employment. The Sixth Circuit also requires a determination of whether the company's response upon being informed of the harassment was "adequate[ ] and effective[ ]";[74] the Eleventh Circuit declared that while such subsequent gestures by the employer may mitigate damages, but they "in no way affect[ ] an employer's liability."[75]

As Judge Posner has sensibly contended, if the employer is not liable for all the conduct of its employees, under whichever theory, then at least the offender should be held accountable. If no one is held liable, then discrimination statutes are merely statements of aspirations, and not the effective prohibitions that Congress intended.

The difficulty of ensuring effective remedies for hostile environment claims is exemplified by *Kauffman v. Allied Signal, Inc., Autolite Division.*[76] In *Kauffman*, the plaintiff, employed by the defendant for more than a decade, took medical leave from her position to have breast augmentation surgery. Upon her return, her supervisor, Mr. Butts, touched her left breast and demanded that the plaintiff expose her newly-enlarged breasts in front of him. In explicit response to Kauffman's refusal to do so, Butts temporarily re-assigned her to a more physically gruelling task. In addition, her supervisor instructed a co-worker to ask Kauffman "to show you her tits." During the three days after her return to work, Kauffman claimed that she was approached by twenty co-workers who made comments about her surgery.

The plaintiff complained about her supervisor's behavior and he was fired. Nevertheless, she suffered a nervous breakdown, which her psychiatrist testified was a result of the sexual harassment at Allied Signal.

The plaintiff sued. While the Sixth Circuit determined that Butts was an agent within the meaning of Title VII, the court affirmed the dismissal of Ms. Kauffman's hostile environment claim because "Allied Signal was protected from liability because its response upon learning of Butts'[s] harassment was adequate and effective."[77] The Sixth Circuit left open the potential for recovery under a quid pro quo theory, but intimated that the tangible job detriment suffered by Kauffman might well be *de minimus.*

73. *See Kauffman*, 970 F.2d at 183-84; *See also Vance*, 863 F.2d at 1513 (declaring that where the harasser is the plaintiff's supervisor, the employer is "directly, rather than indirectly liable" and, hence, "'whether his supervisors know or should have known what he did is irrelevant," and quoting Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417, 1422 (7th Cir. 1986)).

74. *Kauffman*, 970 F.2d at 184-85.

75. *Vance*, 863 F.2d at 1514.

76. 970 F.2d 178, 180 (6th Cir. 1992).

77. *Id.* at 185. In fact, rather than effectively punishing Butts, he was rehired as a temporary full-time employee through a temporary employment service. There is no evidence that Butts's employment was adversely affected by his actions. Note, in fact, that there was no significant consequence to Butts for his behavior.

Likewise, in *Lankford v. City of Hobart*,[78] the plaintiffs, police dispatchers, alleged that Mr. Medrano, the Chief of Police of the City of Hobart, created a hostile and abusive work environment by fondling them, requesting sexual favors, and making obscene gestures and unwelcome advances. The plaintiffs claimed that, when Medrano realized that they would not accept his sexual advances, he began spying on them while they were off duty and spreading rumors that one of them was a lesbian. Medrano also allegedly used his authority as Chief of Police to obtain one plaintiff's private medical records without her consent from a local hospital in an attempt to discredit her and to prove his statements that she was a lesbian.[79]

The plaintiffs sought damages under Title VII and § 1983 for invasion of privacy. The district court granted summary judgment in favor of both the City of Hobart and Medrano for all Title VII claims. On appeal, the Tenth Circuit applied an earlier circuit court decision, *Sauers v. Salt Lake County*,[80] and refused to consider the Title VII claim against the supervisor.[81] At that time, the circuit court refused to review the claims against the city because they were adjudged premature. However, if the city were not held responsible, the plaintiffs would be unable to recover for their supervisor's egregious actions. Note that the likelihood of obtaining relief from the city depends on which test for employer liability is applied. If the test is based on whether the supervisor uses his actual or apparent authority to further the harassment, the chief's use of his power to obtain the plaintiffs' medical records would probably establish the necessary use of authority. However, the plaintiffs' case may be substantially more difficult if the City of Hobart's liability attaches only where the harassment is of a nature of which it must or should have known, and where its failure to respond indicated implicit condonation of Medrano's behavior, since there is no proof in the facts that the chief's supervisor did or should have known of his acts and that such condonation occurred.

Thus, entities whose reactions meaningfully respond to harassment and prevent the re-occurrence of such behavior may be shielded from liability.[82] Nonetheless, if plaintiffs such as Ms. Kauffman and Ms. Calvary cannot recover personally from their supervisors, then they will be unable to obtain relief under Title VII for the injury they have suffered. Moreover, despite the fact that the direct monetary loss of such harassment may be small, in hostile environment situations, the likelihood of some form of psychological damage, requiring costly assistance from which to recover, is

78. 27 F.3d 477 (10th Cir. 1994).

79. *Id.* at 478.

80. Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993). *See discussion infra* note 153.

81. *Lankford*, 27 F.3d at 480.

82. This author has no opinion as to whether or not the tests delineated by the various courts fulfill the requirements of Title VII.

high.[83] The absence of any remedy in such cases is contrary to the purposes for which Congress enacted Title VII. The only means of realizing the "compensation" goal of Title VII is to provide individual liability.

2. *Agent Liability Allows Plaintiffs to Obtain Relief in Cases of Judgment-Proof Employers*

While it is true that employing companies are generally in better financial positions than individual employees to compensate a discrimination victim, courts rejecting individual liability should not automatically presume that recovery can be secured from the company of the discriminator. Individual liability protects a plaintiff from an inability to obtain her remedy from an entity which is judgment-proof because it is insolvent.[84] While one might surmise that this problematic circumstance would be extremely rare, it is likely that the entities involved in discrimination cases include a greater percentage of economically-depressed companies than their percentage of the workforce would indicate. Discrimination is certainly not limited to companies in dire financial straits; the layoffs and lack of job opportunities that often accompany businesses in precarious pecuniary predicaments, however, provide a propitious breeding ground for discrimination. Consequently, agent liability is needed in order to protect the employees of judgment-proof entities.

B. Agent Liability Further Deters Discrimination

The federal anti-discrimination statutes are designed not only to address individual grievances, but also to further important social policies.[85] In addition to compensating victims of past discrimination, the statutes must be interpreted in such a way as to discourage such actions in the future, both by the same perpetrator and by others.

While opponents of agent liability maintain that holding the entity liable will provide sufficient motivation for the discriminator's supervisors to punish her, there are several flaws with this circuitous method of deterrence. First, the discriminator may have moved to another company, or

83. *Cf.* Harris v. Forklift Systems, Inc., 114 S. Ct. 367, 371 (1993) (the effect on the employee's psychological well being is one factor in determining whether the plaintiff actually encountered a hostile working environment).

84. *See* Vakharia v. Swedish Covenant Hosp., 824 F. Supp. 769, 785-85 (N.D. Ill. 1993) (observing the need for individual liability of decision-making employees especially where the entity may be unable to satisfy the judgment to ensure an outcome consistent with the "broad remedial purposes" of Title VII). *See also* Zakutansky v. Bionetics Corp., 806 F. Supp. 1362, 1365 n.7 (N.D. Ill. 1992) (propounding that the presence of an employee as a defendant in his individual capacity might be needed "to deal with the contingency that [the entity] could prove financially incapable of satisfying [the plaintiff's] entitlement"). *But see* EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1282 n.9 (7th Cir. 1995) (noting that the prospect of leaving a potential plaintiff without a means of recovery is insufficient to find individual liability).

85. *E.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27 (1991).

may otherwise be outside the entity's reach. Second, the discriminator's supervisors may concur with her prejudice, and thus simply refuse to punish her. Third, most insidious yet perhaps most common, the actions which the supervisors take in defending their company against the plaintiff's suit may engender a mindset that will discourage them from disciplining the supervisor. This is even more likely if the employer's insurance pays the damage award.

Moreover, individual liability increases deterrence by elevating the likelihood of lawsuits, both by assuring that the victim's opportunity for recovery would be greater and by allowing the victim openly to announce the name of her tormentor in public documents such as the complaint. Consequently, in the attempt to purge society of such inefficient and morally corrupt behavior, those who discriminate must be held personally liable.[86]

1. Entity Liability May Not Have Any Repercussions on the Discriminatory Employee

Courts have asserted that the goal of the anti-discrimination statutes would be fulfilled despite the absence of agent liability, because an employer held liable would punish its discriminatory employee for the damages imposed upon it.[87] However, these courts assume this trickle-down consequence to exist and cite no empirical evidence to prove that employers who lose employment discrimination suits take disciplinary steps against the responsible employee.[88] In fact, this facile assumption fails to acknowledge the situation in which a company held liable is either unable

86. *See* Matthews v. Rollins Hudig Hall Co., 874 F. Supp. 192, 195 (N.D. Ill. 1995), *rev'd*, No. 94-3895, 1995 WL 716186 (7th Cir. Dec. 6, 1995) (quoting Strzelecki v. Schwarz Paper Co., 824 F. Supp. 821, 829 (N.D. Ill. 1993) in declaring that the "ADEA is designed not only to compensate victims of discrimination but to deter potential discriminators, and the latter goal is undermined when people who make discriminatory decisions do not have to pay for them.").

87. *See, e.g.*, Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 588 (9th Cir. 1991), *cert. denied sub nom.*, Miller v. La Rosa, 114 S. Ct. 1049 (1994) (declaring that "an employer that has incurred civil damages because one of its employees believes he can violate [federal discrimination laws] with impunity will quickly correct that employee's erroneous belief"); Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 510 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 666 (1994) (asserting that employer liability is a sufficient safeguard of employees' anti-discrimination rights under both Title VII and the ADEA); Lenhardt v. Basic Inst. of Technology, Inc., 55 F.3d 377, 381 (8th Cir. 1995) (interpreting a state employment discrimination statute by analogizing it to Title VII and concluding that a liable employer "almost certainly will impose some form of discipline upon the offending employee," thus eliminating the "chamber of horrors" argument of perpetual co-worker abuse); Crawford v. West Jersey Health Sys., 847 F. Supp. 1232, 1237 (D.N.J. 1994) (agreeing with *Miller*, because "the court is not persuaded that personal liability increases the likelihood of deterrence"). ADA: Vodde v. Indiana Michigan Power Co., 852 F. Supp. 676, 681 (N.D. Ind. 1994) (maintaining that "the normally deep pocketed and publicity-conscious employer . . . can be counted on to be the most effective guardian of the marketplace.").

88. *See Miller*, 991 F.2d at 588 (failing to indicate any data supporting this contention); *Birkbeck*, 30 F.3d at 510 (same).

or unwilling to discipline the discriminatory employee. In these situations, the discriminatory employee remains unpenalized, and thus neither she nor any potential discriminators working for the employer would be discouraged from such future activity.[89]

A company may be powerless to take punitive measures against the responsible individual, for instance if she has left the company because of retirement or a change in employment. This is not simply a theoretical consideration; in *House*, the court noted that the individual defendants were "no longer with the defendant company, which render[ed] injunctive relief against them meaningless and would have made punishment of the offenders equally impossible to administer."[90] The contention that the threat of termination is equivalent to a sizeable monetary penalty is certainly not accurate in the case of an "employee near retirement who will have left the workforce long before his or her victim's employment discrimination case goes to trial and results in a verdict."[91]

However, even where the individual is still employed by the company, the effect of the judicial remedy might not reach the employee for several reasons.[92] First, the highest echelons of the company itself might be prone to prejudice and, therefore, would be unwilling to reprimand someone for actions caused by bias. Anti-discrimination statutes were enacted "against the backdrop of employment activities . . . that, by their very nature, were not economically rational: failure to hire or promote the most qualified

89. *See* Vakharia v. Swedish Covenant Hosp., 824 F. Supp. 769, 786 (N.D. Ill. 1993) (permitting the plaintiff to pursue her Title VII claim against the agent, since "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"). *See also* EEOC v. AIC Sec. Investigations, Ltd., 823 F. Supp. 571 (N.D. Ill. 1993), *rev'd*, 55 F.3d 1276 (7th Cir. 1995) (upholding a finding of personal liability against an individual decision-maker under the ADA because "if the person most responsible for invidious discriminatory actions . . . were shielded from personal liability, that person may never be sufficiently punished or deterred.").

90. House v. Cannon Mills Co., 713 F. Supp. 159, 161 n.3 (M.D.N.C. 1988).

91. Jendusa v. Cancer Treatment Ctrs. of Am., Inc., 868 F. Supp. 1006, 1012 n.8 (N.D. Ill. 1994).

It might be argued that there is no need for deterring that particular employee if she has retired, and therefore, has permanently left the workforce. However, the notion that one may avoid a penalty for one's actions by leaving the workforce is hazardous for two reasons. First, as discussed in part IV, personal liability is so crucial to our sense of moral and legal justice that it should not be able to be seen to be evaded simply through retirement. Second, absent individual liability, those business associates of the discriminator which might harbor similar intentions would fail to discern any personal consequence to such behavior and thus would not be deterred. Once the first of these still-employed discriminators was caught and found liable, intra-entity reprimanding *might* avoid re-occurrences (however, consider the remainder of this section for the likelihood of such condemnation); nevertheless, there is little reason to wait for a second episode of discrimination prior to responding with censure.

92. Thus, Goldberg's observation that, "the need to maintain a good reputation in the public eye hopefully provides most employers with enough incentive to deter their agents from discrimination," is, at best, optimistic and lacking empirical support. Goldberg, *supra* note 27, at 586.

candidate due to his or her race, gender, disability, etc. is not the conduct of a rational economic actor."[93] These businesses acted irrationally when discriminating and, accordingly, there is no reason to presume that they will act rationally when confronted with damages. The failure to consider the likelihood of irrational behavior within a company significantly undermines an interpretation requiring use of such circuitous means of deterrence.

That is not to say that an employee's supervisors would be pleased that such actions resulted in liability; however, their disapproval is more likely to be connected to having been "caught" than with the act itself. Such censure is more likely to be more limited in scope than that related to condemnation of bias; in any case, such a basis for punishment does not serve the purpose of the federal employment statutes, which is to deter discrimination, not to teach people to hide such action better.

Second, even if the supervisors of the responsible employees do not support discrimination, they may be unwilling or unable to admit that the incident that led to a damage award actually occurred. The presence of such disinclination may be explained through consistency theories, particularly cognitive dissonance. Consistency theories postulate that people attempt to preserve psychological consistency among their beliefs/knowledge and their actions; individuals prefer to be able to perceive their actions as supportive of their beliefs/knowledge and vice-versa. When people discern inconsistencies between their actions and their beliefs/knowledge, they will attempt to alter one of them to correspond to the other.[94]

One prominent consistency theory is Leon Festinger's "Cognitive Dissonance" theory. Dissonant cognitions are beliefs/knowledge that are incompatible with each other (e.g., "Smoking is bad for my health" and "I smoke"); they contradict each other psychologically. Festinger has theorized that dissonant cognitions tend to produce a state of tension or discomfort known as "psychological dissonance," which people will attempt to reduce or remove.[95]

According to Festinger, some dissonant cognitions will likely be activated as the result of making an important decision, and they will produce a state of psychological dissonance known as "Postdecisional Dissonance." Not all decisions will result in the same amount of dissonance; three factors influence the amount of dissonance created. First, important decisions arouse more dissonance than unimportant ones. Second, the more substantial the difference in the alternatives, the greater the dissonance. Third, the more difficult the decision (because the alternatives are virtually equally attractive), the more dissonance increases.[96]

93. *Jendusa*, 868 F. Supp. at 1011.

94. REUBEN M. BARON & WILLIAM G. GRAZIANO, SOCIAL PSYCHOLOGY 230 (1991).

95. *Id.* at 233.

96. *Id.* at 234.

There are three ways to reduce cognitive dissonance. First, one can change one or more of the dissonant cognitions make them more consonant with other cognitions. Second, one can add new consonant cognitions favoring the elected option in order to help create a larger imbalance between the attractiveness of the alternatives. Third, the importance of one or more cognitions one can change to limit the dissonance resulting from the conflict.

Cognitive dissonance theory addresses the effects of people's behavior on their attitudes through an effect explained in the "induced-compliance" paradigm. In this paradigm, a person is persuaded to behave in a way (acting "not-X") that is contrary to her attitudes ("I believe X"). Since the action-cognition ("I acted not-X") cannot be changed, the individual will reduce the dissonance by changing the original attitude to "I believe not-X."[97]

Certain conditions are necessary for counter-attitudinal behavior to produce sufficient dissonance to change an attitude. First, there must be some adverse repercussion as a result of the behavior (otherwise, the counter-attitudinal act can be dismissed as irrelevant). Second, the individual must feel personally responsible for the negative result. Third, there cannot be good, external justification for the behavior (e.g., an external compulsion or a large reward); the behavior must be voluntary.

When the principles of cognitive dissonance theory are superimposed on the landscape of employment discrimination, the effects of cognitive dissonance, and particularly the induced compliance paradigm, are clearly visible. Where an entity defends against a claim of employment discrimination, the entity is indirectly defending the allegedly discriminatory employee. The induced-compliance paradigm indicates that the actions of the discriminatory employee's supervisors will probably affect a change in attitude concerning the discrimination, despite any personal suspicions or knowledge that the claim is valid. Two dissonant cognitions will exist — "Discrimination took place" and "I caused the entity to defend, or assisted the entity in its defense, against a discrimination claim."

The decision to participate in the defense of the claim is of the type which would create significant cognitive dissonance. First, whether or not a person obtains a judgment against the company, thereby causing considerable pecuniary harm and negative publicity to it, is significant enough an occurrence as to create considerable psychological dissonance. Second, the substantial difference in the alternatives[98] increases the attaching dissonance. Third, the level of difficulty in the decision may vary substantially,

97. *See Id.* at 235.

98. The alternatives differ for each person in the entity, depending on her position. If she is in a policy-making role, the alternatives consist of either confessing the agent's wrongdoing and settling the suit or denying the behavior and fighting the claim in court. If the allegedly discriminatory employee's supervisor was in a junior-management position, the

depending on how strongly the employee feels about discrimination and about her company. Nonetheless, while the strength of each element may differ from case to case, the cumulative impact of these elements likely would be to create substantial psychological dissonance.

Moreover, the conditions necessary to create the attitudinal shift demonstrated in the induced-compliance paradigm exist in cases of employment discrimination. First, there is clearly the severe consequence of succeeding in the person's efforts, in that the victim is thwarted from recovering for her torment. Second, the policy-makers, as the ones responsible for deciding whether to deny the discrimination, must feel personally responsible for challenging the claim, thereby satisfying the second criterium for an attitudinal shift.

The third condition, the absence of any external justification for the behavior, may or may not exist. Perhaps management feels that outside forces, such as the stockholders to whom it owes a fiduciary duty, would prefer it to compel the plaintiff to prove the validity of the claim.[99] Except for such a situation, there would be no sufficient moral justification for refusing to compensate voluntarily a person it knows to be a victim of previously tolerated discrimination.

Thus, the action of defending the entity (and, indirectly, the discriminatory employee) is counter-attitudinal to the belief that the discriminatory employee is deserving of punishment, thereby creating cognitive dissonance. Since the defense of the entity and the individual has already occurred, the likely method of eliminating the resulting discomfort is for the supervisors of the discriminatory employee to change their beliefs so that they "conclude" that there was no discrimination, and thus no reason to discipline the employee.

While "induced compliance" paradigm of Cognitive Dissonance theory is widely accepted, there are two other psychological explanations for attitude change after counter-attitudinal behavior, both of which support the belief that supervisors who defend of the entity against an employment discrimination claim are likely to refuse to punish a discriminatory employee.

Bem's Self-Perception theory of attitude formation theorizes that one's attitude towards a subject is determined by unconsciously reviewing one's previous actions concerning that subject. Thus, even absent any discomfort resulting from counter-attitudinal behavior, once a person who had previously believed that the employee had discriminated includes her past defense of the entity (and, indirectly, the individual) into her analysis

alternatives consist of either vigorously assisting the entity in its defense or resisting providing such assistance. (The possible extreme of actively thwarting the entity's defense, by, for instance, testifying for the plaintiff, is possible though rare.).

99. However, if management suspected that the claim could be proven, the cost of defending a lawsuit might indicate that the more financially prudent decision would be to settle the case.

of her views, she will perceive her belief of that employee's actions differently.

A third explanation for the induced-compliance effect is the Impression Management Theory of attitude change. The authors of this theory, Schlenker and Bonoma, argue that people are socialized with the goal of appearing consistent to others. Consequently, people experience "evaluation apprehension" when they act in a way that is opposite to their attitude about an issue. To avoid possible negative evaluations by others, people make themselves appear consistent by reporting attitudes that correspond with their behavior; induced compliance does not produce real attitude change at all, but rather merely its appearance. Under this theory, such change is most likely to occur when the counter-attitudinal behavior is public.[100]

When a manager defends an entity against a claim of employment discrimination, she does so publicly; her co-workers, business associates, and social acquaintances are likely to know of the suit. Thus, the manager, if she knows or believes that the discrimination occurred, is likely to undergo "evaluation apprehension." In order to avoid appearing inconsistent, she will outwardly taken on the facade of supporting the discriminator and, consequently, will refuse to punish her.

Another, more specific, consistency theory concerns the phenomena of "Effort Justification." The two specific dissonant cognitions at issue here are "I worked hard for this" and "This is meaningless." According to this paradigm, the need to justify past expenditures of time and effort results in an increase in individuals' psychological commitment to previous courses of action.[101] The managers who will be making personnel decisions after the trial are likely to have a stake in the outcome, and perhaps even testify in the trial. After enduring the emotional and monetary effects of a trial, the supervisors need to convince themselves that their side should have prevailed in order to justify that effort.

The *Jendusa* court recognized the conclusion of these theories when it described the effect of litigation on the entity's managers:

> [M]ore often than not, employers who lose a discrimination suit walk away from the courthouse believing that an injustice has been worked against them at the hands of a jury sympathetic to [the] . . . plaintiff. The court does not believe that these employers, convinced that their employment decisions were motivated by legitimate non-discriminatory justifications . . . will automatically discharge or otherwise discipline the responsible personnel. This is especially true if the individual employees involved are high ranking corporate officials. . . . For these individuals, the threat of

100. Baron and Graziano, at 237.
101. *Id.* at 238.

prospective termination is not a sufficient deterrent to acting on their discriminatory animus.[102]

An employer is even less likely to react against an employee if employer liability for intentional discrimination is considered to be embodied in the imputed-liability and negligent-supervision portion of the employer's insurance, rather than under the exception made for intentional acts (of the company, rather than of the employee). If the behavior for which it was held liable is considered to be in the former category, it is covered by insurance.[103] While the entity's insurance costs may increase somewhat, it will not bear the full extent of the damages, thus restraining the employer's motivation for punishing the offending employee.

The entity's potential support for the individual's behavior, however, will not prevent personal liability from having the intended deterrence. The entity is certainly not required to indemnify the defendant-employee for any damage award against her,[104] and, in fact, may be barred from so doing.[105]

2. *Individual Liability Increases Deterrence by Elevating the Likelihood of Lawsuits*

Regardless of the effectiveness of the trickle-down theory of entity liability, individual liability would increase the likelihood that a discrimination victim would file a lawsuit in several ways. First, personal liability assures the victim that, despite the economic situation of the entity, the opportunity for recovery would be greater. Heightening victims' chances of obtaining compensation for their injuries will elevate the percentage willing to pursue a lawsuit.[106]

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102. Jendusa v. Cancer Treatment Ctrs. of Am., Inc., 868 F. Supp. 1006, 1012 (N.D. Ill. 1994).

103. *See* Sean W. Gallagher, *The Public Policy Exclusion and Insurance for Intentional Employment Discrimination*, 92 MICH. L. REV. 1256, 1259-60 (1994) (noting that insurance companies may impose a "public policy exclusion" on coverage for intentional employment discrimination).

104. A company potentially might remunerate an employee for several reasons: first, it may support its employee's discriminatory acts; second, it may develop a belief in her innocence fostered by the litigation; or third, it may fear losing a particularly valued employee, who might switch jobs to avoid future damage awards. It can be presumed, however, that most companies would likely wish to distance themselves, at least facially, from such discrimination. Furthermore, most companies prefer not to pay any money they do not have to. Thus, unless there is some prior agreement to do so, it can be surmised that such organizational behavior will not necessarily occur.

105. *See* Kyriazi v. Western Electric Co., 476 F. Supp. 335, 341 (D.N.J. 1979) (proscribing an employer from indemnifying the punitive damage award under Title VII against an employee for sexual harassment, as antithetical to the reproving purpose of punitive damages); Altman v. Stevens Fashion Fabrics, 441 F. Supp. 1318, 1321 n.2 (N.D. Ill. 1977) (suggesting that such indemnification would be a violation of public policy).

106. EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1282 (7th Cir. 1995) (admitting that increasing the number of potentially liable defendants would increase deterrence).

Second, personal liability creates the opportunity to announce on the front of a public document, the complaint, the name of her tormentor. The rare occasion to challenge directly and publicly the persecuting employee presents the victim with a personal method of recrimination that may be more appealing than suing the entity, and may encourage more claims than would otherwise be raised.[107]

III.
ARGUMENTS COMPELLING REJECTION OF AGENT LIABILITY ARE FLAWED

In 1986, Victor Vrdolyak hired Charles Wessel as executive director of AIC, a firm employing about 300 people. In June 1987, Wessel learned that he had lung cancer. Over the following five years he underwent a series of treatments, including multiple surgeries, radiation, and chemotherapy. In April 1992, Wessel was diagnosed with inoperable metastatic brain cancer, a terminal illness. During 1987 and 1992, Wessel suffered the symptoms of his cancer and of the various treatments he underwent, including shortness of breath from having parts of his lungs removed, nausea from radiation and chemotherapy, and somewhat reduced memory due to the effects of brain tumors. He was absent from work a number of times, but essentially continued working full-time during these five years. In July 1992, after the death of her husband, Ruth Vrdolyak took over as the sole owner. On July 29, 1992, she fired Wessel, who then filed a complaint with the EEOC. The agency then sued AIC and Vrdolyak, alleging violation of the ADA. Wessel intervened as plaintiff. The jury concluded that AIC and Vrdolyak had violated the ADA and awarded $22,000 in back pay, $50,000 in compensatory damages, $250,000 in punitive damages against AIC, and $250,000 in punitive damages against Vrdolyak. Noting that Title VII restricts the total amount of compensatory and punitive damages for entities of AIC's size to $200,000, and concluding that the jury award was excessive, the district court reduced the total award of punitive damages to $75,000 each for Vrdolyak and AIC.

On appeal, the Seventh Circuit examined the issue of Vrdolyak's individual liability. Citing with approval the conclusions reached by the cases discussed later in this section, the court determined that both the ADA's language and its scheme reject individual liability.[108] After doing so, the circuit court concluded that the externalities that create barriers to the

107. Some victims attribute such importance to public condemnation of their tormentors that they continue their lawsuit even after settling with a deep-pocket entity. *See Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583 (9th Cir. 1993), *cert. denied sub nom.*, Miller v. La Rosa, 114 S. Ct. 1049 (1994) (noting that the plaintiff had settled her lawsuit with the corporation involved and was only pursuing her claim against the restaurant manager). While such strategy does not advance the goal of providing the victim with a remedy, it does foster advantageously public condemnation of the discriminator. See *infra* Part IV.B.

108. *AIC Sec.*, 55 F.3d at 1279-81.

smooth functioning of the employment discrimination statutes absent personal liability are merely "a short parade of horribles."[109] Repudiating what it claimed was a "Chicken Little-esque argument,"[110] the court concluded that the absence of individual liability was inherent in the structure of the statute and was the result of a balance struck between deterrence and societal cost, and declined to upset that equilibrium.[111]

Like those relied upon by the Seventh Circuit, courts have offered various arguments against recognizing personal liability. As discussed earlier, some courts incorrectly have reasoned from their interpretations of the statutory language, declaring that such inclusion runs counter to the popular definition of "employer" or that the presence of "agent" was meant only to create respondeat superior liability.

Likewise, various courts,[112] most influentially the Ninth Circuit in *Miller v. Maxwell's International*,[113] have provided a myriad of structural

109. *Id.* at 1282.

110. *Id.*

111. *Id.*

112. *See AIC Sec.*, 55 F.3d at 1276; Lenhardt v. Basic Inst. of Technology, Inc., 55 F.3d 377, 380-81 (8th Cir. 1995). Some district courts also have rejected agent liability.

ADEA: Low v. Hasbro, Inc., 817 F. Supp. 249, 250 (D.R.I. 1993); Pacourek v. Inland Steel Co., 858 F. Supp. 1393, 1405 (N.D. Ill. 1994); Straka v. Francis, 867 F. Supp. 767 (N.D. Ill. 1994).

Title VII/ADA: Smith v. Capitol City Club of Montgomery, 850 F. Supp. 976, 979 (M.D. Ala. 1994) (following *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583 (9th Cir. 1993), *cert. denied sub nom.*, Miller v. La Rosa, 114 S. Ct. 1049 (1994), and holding that the presence of the minimum number of employees and the limitation on punitive and compensatory damages reject agent liability); Ostendorf v. Elkay Mfg. Co., No. 94-C50170, 1994 WL 741425, at *5-6 (N.D. Ill. Dec. 29, 1994) (holding that the state's workers' compensation law and the ADA precluded individual supervisor liability); Haltek v. Village of Park Forest, 864 F. Supp. 802 (N.D. Ill. 1994) (holding that supervisory employees were not subject to personal liability under the ADA, Title VII, or the Rehabilitation Act); Russell v. NMB Technologies, Inc., 1994 WL 376277, at *6 (N.D. Ill. July 15, 1994) (determining that there is no individual liability under Title VII of the Civil Rights Act of 1964); Carlson v. Northwestern Univ., 1994 WL 130763, at *2 (N.D. Ill. April 14, 1994) (finding that individuals may not be held liable under federal discrimination laws); Dellert v. Total Vision, Inc., 1994 WL 262219, at *1 (N.D. Ill. June 13, 1994) (dismissing Title VII claims against part owner of employing company since individual employees cannot be held personally liable under Title VII); Jakowski v. Rodman & Renshaw, Inc., 842 F. Supp. 1094, 1098 (N.D. Ill. 1994) (holding that individual defendants could not be held liable as employer); Pommier v. James L. Edelstein Enters., 816 F. Supp. 476, 480-81 (N.D. Ill. 1993) (ADA as well as Title VII); Henry v. E.G. & G. Missouri Metals Shaping Co., 837 F. Supp. 312, 314 (E.D. Mo. 1993) (holding that supervisor was not liable in his individual capacity for alleged Title VII violation); Weiss v. Coca-Cola Bottling Co., 772 F. Supp. 407, 410-11 (N.D. Ill. 1991) *aff'd*, 990 F.2d 333 (7th Cir. 1993) (holding that former supervisor was not an employee against whom Title VII action could be brought); Wilson v. Wayne County, 856 F. Supp. 1254, 1261-63 (M.D. Tenn. 1994) (rejecting the application of individual liability "without a clear statement to the contrary from [the appellate courts]"), *aff'd sub nom.*, Wilson v. Nutt, 69 F.3d 538 (1995).

See also Tim A. Baker, *Survey of Recent Labor and Employment Law Developments for Seventh Circuit Practitioners*, 27 IND. L. REV. 1205, 1211-13 (1994) (discussing individual liability under the Civil Rights Act of 1991).

113. Miller v. Maxwell's Int'l, Inc., 991 F.2d 583 (9th Cir. 1993), *cert. denied sub nom.*, Miller v. La Rosa, 114 S. Ct. 1049 (1994).

justifications for denying that federal employment discrimination statutes require individual liability. Courts have inferred that the various statutory schemes preclude individual liability. For instance, noting that each statute exempts employers with fewer than a minimum number of employees, some courts have struggled to analogize that exemption to individual liability. Courts have also attempted to use Title VII's damages limitations to demonstrate the lack of individual liability in all three employment discrimination statutes. In addition, several courts have applied the structure of 42 U.S.C. § 1983[114] to limit actions against employees to those in the employees' official capacity.

A. Exclusion of employers with fewer than a minimum number of employees does not preclude agent liability

Many courts rejecting individual liability assert that the schemes of the various discrimination statutes indicate that Congress did not intend to impose individual liability. Noting that Title VII limits employer liability to those companies with more than fifteen employees,[115] these courts have insisted that Congress would not have protected small businesses from the possible financial catastrophe arising from a judgment against them if it had intended to allow civil liability to run against individual employees.[116] Applying this reasoning in *Birkbeck v. Marvel Lighting Corporation*,[117] the Fourth Circuit affirmed the district court's judgment notwithstanding the verdict in favor of both the employer and agent defendants. The court asserted that the only possible purpose of the ADEA's exclusion of employers with fewer than twenty workers is to diminish the ADEA's burden on small businesses, and then concluded that

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114. *See supra* note 36 for pertinent language of 42 U.S.C. § 1983.

115. The minimum number of employees required to fall under the scope of the ADA is twenty-five. 42 U.S.C. § 12111(5)(A) (Supp. 1995). The analogous minimum for the ADEA is twenty. 29 U.S.C. §630(b) (Supp. 1995).

116. *See also Miller*, 991 F.2d at 587 (noting same); *AIC Sec.*, 55 F.3d at 1281-82 (concluding personal liability would pervert the intention of the minimum-employee limitation to "protect[ ] small entities from the hardship of litigating discrimination claims"). Cases brought under the ADEA: Violanti v. Emery Worldwide A-CF Co., 847 F. Supp. 1251, 1257 (M.D. Pa. 1994) (finding that no cause of action existed against co-employees or supervisors under the ADEA); Crawford v. West Jersey Health Sys., 847 F. Supp. 1232, 1237 (D.N.J. 1994) (holding that physician could not be held liable in his individual capacity under Title II or ADEA). Cases brought under Title VII/ADA: Ryan v. Grae & Rybicki, No. CV-94-3731, 1995 WL 170095, at *3 (E.D.N.Y. March 31, 1995) (asserting that Congress likely would have meant to give individuals the same protection as was provided to small entities); Hudson v. Soft Sheen Products, 873 F. Supp. 132 (N.D.Ill. 1995) (holding that Civil Rights Act of 1991 did not expand Title VII liability to include individuals in their individual capacity); Ostendorf v. Elkay Mfg. Co., No. 94-C50170, 1994 WL 741425, at *6 (N.D. Ill. Dec. 29, 1994) (holding that such a reading is the "more persuasive interpretation"); Brogdon v. Alabama Dep't of Economic and Community Affairs, 864 F. Supp. 1161 (M.D. Ala. 1994) (same as *Ryan*); Pelech v. Klaff-Joss, 828 F. Supp. 525, 529 (N.D. Ill. 1993) (same as *Ryan*).

117. 30 F.3d 507 (4th Cir.), *cert. denied*, 115 S. Ct. 666 (1994).

> [g]iven this evident limitation, it would be incongruous to hold that the ADEA does not apply to the owner of a business employing, for example ten people, but that it does apply with full force to a person who supervises the same number of workers in a company employing twenty or more. Such personal liability would place a heavy burden on those who routinely make personnel decisions for enterprises employing twenty or more persons. . . . Employer liability ensures that no employee can violate the civil rights laws with impunity, a safeguard that has proven sufficient with respect to Title VII, the ADEA's closest statutory kin.[118]

The conclusion of a nexus between the required number of employees to allow employer liability and the presence of individual liability, however, is flawed. When deciding to set a statutory minimum, Congress focused on factors which are not at issue when analyzing agent liability.

The legislative history of Title VII indicates that one motivating factor in Congress's decision was the need to protect the independence of small businesses, which were presumed to be predominately family-owned and operated.[119] These small enterprises, Congress concluded, based their employment decisions on personal affinity too much to permit their inclusion in anti-discrimination regulation. In contrast, Senator Humphrey, the main proponent of Title VII in the Senate, argued that larger businesses generally had lost this justification.[120] When others in Congress attempted to have the minimum number of employees permitted in an exempted company increased to 100, they only addressed the private nature of small businesses, not the financial burdens potentially placed on them by monetary awards.[121]

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118. *Id.* at 510. *See also* Nelson-Cole v. Borg-Warner Sec. Corp., 881 F. Supp. 71, 73 (D.D.C. 1995) (following *Birkbeck* and refusing to extend liability to individuals based on their "agent" status). Of course, the "heavy burden" to which the *Birkbeck* court refers is merely the burden not to discriminate. *See Birkbeck*, 30 F.3d at 510. Unsurprising, the *Birkbeck* court presents no evidence to support its underlying assumption that employer liability is "sufficient" to deter violations of civil rights laws.

The *Birkbeck* court claimed, however, that its decision did not apply to all ADEA suits and it asserted that it limited its holding to employment actions of "plainly delegable character," distinguishing itself from Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989), *vacated on other grounds*, 900 F.2d 27 (4th Cir. 1990), in which the circuit court had found personal liability under Title VII in a sexual harassment setting. *Birkbeck*, 30 F.2d at 510.

119. *See, e.g.*, Jendusa v. Cancer Treatment Ctrs. of Am., Inc., 868 F. Supp. 1006, 1013-14 (N.D. Ill. 1994); Lamirande v. Resolution Trust Corp., 834 F. Supp. 526, 528 (D.N.H. 1993).

120. 110 CONG. REC. 12,649 (1964).

121. *Id.* at 12,645-47. Senator Cotton, speaking in support of a (later defeated) amendment to restrict Title VII's definition of "employer" only to those employing 100 or more persons, argued: "in a small business which employs 30 or 40 persons, the personal relationship is predominant . . . [W]hen a small businessman who employs 30 or 25 or 26 persons selects an employee, he comes very close to selecting a partner." 110 CONG. REC. 13085-86 (1964). In addition, Senator Ervin, arguing against lowering the definitional limit from

One court has responded that Congress's exclusion was based on the size of the entity, and not on a definition of a "family-run business."[122] The legislative history provides no rationale for this, admittedly inexact, substitution. Nonetheless, a simple explanation is the practical inability to create a sufficiently precise definition of what constitutes a family enterprise; in such companies, cousins and fairly distant relatives are often involved, as well as the nuclear family. While the statutory definition is likely to be overbroad,[123] it merely demonstrates Congress's ardent concern for the protection of that subset of businesses.

This purpose of limiting liability based on employer size does not logically extend to agents of those employers which are liable.[124] Agents at companies above the statutory minimum should not be making business decisions based on personal preference, familial or otherwise; rather, they are making decisions for companies whose employment determinations the ADEA was meant to affect. Thus, contrary to the conclusion of some courts, Congress's limitation does not indicate an intended absence of individual liability for these agents.

Another significant rationale for creating the statutory minimum was to refrain from over-burdening small employers with the administrative expense of complying with government regulations.[125] This burden does not apply when discussing agent liability, since it has been decided that businesses employing more than twenty workers should have to deal with the administrative costs of anti-discrimination laws. It is the entity, not the agent, that bears those administrative costs. Contrary to the assumption of the *Birkbeck* court, the costs of actually defending against a discrimination

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twenty-five to eight explained, "when we get below the coverage of 25, we run into the situation where most of the employment is done on the basis of friends of the employers.... There are the most intimate relations between the small businessman and the various of employees." 118 CONG. REC. 3171 (1972). *See also* Armbruster v. Quinn, 711 F.2d 1332, 1337 n.4 (6th Cir. 1983) (citing remarks of Senator Fannin, 118 CONG. REC. 2409-10 (1972) and remarks of Senator Ervin, 118 CONG. REC. 3171 (1972), *in* SUBCOMMITTEE ON LABOR-SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 (Comm. Print 1972)); Phillip L. Lamberson, *Personal Liability for Violations of Title VII: Thirty Years of Indecision*, 46 BAYLOR L. REV. 419 (1994).

122. Smith v. Capitol City Club of Montgomery, 850 F. Supp. 976, 979 n.5 (M.D. Ala. 1994).

123. The chance that the definition is underinclusive to any significant extent—that is, that there are many businesses of more than twenty employees which are almost entirely operated by one family—seems remote. Particularly in recent times, with the rise in smaller families, the likelihood of twenty family members working in one business is limited.

124. *See* Lamirande v. Resolution Trust Corp., 834 F. Supp. 526, 528-29 (D.N.H. 1993) (finding similar flaws in the *Miller* analysis and interpreting the purposes of the statutory minimum discussed in the legislative history to allow individual liability).

125. *See* Remarks of Senator Fannin, 118 CONG. REC. 2410 (1972) ("Men and women who are very able and eager to run small businesses find that they are overwhelmed by paperwork and regulations and redtape"). *See also* Bishop v. Okidata, Inc., 864 F. Supp. 416 (D.N.J. 1994) (noting that small employers are exempted from the ADA because of the undue burden compliance would put on their financial condition).

claim are not what concerned Congress when determining the confines of anti-discrimination laws, and thus do not affect the presence of agent liability.[126]

This explanation exposes the fallacy in the reasoning of one court, which argued that "if there were individual liability [under Title VII] . . . Congress created an incentive structure for harassers to work for small companies. . . . We cannot imagine that Congress intended to inflict an inordinate number of harassers on small companies."[127] The corollary, of course, would be that individual liability creates an incentive for women and minorities and older workers to avoid small companies. Clearly, Congress's decision to create agent liability was not based on an expectation that potential discriminators and/or victims would choose their employer based on liability. Rather, Congress wanted to allow small employers and their employees to have the freedom to act on their personal affinity.

Several courts have argued that interpreting the anti-discrimination statutes to create agent liability would lead to the dubious result of allowing discriminatory individuals in companies with fewer than twenty employees to be found liable, while exempting their employers.[128] For instance, the manager of a family-owned restaurant could be held liable for discrimination, while the restaurant itself would be exempt. This reading fails for two reasons. First, and most significant, this concern ignores the statutes' specific language. The definition of employer does include agents, but specifically limits liability to "any agent *of such a person*."[129] Accordingly, only agents of employers who meet the statutory requirements could be held liable.[130] Second, this interpretation disregards the rationales for

126. In any case, many employers contribute financially to the their employees' defense against claims of employment discrimination for several reasons. First, such indemnification generally provides encouragement to its workers to continue to perform their duties. Second, such entity behavior is used to gain the employee's complete cooperation in the entity's likely co-defense against claims based on respondeat-superior liability. *See* AMERICAN LAW INSTITUTE, *Individual Liability and Defending Individual Co-Defendant (Defendant's Perspective)*, C463 ALI-ABA 205, 208-09 (1989). *But see* discussion *supra* notes 104 & 105 on employer payment of cost of damages.

127. Hudson v. Soft Sheen Products, Inc., 873 F. Supp. 132, 135 n.2 (N.D. Ill. 1995).

128. *E.g.*, Ostendorf v. Elkay Mfg. Co., No. 94-C50170, 1994 WL 741425, at *6 (N.D. Ill. Dec. 29, 1994) (declaring that "it would make little sense for Congress to have intended to exempt from liability the owner of a small business but then to make liable an individual supervisor" of that business for a violation of the ADA).

129. 29 U.S.C. § 630(b) (1994).

130. Since this limitation relies on the definition of employer, it should not affect the application of individual liability in sexual harassment cases, where *Meritor Savings Bank v. Vinson* indicates that the imposition of "absolute liability on employers for the acts of their supervisors" is inappropriate. 477 U.S. 57, 73 (1986). The reasoning generated by the *Meritor* court's conclusion is not based on any restriction within the statutory definition of "employer," but rather on a policy argument that discerns little deterrence in strict liability in such situations. Thus, even in sexual harassment cases where the entities themselves might not be held liable, their agents could still be liable.

creating the statutory minimum, particularly the protection of personal affinity in small-business employment decisions.[131] Those reasons counsel that liability should simply be limited to those agents working for employers who meet the statutory minimum.

Hence, Congress chose to restrict its anti-discrimination laws to employers of more than a certain minimum of employees based on several rationales, none of which provide a reason for rejecting agent liability.

B. Title VII's Damage Limitations Do Not Preclude Agent Liability

Prior to the 1991 amendments to the Civil Rights Act, Title VII and the ADEA provided different damage remedies. The ADEA's scope of relief was much broader than that available under Title VII: while Title VII permitted only equitable relief and some compensatory relief,[132] the ADEA permits awards of legal as well as equitable relief and provides liquidated damages for willful violation.[133] One court, contrasting the two statutes, argued that the existence of relief based on the willfulness of conduct under the ADEA intimated the existence of individual liability, regardless of such liability under Title VII.[134]

The 1991 amendments to the Civil Rights Act modified this distinction, explicitly establishing compensatory and punitive damages under Title VII, while limiting them based on the number of employees of the employer.[135] Since enactment of these awards, courts rejecting personal liability have rationalized that the 1991 Amendments to the Civil Rights Act indicated that Congress did not intend agent liability, hypothesizing that if Congress had envisioned individual liability under Title VII, individuals would have been included in the calculation of limitations.[136]

There are several problems with this interpretation as it applies to Title VII and the ADA.[137] First, the Ninth Circuit failed to consider the amendments' legislative history, which demonstrates that Congress knew

131. *Cf.* Bishop v. Okidata, Inc., 864 F. Supp. 416 (D.N.J. 1994) (noting that despite the small employer exemption, individuals are still liable).

132. 42 U.S.C. § 2000e-5(g) (Supp. 1995). *See* Violanti v. Emery Worldwide A-CF Co., 847 F. Supp. 1251, 1257 (M.D. Pa. 1994) (discussing the nature of Title VII relief before 1991); Pommier v. James L. Edelstein Enter., 816 F. Supp. 476, 480 (N.D. Ill. 1993) (same).

133. 29 U.S.C. § 626(b) (1994).

134. House v. Cannon Mills Co., 713 F. Supp. 159, 160 (M.D.N.C. 1988).

135. *See* 42 U.S.C. § 1981a(b)(3)(A)-(D) (Supp. 1992).

136. *Miller*, 991 F.2d at 587-88; EEOC v. AIC Sec. Investigations, Ltd., 82 F.Supp. 571 (N.D. Ill. 1993), *rev'd*, 55 F.3d 1276 (7th Cir. 1995), *on remand*, No. CIV.A 92-C7330, 1995 WL 642975 (N.D. Ill. Oct. 30, 1995); Straka v. Francis, 867 F. Supp. 767 (N.D. Ill. 1994). *See also* Smith v. Capitol City Club of Montgomery, 850 F. Supp. 976, 980 (M.D. Ala. 1994) (concluding that the existence of statutory limits on compensatory and punitive damages necessitates rejecting individual liability).

137. The difficulties with the Ninth Circuit's analysis, as applied to the ADEA, are discussed in Part V.A.

of some courts' decisions finding agent liability.[138] If Congress disapproved of the practice, it likely would have responded to those decisions more clearly than through the ambiguous means of excluding individuals from the new damages scheme — most clearly, by amending the statute to exclude explicitly such liability.[139]

Second, the 1991 Amendments failed to include damages limitations for entities explicitly liable under Title VII, such as employment agencies and labor unions.[140] This absence undermines the argument that the lack of explicit damage limitations for agents indicates an absence of individual liability. That interpretation would result in negating the liability for those other, expressly liable entities, simply based on the similar lack of such damage restrictions.[141]

Third, the amendments were intended to increase the effectiveness of Title VII, not to dampen it. In the "Findings and Purposes" of the 1991 amendments, Congress focused on the need for additional remedies in order to combat adequately employment discrimination.[142]

Most likely, members of Congress gave no thought to any impact of the addition of punitive damages and damage caps on the existence of individual liability.

Nonetheless, the presence of the damage limitations for entities leaves open the important question of how they affect potential damage awards against the discriminatory employee. Of course, the victim's compensatory damages cannot be imposed more than once. The corporation and the discriminatory employee should be held jointly-and-severally liable for restitution such as back pay, to ensure that the victim receives some compensation, regardless of the solvency of the entity at the time of judgment.[143]

Punitive damages, on the other hand, may be awarded separately against the employee; at issue is whether an employee's damages should be

138. In the "Findings and Purposes" of the 1991 Amendments, Congress discussed several cases, including *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 785 (E.D. Wis. 1984), in which the court ordered a back pay award against both the corporate defendants and its individual officers. H.R. REP. No. 40(I), 102d Cong., 1st Sess. 67 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 605.

139. Jendusa v. Cancer Treatment Ctrs. of Am., Inc., 868 F. Supp. 1006, 1016 (N.D. Ill. 1994).

140. *See* 42 U.S.C. § 2000e(c)-(d) (1994).

141. Goldberg, *supra* note 27, at 579.

142. Christopher Greer, *"Who, Me?": A Supervisor's Individual Liability for Discrimination in the Workplace*, 62 FORDHAM L. REV. 1835, 1846-47 (1994).

143. The germane Restatement declares that

> [i]f there is an independent ground for finding the principal liable, judgment can be entered against him and for the agent . . . If, however, judgment is rendered against both for a single harm, the judgment should be for the same amount, *in the absence of award of punitive damages.*

RESTATEMENT (SECOND) OF AGENCY § 217B cmt. d (1958) (the Restatement indicates that this section's comments are applicable to §359C) (emphasis added).

limited, or indeed necessarily have any relation, to those imposed on the employing entity. One view is that the combined damages awarded the victim may not be more than the limitation imposed based on the entity's size. However, this view significantly limits the use of punitive damages. The limitation imposed by the statute was some indication of what Congress believed the monetary penalty might need to be in order to deter effectively an entity from allowing future acts of discrimination.[144] Apportioning punitive damages within this limitation could prevent the factfinder from reaching the award that will efficiently deter the entity. Additionally, limiting the possible damage award against the employee would send a signal that discrimination by an employee at a small company is in some way less severe than the same conduct at a larger company.[145] To the contrary, the increased probability of an absence of a structured grievance system at a smaller company likely makes the discriminatory individual even more powerful, and thus the discrimination more of an invasion on the victim's financial security and emotional stability.

Another, more logical, notion is to require separate consideration of the award against the individual employee, with no limits placed on the potential punitive award against the employee. This would allow the factfinder to determine the award that will deter the individual employee, while still allowing the most efficient level of punitive award against the liable entity.[146] When examined in light of the legislative histories of both the original Title VII and its amendment, this eminently sensible approach to the distribution of damages most closely corresponds with the goals of the legislation.

C. *The Official/Individual Distinction Is Inapplicable to Title VII, Particularly for Private Employers*

Many courts rejecting individual liability under Title VII often have relied on a few cases, primarily from the Fifth Circuit, which have inappropriately (and inconsistently) applied reasoning concerning § 1983 to federal employment discrimination statutes.[147]

144. The limitations, of course, apply to the most extreme cases. In some situations the fact-finder will conclude that lesser penalties will suffice.

145. While the damage limitations on the entities themselves may demonstrate some concern for the financial stability of the company (a more direct and logical nexus than any created by the definitional employee minimum), the absence of such a limitation on punitive damages against the individual employee creates no additional pecuniary danger to the company.

146. The Seventh Circuit considered this interpretation, but concluded without explanation that it was "highly improbable." EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1281 n.6 (7th Cir. 1995), *rev'd*, 55 F.3d 1276 (1995), *on remand*, No. 92-C7330, 1995 WL 642775 (N.D. Ill. Oct. 30, 1995).

147. *See, e.g.*, Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 587 (9th Cir. 1993), *cert. denied sub nom.*, Miller v. La Rosa, 114 S. Ct. 1049 (1994) (noting that its conclusion was "buttressed by the fact that many of the courts that purportedly have found individual liability under the statutes actually have held individuals liable only in their official capacity and

Section 1983 creates a private cause of action against persons acting under color of state law. Acts fall "under color of law" if they are made in the officers' "official capacity"—that is, behavior clothed with the authority of state law, even if in violation of state law.[148] An official-capacity suit is treated as a suit against the entity.[149] If such acts occur, personal damages awards are generally precluded by the common-law doctrine of "official immunity."[150] The purpose of this doctrine is to allow government officials to act in the public good without fear of private responsibility for their good-faith errors, by ensuring that "'[i]t is not a tort for government to govern.'"[151]

In *Clanton v. Orleans Parish School Board*, the Fifth Circuit, noting that Title VII's language establishing employer liability was even narrower than § 1983's creation of liability against "every person" violating that statute,[152] held that "'[t]here is no statutory warrant for such an award against a public official' in his *individual* capacity."[153]

Reversing itself in *Hamilton v. Rodgers*,[154] the Fifth Circuit affirmed a finding of liability against various governmental supervisors. Repudiating the "individual" and "official" distinction, the court concluded that "'a person is an agent under §2000e(b) if he participated in the decision-making process that forms the basis of the discrimination.'"[155]

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not in their individual capacities"); Smith v. Lomax, 45 F.3d 402, 403 n.4 (11th Cir. 1995) (citing Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991), *inter alia*, in concluding that members of the board of county commissioners were not the plaintiff's employers under Title VII and the ADEA).

148. Monroe v. Pape, 365 U.S. 167 (1961), *overruled in part on other grounds*, Monell v. Dep't of Social Servs. of New York, 436 U.S. 658 (1978).

149. Kentucky v. Graham, 473 U.S. 159, 166 (1985).

150. Wood v. Strickland, 420 U.S. 308, 322 (1975) (holding such a defense is applicable to § 1983 claims unless the official acts with a "malicious intention to cause a deprivation of constitutional rights or other injury" or if he "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights" of the plaintiff).

151. Scheuer v. Rhodes, 416 U.S. 232, 241 (1974) (quoting Dalehite v. United States, 346 U.S. 15, 57 (1953) (Jackson, J., dissenting)).

152. Clanton v. Orleans Parish Sch. Bd., 649 F.2d 1084, 1099-1100 (5th Cir. 1981).

153. *Id.* at 1099 n.19 (citing Monell v. Dep't of Social Servs. of New York, 532 F.2d 259, 261 (2d Cir. 1976) (dictum), *rev'd on other grounds*, 436 U.S. 658 (1978)) (emphasis added). The court then concluded that "even if the policy was unconstitutional, in addition to being a violation of Title VII, the individual defendants cannot be held personally liable for backpay because they established the defense of qualified immunity as a matter of law." *Id.* at 1100.

Accord Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993) (declaring that "[u]nder Title VII, suits against individuals must proceed in their *official capacity*; individual capacity suits are inappropriate") (emphasis added); Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991) (concluding that the naming of supervisors in Title VII lawsuits can only be for the purpose of indirectly naming the entity-employer through its agents).

154. 791 F.2d 439 (5th Cir. 1986).

155. *Id.* at 443 (quoting Jones v. Metro. Denver Sewage Disposal Dist., 537 F. Supp. 966, 970 (D. Colo. 1982)).

In *Harvey v. Blake*, however, the Fifth Circuit returned to the erroneous analogy when it concluded that a Houston public service department inspector defending a discrimination and retaliation suit could be liable only in her official capacity.[156] The *Harvey* court declared that

> [b]ecause Ms. Blake's liability under Title VII is premised upon her role as agent of the city, any recovery to be had must be against her in her official, not her *individual* capacity . . . . Only when a public official is working in an *official* capacity can that official be said to be an agent of the government; there can be no liability for backpay under Title VII for the actions of mere co-workers.[157]

This description once again incorrectly implies that to be an "agent" one must be working under some vague banner of employer authority beyond that created by her role as an employee.

The Fifth Circuit took the fallacious analogy one step further in *Grant v. Lone Star Company*,[158] in which it reversed a Title VII judgment based on agent liability against an employee of a *private* company. The *Grant* court applied *Harvey*, noting that it found no basis for any distinction between public and private employees.[159]

The conclusion that Title VII's limitation of liability to agents creates an immunity when acting in an official capacity fails within both the public employment and private employment context. First, this conclusion was drawn without any reference to the statutory definition of "employer." The use of "employer," rather than § 1983's "person," serves a clearly delineated purpose other than any theoretical connection to the issue of agent liability; "employer," as defined, limits liability to entities above a certain minimum number of employees.

Second, equating anyone in the role of agent with one acting solely within an official capacity fails to distinguish between the backgrounds and the purposes of the laws involved. Section 1983 regulates the relationship

156. 913 F.2d 226, 227-28 (5th Cir. 1990). *See also* Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991) (following *Harvey*, the court concluded that "such [Title VII] claims must be made against the municipal officer in his official capacity, not in his individual capacity . . . . The relief granted under Title VII is against the employer, not individual employees whose actions would constitute a violation of the Act"); Smith v. Lomax, 45 F.3d 402, 403 (11th Cir. 1995) (determining that members of the board of county commissioners could not be considered the plaintiff's employer).

157. *Harvey*, 913 F.2d at 228.

158. 21 F.3d 649 (5th Cir. 1994).

159. *Id.* at 652-53 (relying on Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 584 (9th Cir. 1993), as a case extending individual liability to private employers). *See also* Pommier v. James L. Edelstein Enters., 816 F. Supp. 476, 480-81 (N.D. Ill. 1993) (reasoning that the individual named in a Title VII suit was merely a surrogate for the employer, and thus could only be held liable in his official capacity, citing Weiss v. Coca-Cola Bottling Co., 772 F. Supp. 407, 410-11 (N.D. Ill. 1991)).

between state officials as government and individuals; in contrast, employment statutes regulate the relationship between employers and employees. Consequently, the issue of liability depends not on whether the defendant acted in an official capacity, but whether he was an employer as defined by the statute.[160] None of the employment discrimination statutes contain the "under color of statute" language of § 1983. Thus, if the alleged discriminator falls within the definition of employer, "his 'capacity' during the alleged discriminatory events is irrelevant, so long as the behavior relates to employment."[161]

Third, and most important, when the employees of *private* employers are involved, the distinction between official and individual capacity should not be applied at all. Those concepts pertain to persons whose acts may appear to have been done under the authority of the state, no claim of which is made in Title VII cases against employees of private employers.[162] In sum, the cases that apply the functioning of § 1983 to Title VII inappropriately ignore the distinctions in both the language and the goals of the two statutes. Accordingly, their faulty analysis provides no basis for rejecting personal liability.

IV.
OTHER POLICY CONSIDERATIONS SUPPORT AGENT LIABILITY

A. Common-Law Principles Require Personal Liability

The Supreme Court has credited explicitly the application of common-law principles as an significant method of interpreting statutes, particularly employment discrimination statutes.[163] In fact, the Restatement provides a solid common-law foundation for the requirement of agent liability under discrimination statutes.[164] The Restatement observes that, regardless of the existence of vicarious liability,

160. Doe v. Shapiro, 852 F. Supp. 1246, 1252 (E.D. Pa. 1994).

161. Hanshaw v. Delaware Technical & Community College, 405 F. Supp. 292, 296 n.10 (D. Del. 1975). *See also* Kelly v. Richland Sch. Dist. 2, 463 F. Supp. 216, 218 (D.S.C. 1978) (quoting *Hanshaw* in rejecting defendant school superintendent's contention that Title VII action should be brought against him in his official capacity).

162. *See* Bishop v. Okidata, Inc., 864 F. Supp. 416, 423 (D.N.J. 1994) (quoting *Shapiro*, 852 F. Supp. at 1253, in stating that distinguishing between agent's "individual" and "official" capacities for the purpose of creating Title VII liability is "without a basis in law"). *See also* Domm v. Jersey Printing Co., 871 F. Supp. 732, 737 (D.N.J. 1994) (denying individual defendants' motions to dismiss for lack of personal liability under Title VII, relying on *Bishop*).

163. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986) (citing sections of RESTATEMENT (SECOND) OF AGENCY (1958), pertaining to employer liability for torts, while discussing Congress's inclusion of "agent" in Title VII).

164. Goldberg, *supra* note 27, at 589.

> [an] agent who does an act otherwise a tort is not relieved from liability by the fact that he [or she] acted at the command of the principal or on account of the principal.[165]

Specifically, the position as agent does not prevent a person from being joined in an action based on her own conduct. The Restatement declares that

> (1) 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.
> (2) 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 against the agent than against the principal, is erroneous.[166]

Thus, the auspices of an entity-employer should not provide a shield against liability for discriminatory acts; such an aegis would defy long-established notions of personal responsibility. Consequently, even where the entity is itself liable, viewing discrimination as an intentional tort compels holding the individual tortfeasor liable for her actions.[167]

Agent liability is further promoted by another common-law view of tort liability recognized by Oliver Wendell Holmes, which provides that the most blameworthy party in a situation should be held liable.[168] The employee who discriminates must be considered the most blameworthy party. Generally, the company is held merely to be vicariously liable under respondeat superior. Even in hostile environment harassment cases, where the entity may be found liable based on condonation of the employee's action, the employee who acted in a discriminatory manner is as blameworthy as the entity, and certainly more blameworthy than the victim.

In sum, common law theory repudiates a liability scheme in which the entity is held fully liable but the discriminatory employee is not held accountable for her actions.

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165. RESTATEMENT (SECOND) OF AGENCY § 343 (1958). There are three exceptions to this rule; there may be an exemption of liability for the agent where she is "exercising a privilege of the principal, or a privilege held by him for the protection of the principal's interests, or where the principal owes no duty or less than the normal duty of care to the person harmed." *Id.* None of these exceptions, however, is applicable to the employment discrimination scenario.

166. RESTATEMENT (SECOND) OF AGENCY §359C (1958).

167. *See Bishop v. Okidata, Inc.*, 864 F. Supp. 416, 424 (D.N.J. 1994) (concluding that defendants may be liable under ADA, because "individuals. . .have always been liable for their torts committed in the workplace, including indemnification of their employer where the plaintiff proceeds directly against the employer under the theory of respondeat superior.").

168. Holmes applied this rationale to unintentional torts. However, the same view applies even more clearly to intentional torts, where deterrence provides additional motivation to hold the offending individual liable. *See Goldberg, supra* note 27 at 589.

B. *Agent Liability Allows for Needed Public Condemnation of Discriminators*

As noted earlier, there may be several reasons why an organizational mentality may cause the entity not to seek punish or hold accountable the offending employee. As a result, the discriminator, as well as other employees, may acquire an "entity standard" of acceptance, and perhaps encouragement, of discrimination.

Thus it is imperative that there be wider publicity of an employee's acts than merely through office gossip. While any lawsuit brought against a company is likely to generate some notoriety, the lay notion that non-parties are merely witnesses to the incidents generating the lawsuit allows the offender to downplay his role in any action. In contrast, naming the discriminator as a defendant tends to expose the fact that she was directly and significantly responsible for the acts at issue.[169] If the plaintiff wins her suit, the discriminator's status as a party increases the chance that non-employees and other community individuals will appropriately castigate the individual, re-confirming, to the discriminatory employee and others, the general sentiment that such behavior is improper.

V.

THE ADEA'S LEGISLATIVE HISTORY, SCHEME, AND BACKGROUND PROVIDE ADDITIONAL REASONS TO FIND AGENT LIABILITY FOR AGE DISCRIMINATION

In *Shager v. Upjohn*,[170] the plaintiff was a fifty-year old seed sales representative who reported to Asgrow's (the defendant's predecessor) youngest district manager, thirty-five-year old Lehnst. Shager was originally the sole sales representative for Wisconsin. The district manager proceeded to hire one, then two, additional representatives to manage the salespeople within the state, even though he anticipated that the Wisconsin seed market would be unable to justify three such managers. Each time a new sales representative was hired, Lehnst redivided the territory allotted to each salesperson and gave Shager the most difficult sales region, disregarding Shager's requests for a more equitable distribution. Despite the additional burden placed on the plaintiff, he outperformed both of his peers. Nevertheless, in the next written evaluation of the sales representatives performance, Lehnst rated Shager as marginal and placed him on probation. Lehnst was also heard to make several comments indicating his hostility towards older workers. Lehnst then recommended to Asgrow's

169. The increased nexus between actions and one's presence as a party may sometimes be a fallacious correlation; in the employment discrimination setting, where the entity's liability is primarily, if not solely, based on the employee's actions, however, it is accurate.

170. 913 F.2d 398 (7th Cir. 1990).

Career Path Committee, which reviewed personnel actions, that Shager be fired. Subsequently, the committee terminated Shager's employment.[171]

Shager sued, claiming a violation of the ADEA. The district court granted summary judgment to both Lehnst and Upjohn, concluding that Shager had failed to present evidence either that he was fulfilling his employer's expectations or that the motive for firing him was his age.[172]

The Circuit Court, overturning the district court's summary judgment for both Lehnst and the entity, noted that if the supervisor's comments and actions were determined to be unambiguous in the plaintiff's favor,

> this becomes a case in which a young supervisor predominantly of much older workers, uncomfortable with the disparity in age between him and them, hires a young worker in the hope of replacing one of the older workers with him; comes down hard on the older worker's deficiencies while supplying excuses for the greater deficiencies of the younger worker; and finally persuades his supervisors to endorse his decision to fire the older worker.[173]

Such behavior clearly violates the ADEA by discriminating against Shager with respect to the terms and conditions of employment and discharging him because of his age.

Cases such as Shager's, and age discrimination issues in general, are likely to take on even greater prominence in the coming decades as a result of the confluence of factors resulting in more working older people. First, the demographics show a clear shift toward a maturing population. Although fewer than ten percent of Americans were over fifty-five years old in 1900, more than twenty percent were in that group by 1986.[174] By 2030, nearly thirty-three percent of the population will be over fifty-five.[175] Americans over sixty-five will constitute almost fourteen percent of the population in 2010 and over twenty percent by 2030.[176]

Second, the Social Security retirement age, presently at sixty-five, is scheduled "to start rising gradually until it reaches sixty-seven in 2027."[177] Meanwhile, at least ten million baby-boomers will live to see ninety,[178] requiring greater savings prior to retirement than were ever needed before.

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171. *Id.* at 399-400.

172. *Id.* at 401.

173. *Id.* at 402.

174. STAFF OF SENATE SPECIAL COMM. ON AGING, 101ST CONG., 1ST SESS., AGING AMERICA: TRENDS AND PROJECTIONS 8 (Comm. Print 1988) [hereinafter AGING AMERICA].

175. BUREAU OF NATIONAL AFFAIRS, OLDER AMERICANS IN THE WORKFORCE: CHALLENGES AND SOLUTIONS 5 (1987) [hereinafter OLDER AMERICANS IN THE WORKFORCE].

176. *Id.* at 15.

177. *Stop Working? Not Boomers*, U.S. NEWS & WORLD REPORT, June 12, 1995, at 70.

178. *Id.*

Third, a recently-released report by the Committee for Economic Development warns that the combination of the curtailment of pension benefits, the uncertain future of Social Security, the bad savings habits of the present baby boomers, and the increasing costs of living, is likely to compel people to work until a later age than ever before.[179]

Unfortunately, the ability of these maturing individuals to climb the company ladder, or even stay in place, seems limited. Those fifty-five years and older lost their jobs at five times the rate of younger workers during the last recession.[180] An average of over 17,000 age-discrimination charges have been filed each of the past five years with the Equal Employment Opportunity Commission.[181]

Thus, it becomes increasingly more crucial to reduce the number of employment decisions based on age discrimination through the application of individual liability to the ADEA.

A. The ADEA's Correspondence to the Fair Labor Standards Act Supports Agent Liability

While many courts that have determined agent liability have done so by strictly analogizing to Title VII,[182] the legislative history, statutory language, and precedent surrounding the ADEA provide much support for using the FLSA as a guide for determining the proper interpretation of the ADEA's remedies and procedures.[183]

1. The Present Interpretation of the FLSA Embraces Agent Liability

When the ADEA was enacted, few courts had examined the issue of individual liability under the FLSA. The two courts that had reviewed the question, one federal circuit and one state, held that such liability existed.[184] By the time of the 1978 amendments to the ADEA, however, the

179. *Id.* at 70-71.

180. ANTHONY P. CARNEVALE & SUSAN C. STONE, THE AMERICAN MOSAIC: AN IN-DEPTH REPORT ON THE FUTURE OF DIVERSITY AT WORK 452 (1995).

181. OFFICE OF PROGRAM OPERATORS, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AGE DISCRIMINATION IN EMPLOYMENT STATISTICS, FY1994-FY1995 (1996).

182. *See, e.g., Miller v. Maxwell's Int'l*, 991 F.2d 583, 587-88 (9th Cir. 1993). *But see* House v. Cannon Mills, 713 F. Supp. 159, 159-62 (M.D.N.C. 1988) (refusing to find individual liability by reference to Title VII, but establishing individual liability under ADEA because of its correspondence to FLSA). For a strong argument for agent liability under Title VII, *see* Goldberg, *supra* note 27, at 579.

183. *See House*, 713 F. Supp. at 160-63 (comparing the ADEA with Title VII and the FLSA). *See also* Brownlee v. Lear Siegler Management Servs., 15 F.3d 976, 978 (10th Cir. 1994), *cert. denied*, 114 S. Ct. 2743 (1994) (finding individual liability possible for age-discriminatory conduct and comparing Owens v. Rush, 636 F.2d 283 (10th Cir. 1980), which rejected such liability under Title VII).

184. Chambers Constr. Co. v. Mitchell, 233 F.2d 717, 724 (8th Cir. 1956); Brennan v. Community Serv. Soc'y of N.Y., 45 N.Y.S.2d 825, 830 (1943).

presence of personal liability under the FLSA generally had been accepted.[185] Under the current interpretation of the FLSA, any person who "independently exercised control over the work situation" is liable.[186]

2. *The Legislative History Indicates that the FLSA Should Be Referenced to Determine the ADEA's Remedies*

There is no legislative history concerning the ADEA which directly refers to, or reflects on, Congress's intent concerning the existence of individual liability under the ADEA. There is support, however, for the position that a faithful interpretation requires corresponding liability to that under the FLSA. Senator Javits, one of the floor managers of the bill, so indicated in describing the enforcement section which became part of the Act: "The enforcement techniques provided by [the ADEA] are directly analogous to those available under the Fair Labor Standards Act; *in fact [the ADEA] incorporates by reference, to the greatest extent possible, the provisions of the FLSA.*"[187]

3. *The Interpretation of the FLSA's "Employer" Provision is Applicable to the ADEA, Despite a Semantic Change*

Courts advocating the existence of individual liability by analogizing to the FLSA, including the district court in *House v. Cannon Mills*, argue that "the specific and selective incorporation of the FLSA's enforcement provisions evidences a congressional intent to adopt the existing interpretations of FLSA provisions."[188]

Several provisions enacted into the ADEA were adopted in part from the FLSA and then explicitly modified. For instance, at the time of the

185. *See, e.g.*, Hodgson v. Royal Crown Bottling Co., 324 F. Supp. 342, 347 (D. Miss. 1970), *aff'd*, 465 F.2d 473 (5th Cir. 1972); Shultz v. Chalk-Fitzgerald Constr. Co., 309 F. Supp. 1255 (D. Mass. 1970); Usery v. Weiner Bros., Inc., 70 F.R.D. 615, 617 (D. Conn. 1976); Brennan v. Whatley, 432 F. Supp. 465, 469 (E.D. Tex. 1977).

186. *See* Donovan v. Sabine Irrigation Co., 695 F.2d 190, 195 (5th Cir. 1983), *cert. denied*, 463 U.S. 1207 (1983) (holding individual liable for wages since he "independently exercised control over the work situation"); Donovan v. Agnew, 712 F.2d 1509 (1st Cir. 1983) (same). While most of these cases have involved corporate officers (in both *Sabine* and *Agnew*, the individual involved was company president), a defendant's title at the company should not affect the determination of liability. As the court in *House v. Cannon Mills* explained, "[t]he consideration of their position or ownership interest was only relevant to the question of their authority, i.e. whether they were acting at their own discretion or only at the direction of a superior." 713 F. Supp. 159, 161 (M.D.N.C. 1988).

187. 113 CONG. REC. 31,254 (1967) (italics added).

188. *House*, 713 F. Supp. at 160. The ADEA incorporates several provisions from the FLSA—for example, the provisions of the FLSA which effectively prohibit class actions apply to ADEA litigation, but not to Title VII. 29 U.S.C. § 216(b) (Supp. 1995). Furthermore, § 7(b) of the ADEA authorizes suits by the EEOC pursuant to §§ 16 and 17 of the FLSA.

ADEA's enactment, the FLSA required the granting of liquidated damages for all violations (unless the employer showed good faith or a reasonable belief that no violation was occurring).[189] Congress specifically modified the FLSA's provision concerning liquidated damages, allowing them under the ADEA only in cases of willfulness.[190]

Similarly, prior to the ADEA, courts had held that injunctive relief was available under the FLSA only in suits by the Secretary of Labor, not private individuals.[191] In the ADEA, Congress expressly announced that "[i]n any action brought to enforce this chapter, the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate . . . including without limitation judgments compelling employment, reinstatement, or promotion."[192]

Those courts rejecting personal liability respond that the incorporation of the FLSA's provisions into the ADEA was limited to those provisions that were identically copied from the FLSA or explicitly modified from it.[193] They argue that, given Congress' ability and willingness to incorporate provisions from the FLSA to the ADEA, any failure to do so indicates an intention not to adopt that exact interpretation of the FLSA's features. The Supreme Court, in *Lorillard v. Pons*,[194] recognized that "in enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation."

In fact, the language used in the ADEA's definition of employer was taken not from the FLSA, but from Title VII. The ADEA does not expressly incorporate the FLSA's definition of employer, which defines employer as "any person acting directly or indirectly in the interest of an employer in relation to an employee";[195] rather, the ADEA contains Title VII's definition, which uses the term agent.[196] Opponents of individual liability maintain that if Congress had meant to adopt that definition from the

189. 29 U.S.C. § 216(b) (1994).

190. 29 U.S.C. § 626(b) (1994).

191. *See* Roberg v. Phipps, 156 F.2d 958, 963 (2d Cir. 1946); Powell v. Washington Post Co., 267 F.2d 651 (D.C. Cir. 1959), *cert. denied*, 360 U.S. 930 (1959).

192. 29 U.S.C. § 626(b) (1994).

193. *See* Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 588 n.3 (9th Cir. 1991), *cert. denied sub nom.*, Miller v. La Rosa, 114 S. Ct. 1049 (1994).

194. 434 U.S. 575, 581 (1978) (incorporating the FLSA's right to a jury trial into § 7 of the ADEA). The *Lorillard* holding was codified in 1978 when § 7(c) was amended to provide explicitly for jury trials in actions brought under that section.

195. 29 U.S.C. § 203(d) (1994). "Employee" is defined, with a few exceptions, as "any individual employed by an employer." 29 U.S.C. § 203(e)(1) (1994).

196. 42 U.S.C. § 2000e(b) (1994).

FLSA, Congress likely would not have indicated such an intention by directly copying the language of Title VII.[197] They then insist that Title VII, and by analogy the ADEA, do not permit agent liability.[198]

Advocates of this analysis, however, overlook that the difference between the ADEA's and the FLSA's definitions of employer is merely a semantic change. Black's Law Dictionary defines agent as "a person authorized by another (principal) to act for or in place of him . . . . one who represents and acts for another under the contract or relation of agency."[199] It is likely that when formulating such significant legislation as Title VII, the drafters examined previous employment legislation. In doing so, they simply may have realized that the FLSA's "employer" actually included agents, and so concluded that it could replace the FLSA's protracted definition with the abbreviated "agent." Consequently, the variation in "employer" between FLSA and Title VII has no substantive meaning and thus both the ADEA and Title VII should follow the FLSA's interpretation of personal liability, rather than departing from its view.

4. Precedent Evidences that Interpretation of the ADEA's Remedial Provisions Must Take the FLSA Into Consideration

The Supreme Court has made explicit that Title VII and the ADEA were not to be interpreted to be in judicial lock-step. In *Lorillard v. Pons*,[200] the Court held that the ADEA follows the FLSA, and not Title VII, in requiring jury trials. In creating the ADEA, Congress "incorporat[ed] the FLSA procedures even while adopting Title VII's substantive provisions."[201]

Justice Marshall was quick to acknowledge the correspondence in the ADEA and Title VII's purposes: the intention to eliminate the impact of certain factors in employment decisions.[202] In addition, the Court recognized the similarities of the two statutes' substantive provisions, citing both statutes for the prohibition against discharging or failing to hire or otherwise "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment," and declaring "[i]n fact, the prohibitions of the ADEA were derived in haec verba from Title VII."[203]

Despite this correspondence, however, the *Lorillard* court asserted that in examining "the *remedial* and procedural provisions of [Title VII and the ADEA] . . . we find significant differences." The court concluded that

197. *Miller*, 991 F.2d at 588.
198. *Id.*
199. BLACK'S LAW DICTIONARY 63 (6th ed. 1991).
200. 434 U.S. 575 (1978).
201. *Id.* at 584.
202. *Id.* at 583.
203. *Id.* at 583.

"rather than adopting the procedures of Title VII for ADEA action, Congress rejected that course in favor of incorporating the FLSA procedures even while adopting Title VII's substantive provisions."[204]

The court acknowledged certain remedial and procedural changes from the FLSA to the ADEA, listing the modification in the availability to obtain injunctive relief, the addition of the willfulness requirement to secure liquidated damages, and the refusal to incorporate any criminal penalties. Notably, the court failed to include any mention of the "employer" revision prior to asserting that "but for those changes expressly made, it intended to incorporate fully the remedies and procedures of the FLSA."[205]

While the recognition of a remedy against a defendant often considered immune from liability may appear to be a substantive shift, this observation applies to almost all relief. Nonetheless, as the *Lorillard* court explicitly focused on the remedial parallel, the interpretation of personal liability under the ADEA should be guided by the FLSA.

B. The ADEA's Use of Liquidated Damages Does Not Preclude Agent Liability

In contrary logic, but similar conclusion, to those courts rejecting personal liability based on the ADEA's correspondence to Title VII, one court has argued that the ADEA's correspondence with the FLSA indicates that the ADEA is a labor law pertaining to employer-employee relationships, not a tort law, and thus concluded that the effect is to reject agent liability.[206] In *Flamand v. American International Group*, the district court observed that the ADEA allows for recovery only in the form of unpaid

204. *Id.* at 582-83 (emphasis added). *Cf.* Pub. Employees Retirement Sys. of Ohio v. Betts, 492 U.S. 158 (1989) (holding that employment benefit plans adopted before the enactment of ADEA cannot evade the applicability and interpretation rules of the statute). In *Betts*, Justice Kennedy cites *Lorillard* for the proposition that "the prohibitions of the ADEA were derived in haec verba" from Title VII; Justice Kennedy, however, failed to acknowledge that the quote was referring only to the substantive provisions and that Justice Marshall had expressly contrasted those with the procedural ones.

In EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991), however, the Supreme Court once again emphasized the potential for dissimilarity between the remedial provisions of the ADEA and Title VII. Holding that Title VII does not regulate employment practices of U.S. employers who employ U.S. citizens abroad, the Court contrasted that statute with the ADEA. The Court found that Congress had amended the ADEA to reverse judicial decisions that the statute was not extra-territorial. However, in the 1991 Amendments to Title VII, Congress added extra-territorial application to Title VII. Though this could be taken as a thrust for correspondence between the ADEA and Title VII, it must be noted that it was Title VII that was amended to correlate to the ADEA, rather than the opposite. Thus, it is possible that the interpretation of individual liability under the ADEA could affect the determination of the existence of individual liability under Title VII.

205. *Id.*

206. Flamand v. Am. Int'l Group, Inc., 876 F. Supp. 356, 362-63 n.3 (D.P.R. 1994) (noting that the ADEA provides that "any act prohibited under section 623 of this title [which lists the practices prohibited by the ADEA] shall be deemed to be a prohibited act under

minimum wages and overtime compensation or, in the case of liquidated damages for willful violations, twice the backpay due — all remedies based on the victim's wages, which are grounded in the employer-employee relationship.[207] Moreover, any equitable relief would be performed by the employer and based on the same relationship. The court thus concluded that "because the employer solely controls the payment of wages and the reinstatement of ADEA's discriminatees," the ADEA is focused on that relationship and meant to discipline only the employer.[208] Acknowledging that the punitive role of liquidated damages might intimate a purpose for applying them to the employer's agent, the court claimed that "the actual effect . . . [of such an application] would be the absurd situation of having the true employer pay the unpaid wages and the supervisor pay the additional amount of unpaid wages as liquidated damages."[209]

There are three flaws with the reasoning of the *Flamand* court. First, damage awards serve several distinct functions, and these various purposes must be considered when determining both the amount of damages and who should pay for them. The former decision is primarily, as under any other tort statute, a calculation of how much relief is needed in order to make the victim whole. The use of the employee's lost wages is one common method of ascertaining the needed legal relief. In addition, anti-discrimination statutes also consider the need for future deterrence and for creating additional incentive for an employee to seek relief. The use of liquidated damages, while a rougher measuring-stick than compensatory and punitive damages, for instance, is one method of furthering those goals.

In contrast, the latter liability issue focuses more heavily on who is most directly responsible for the current injury and how such future injuries may be most effectively discouraged. Liability is established not simply by the existence of the employer-employee relationship, but rather by the acts the discriminatory person performs in relation to the employee.[210] The suggestion that the ADEA was meant only to discipline the employer ignores these concerns.[211]

Second, the court's dismay at the possibility of splitting the damages between the employer and the employee fails to consider that joint-and-several liability exists as a possibility in many tort cases.

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section 215 of this title [which includes the conduct prohibited by the FLSA]" and that the ADEA explicitly incorporates the remedial scheme described in FLSA sections 216(b)-(d) and 217).

207. *Id.* at 363 (citing 29 U.S.C. § 626(b)).

208. *Id.*

209. *Id.* at 363 n.7 (noting that Sanchez v. Puerto Rico Oil Co., 37 F.3d 712, 725 (1st Cir. 1994) declared, "liquidated damages under ADEA are punitive in nature").

210. Wanamaker v. Columbia Rope Co., 740 F. Supp. 127, 135 (N.D.N.Y. 1990) (referring to Schultz v. Chalk-Fitzgerald Const. Co., 309 F. Supp. 1255 (D. Mass. 1970)).

211. The necessity of disciplining the employee for effectual deterrence is discussed further in Part II.B *supra*.

Third, the court's erroneous conclusion that the ADEA's correspondence to the FLSA requires a rejection of individual liability neglects the fact that, as explained earlier, courts recognize agent liability under the FLSA. Consequently, the ADEA's correspondence to the FLSA provides no basis for rejecting personal liability.

C. *Title VII's Damage Limitations Do Not Preclude Agent Liability under the ADEA*

Prior to the 1991 Amendments to the Civil Rights Act, the damage remedies under Title VII and the ADEA were distinguished based on their scopes of relief. The ADEA's scope of relief was much broader than that available under Title VII; while Title VII permitted only various forms of equitable relief and some compensatory relief,[212] the ADEA permits awards of legal as well as equitable relief and provides liquidated damages for willful violation.[213] One court, contrasting the two statutes, argued that the existence of relief based on the willfulness of conduct under the ADEA intimated the existence of individual liability, regardless of such liability under Title VII.[214]

The *Miller* court's speculation, that the 1991 Amendments indicate that Congress did not intend agent liability for the ADEA, fails to acknowledge the continued difference between the scope of damages under Title VII and that under the ADEA. The ADEA penalizes willful violations through liquidated damages, and hence contains no corresponding list limiting the amount of damages based on employer size or any other factor.[215] Thus, the attempted analogy between the rationale for precluding liability under Title VII and ADEA fails.[216]

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212. 42 U.S.C. § 2000e-5(g) (Supp. 1995). *See also* Violanti v. Emery Worldwide A-CF Co., 847 F. Supp. 1251, 1257 (M.D. Pa. 1994) (discussing the nature of Title VII relief before 1991); Pommier v. Edelstein Enters., 816 F. Supp. 476, 480 (N.D. Ill. 1993) (same).

213. 29 U.S.C. § 626(b) (Supp. 1995).

214. House v. Cannon Mills Co., 713 F. Supp. 159, 160 (M.D.N.C. 1988).

215. 29 U.S.C. § 626(b) (Supp. 1995) (stating that the provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in the FLSA, 29 U.S.C. § 216, except for subsection (a) thereof).

216. The issue of the caps on compensatory and liquidated damages may be clarified further by the result of two competing bills recently under consideration in Congress. One bill, sponsored by Senator Barbara Kennelly (Connecticut) and 33 co-sponsors, including four Republicans, would remove the caps from Title VII (Equal Remedies Act, S. 17, 103d Cong., 1st Sess. (1993)); a similar bill is pending in the House (Equal Remedies Act, H.R. 224, 103d Cong., 1st Sess. (1993)). By eliminating the only provision that arguably confutes the existence of individual liability under Title VII, this legislation would remove one vital buttress from the *Miller* court's structured interpretation precluding such liability under both that statute and the ADEA. In contrast, Representative Goodling has introduced legislation that would amend the ADEA to provide the same damages available under Title VII and the ADA. *See Goodling Bill Would Amend Age Bias Act to Conform Remedies With 1991 Rights Law*, DAILY LABOR REPORT (BNA) No. 70, at A-9 (Apr. 10, 1992). If passed, that would provide support for withholding individual liability.

D. The Higher-Level Discriminators in ADEA Cases Augments the Justifications for Agent Liability

1. Those of a Higher Employment Status are More Apt to Be Able to Recompense Plaintiffs

The prospect that a liable company is judgment-proof is probably unrelated to the type of discrimination of which it is found guilty. However, the use of individual liability to safeguard a victim against a judgment-proof company[217] is more likely to be effective under the ADEA than under Title VII. Unlike the discriminatory employee in Title VII cases, the potential individual defendants in ADEA claims are more likely than those named in Title VII cases to be high-paid executives.[218] Those executives are more likely to have the resources to assist in compensating the victim of the discrimination than a defendant in a Title VII case.

2. The Higher Employment Status of the Discriminatory Employee Decreases the Likelihood that She Will Be Disciplined

As discussed earlier, those in a liable company who have the power to censure a discriminatory employee may have been influenced, after the vehement efforts to defend against the lawsuit, to believe that theirs was the meritorious position.[219] As the *Jendusa* court recognized, this consequence is particularly true "if the individual employees involved are high ranking

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An amendment concerning damages caps most likely shows no intent whatsoever concerning individual liability. (A call to Senator Kennelly's office to discuss the proposed legislation revealed that the aide in charge of Women's Issues knew nothing of the on-going debate involving agent liability. Telephone Interview with Stephanie Goodman, (April 1994)). Nevertheless, it must be noted that while amendments to statutes may demonstrate Congress's current intent, they do not necessarily demonstrate the original intent of the drafters. Thus, until such time as one of these bills are passed, the courts should not be considering those amendments in their analyses of the statutes.

217. As described for Title VII cases in *supra* Part II.A.

218. No statistics are kept by the EEOC concerning the employment status of any plaintiff or defendant in an employment discrimination action. However, according to the EEOC, in Fiscal Year 1994, the average age of Title VII plaintiffs was 39, whereas the average age for ADEA plaintiffs was 57. Since the difference between the mean plaintiffs was 18 years, one can speculate that, despite any discrimination, the average ADEA plaintiff is likely to have moved up the employment ranks further than the average Title VII plaintiff prior to initiating suit. Where the discrimination is based on a dismissal or failure to promote, one can presume that the controlling individual is of a superior level than the plaintiff. Of course, this need not hold true where the discrimination is based on harassment.

(The breakdown of Title VII plaintiffs were: race (31,729) - 39; religion (1,533) - 42; and gender (24,505) - 39.) Telephone Interview with Esther Cosby, EEOC Office of Communications and Legislative Affairs (Feb. 21, 1995).

See also Phillip L. Lamberson, *supra* note 27 at 421 (1994).

219. See *supra* Part II.B. for the discussion concerning the potential cognitive effects of litigation.

corporate officials."[220] Since those employees able to discipline the discriminator are the executives most threatened by the lawsuit and who, consequently, are most likely to take an extreme view of the lawsuit's invalidity, the potential for punishment may be inadequate to deter such behavior.

This analysis is particularly likely to be true when applied to ADEA. As already discussed, one may hypothesize that because the ADEA is more often used to protect higher-ranking employees than is Title VII or the ADA, the individuals responsible for the discrimination are more likely to be high-ranking than the employees responsible for violating the other anti-discrimination statutes.[221] Consequently, those supervising an employee who violates the ADEA are even less likely than those of Title VII violators to punish the offender. Accordingly, individual liability is needed to discourage fully such discrimination.

CONCLUSION

As this article demonstrates, the language, legislative history, and policy of anti-discrimination statutes require that agents of the employer who personally discriminate be held individually liable under Title VII, ADA, and the ADEA.

In addition to the narrower objectives of the statutes, individual liability conforms with broader policy goals and methods. Personal accountability is the cornerstone of our common-law tort scheme; to omit it is to transform a discriminatory employee's uniform into indestructible armor. Moreover, individual liability increases the likelihood that the discriminator's behavior will be known outside the potentially-protective fortress of the entity, thus allowing a more economically-rational, and socially appropriate, outlook to observe, and castigate, the siege mentality of prejudice.

If the perspective described above resembles a battle strategy, that is proper and, unfortunately, necessary. Congress's vision, over thirty years ago, was for a nation unimpeded by irrational and hurtful employment discrimination. The war is not yet won. Clearly authorized by the statutes and supported by solid policy considerations, agent liability should be an indispensable weapon in the fight against discrimination.

220. *Jendusa*, 868 F. Supp. at 1012.
221. *See supra* note 217.