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WHEN THE BOSS STEPS OVER THE LINE:
SUPERVISOR LIABILITY UNDER TITLE VII

I. INTRODUCTION

Over the past century, our country has witnessed enormous changes in the workplace. From the Great Depression, to World War II, to corporate down-sizing, the workplace has been in a constant state of change. One product of the changes was the recognition that certain employees were not receiving equal treatment. These employees included minorities, women, the disabled, and older Americans. Members of these groups experienced difficulty obtaining employment and they often faced discrimination and harassment on the job. In an attempt to end unequal treatment, Congress initiated a federal plan to eradicate discrimination in the workplace.

In 1964, Congress passed Title VII of the Civil Rights Act of 1964 (hereinafter Title VII). Title VII prohibits discrimination by employers based on race, color, religion, sex, or national origin. Congress

1. See 29 U.S.C. § 621(a)(1) (1994). When passing the Age Discrimination in Employment Act (hereinafter the ADEA) Congress said, "in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs." Id. Similarly, when enacting the Americans With Disabilities Act (hereinafter the ADA) Congress summarized the discrimination experienced by the disabled. For instance, 43,000,000 disabled Americans face isolation and segregation in the workforce as well as outright exclusion. 42 U.S.C. § 12101(a)(1)-(9) (1994).

2. 42 U.S.C. §§ 2000e-2000e-17 (1994). Title VII was only one portion of the Civil Rights Act of 1964. To view the remainder of the act, see id. §§ 2000a-2000e-17. The purpose of the Civil Rights Act of 1964 was:

To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.


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 adversely affect his status as an employee, because
continued to legislate in the area of employment discrimination by enacting two other major pieces of legislation. In 1967, Congress enacted the Age Discrimination in Employment Act (hereinafter the ADEA). The ADEA prohibits discrimination “against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.” More recently, Congress passed the Americans with Disabilities Act (hereinafter the ADA). The ADA makes it unlawful for an employer to discriminate against qualified disabled employees in the workplace.

Since their passage, the federal courts have struggled to apply the anti-discrimination employment laws in a consistent manner. This inconsistency is personified by the controversy regarding whether individual supervisors are liable under anti-discrimination employment laws, particularly Title VII, for conduct directed at those they supervise. Federal courts disagree over whether an individual supervisor may be held liable under Title VII.

The source of the problem is § 2000e(b) of Title VII which defines an employer as “a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person.” The “any agent” language has been subject to inconsistent interpretation and courts disagree as to what extent of liability, if any,
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this language imposes upon individual supervisors. Title VII, the ADEA, and the ADA each have a very similar definition of the term employer, which causes many courts to use the same analysis when examining any of the three statutes. However, for purposes of this comment, § 2000e(b) of Title VII will be the sole focus of the analysis.

This comment argues that Title VII mandates that individual supervisors, in addition to their employers, who engage in prohibited discrimination are liable under Title VII jointly and severally when they exercise control over an employee's conditions of employment.

Part II of this comment begins with a brief overview of the case law as it developed in the federal circuit courts. Part III outlines the legal principles that give rise to individual supervisor liability, namely the plain meaning of § 2000e(b) and expressions of congressional intent. Part IV argues that supervisor liability is sound public policy. Finally, Part V proposes a practical test for courts to apply when deciding issues of supervisor liability.

II. CASE LAW

Supervisor liability is an issue that the Supreme Court needs to

12. See infra notes 26-57 and accompanying text.
13. See, e.g., Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 587 (9th Cir. 1993) ("The liability schemes under Title VII and the ADEA are essentially the same in aspects relevant to this issue; they both limit civil liability to the employer."). See also, e.g., Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 510 (4th Cir. 1994); cert. denied, 115 S.Ct. 666 (1994); York v. Tennessee Crushed Stone Ass'n, 684 F.2d 360, 362 (6th Cir. 1982); EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1280 (7th Cir. 1995) (stating that "Courts routinely apply arguments regarding individual liability to all three statutes interchangeably. Therefore, we will use other courts' interpretations of Title VII and the ADEA to help us in our decision.").
14. The purpose for only referring to Title VII is two-fold. First, a majority of the decisions on supervisor liability deal with Title VII. Second, it is easier to refer to Title VII in the comment. Discussing all three statutes may lead to confusion.
15. "Unitedly, combined or joined together in unity of interest or liability ... [t]o be or become liable to a joint obligation." BLACK'S LAW DICTIONARY 838 (6th ed. 1990).
16. "Distinctly, separately, apart from others. When applied to a number of persons the expression severally liable usually implies that each one is liable alone." Id. at 1374.
17. Conditions of employment include the ability to hire, fire, or change the employees conditions of employment.
18. For instance, the Supreme Court denied certiorari in Birkbeck v. Marvel Lighting, despite the fact the Fourth Circuit was extremely divided over the issue of supervisor liability. Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 510 (4th Cir. 1994), cert. denied, 115 S. Ct. 666
review because there are no unified principles or standards for evaluating whether supervisors should be liable for discriminatory conduct among the federal circuit courts.\textsuperscript{19} Although many of the federal circuit courts have considered the issue of supervisor liability, they are unable to agree on one clear interpretation of the “any agent” language of § 2000e(b).\textsuperscript{20} Contributing to the difficulty is the fact that the passage of Title VII involved a series of political compromises.\textsuperscript{21} Unfortunately, the product of these compromises is an inconsistency between the enforcement provisions of Title VII and its remedy provisions as originally enacted.\textsuperscript{22} The circuit court decisions fall into one of three categories: some courts reject supervisor liability under Title VII,\textsuperscript{23} other courts declare that supervisors are subject to liability under Title VII,\textsuperscript{24} and still other courts fall somewhere in the middle.\textsuperscript{25}

(1994). For a discussion of the confusion in the Fourth Circuit, see \textit{infra} notes 50-57 and accompanying text.

19. \textit{See infra} notes 26-57 and accompanying text.


22. \textit{Id}. at 58. For a discussion of the inconsistencies between the remedy and enforcement provisions, see \textit{infra} notes 99-108 and accompanying text.


The Seventh Circuit has also denied supervisor liability. \textit{See}, e.g., EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276 (7th Cir. 1995); Williams v. Banning, 72 F.3d 552 (7th Cir. 1995). However, a federal district court within the Seventh Circuit has imposed liability for supervisors under the Family and Medical Leave Act (hereinafter the FMLA). Freemøn v. Foley 911 F. Supp. 326 (N.D. Ill. 1995). The court stated that the definition of “employer” in Title VII, the ADEA, and the ADA differed from the definition of “employer” in the FMLA. \textit{Id}. at 330. Whereas Title VII, the ADEA, and the ADA define “employer” by using the “and any agent” language, the FMLA defines an “employer” as “any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer.” 29 U.S.C. § 2611(4)(A)(ii)(I) (1994). The court relied on the differences in the definition of “employer” between the statutes to impose liability upon the supervisor. \textit{Freemøn}, 911 F. Supp. at 330-31. It is interesting to consider that a supervisor may be held liable for violating the FMLA, but that same supervisor would not be held liable for sexual harassment, gender discrimination, age discrimination, or discrimination based on disability.


25. \textit{See}, e.g., Birkbeck, 30 F.3d at 510; Paroline, 879 F.2d at 104.
A. Courts That Reject Supervisor Liability

Courts that reject supervisory liability justify their decision in several ways. Rather than accept the plain meaning of § 2000e(b) as a statement of pure agency principles,26 these courts chose to impose respondeat superior principles.27 For example, in Miller v. Maxwell's International Inc.,28 the court conceded that the statutory construction argument was valid, but concluded "'[t]he obvious purpose of this [agent] provision was to incorporate respondeat superior liability into the statute.'"29 The effect of this interpretation is that employers are held liable for the discriminatory acts of their agents, while the agent faces no liability at all.30

Another justification for the rejection of supervisor liability is to give more weight to other portions of Title VII; for example, the fifteen employee threshold included in the definition of an employer.31 The fifteen employee threshold played an important role in Tomka v. Seiler Corp.32 In Tomka, the court rejected the plain language of § 2000e(b) and instead looked to the fifteen employee threshold as an expression of Congress' intent to limit liability to entities with at least fifteen employees.33 The court held that individual liability conflicted with the fifteen employee threshold requirement.34 According to the Tomka court, Congress did not mean to protect employers with less than fifteen

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26. For an in-depth discussion of agency principles see infra notes 58-82 and accompanying text.
27. Respondeat superior is defined as "'[L]et the master answer. This doctrine or maxim means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent.'" BLACK'S LAW DICTIONARY 1311-12 (6th ed. 1990).
28. 991 F.2d 583 (9th Cir. 1993).
29. Id. at 587 (quoting the lower district court); see also Lenhardt, 55 F.3d at 381 ("By incorporating the principles of respondeat superior into Title VII, Congress has required employers to answer for prohibited acts of discrimination perpetrated by their employees.").
30. The supervisor may be subject to discipline by the employer, but any discipline is at the discretion of the employer. For this reason, it may not be an effective method of deterrence.
31. 42 U.S.C. § 2000e(a) (1994). An "employer" under Title VII is "a person engaged in an industry affecting commerce who has [fifteen] or more employees for each working day." Id. The ADA also has a fifteen employee threshold. 42 U.S.C. § 12111(5)(A) (1994). The ADEA has a similar provision, but the employee threshold is twenty employees. 29 U.S.C. § 630(b) (1994).
33. 66 F.3d at 1314.
34. Id.
employees and impose liability on individuals who worked for larger employers at the same time.\textsuperscript{35}

\textbf{B. Courts That Accept Supervisor Liability}

Another set of federal circuit courts take the opposite approach to supervisor liability by holding a supervisor liable along with his or her employer.\textsuperscript{36} These courts hold that the plain meaning of the "any agent" language from § 2000e(b) compels supervisor liability. In \textit{York v. Tennessee Crushed Stone Association},\textsuperscript{37} one of the first cases to uphold supervisor liability, a supervisor was deemed liable because he had been delegated authority by the employer.\textsuperscript{38} The court, lacking specific precedent, concluded that the plain meaning of § 2000e(b), in particular the "any agent" language, confirmed that individual supervisors were liable under Title VII.\textsuperscript{39} In more recent decisions, courts have held individual supervisors liable if they exercised significant control over traditional employee duties.\textsuperscript{40} For example, in \textit{Sauers v. Salt Lake County},\textsuperscript{41} the court held a supervisor liable if he or she "exercise[d] significant control over the plaintiff's hiring, firing or condition of employment."\textsuperscript{42} Likewise, in \textit{Garcia v. Elf Atochem North America},\textsuperscript{43} the court said the purpose of supervisor liability is to hold those liable who have "power over the plaintiff which exceeds that of mere co-workers."\textsuperscript{44} Some courts have refined this approach by stating that, "[t]he supervisory employee need not have ultimate authority to hire or fire to qualify as an employer, as long as he or she has significant input into such personnel decisions."\textsuperscript{45} Generally, these courts accept agency principles, rather than only respondeat superior principles, as the proper interpretation of § 2000e(b).

\textsuperscript{35} \textit{Id.}
\textsuperscript{36} \textit{See supra} note 24 and accompanying text.
\textsuperscript{37} 684 F.2d 360 (6th Cir. 1982).
\textsuperscript{38} \textit{Id.} at 362.
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} \textit{See, e.g.}, Ball v. Renner, 54 F.3d 664, 668 (10th Cir. 1995); Garcia v. Elf Atochem N.A., 28 F.3d 446, 451 (5th Cir. 1994); Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993).
\textsuperscript{41} 1 F.3d 1122 (10th Cir. 1993).
\textsuperscript{42} \textit{Id.} at 1125 (quoting \textit{Paroline v. Unisys Corp.}, 879 F.2d 100, 104 (4th Cir. 1989), \textit{aff'd in pertinent part}, 900 F.2d 27 (4th Cir. 1990) (en banc)) (stating that, "[i]n such a situation, the individual operates as the alter ego of the employer. . . .")
\textsuperscript{43} 28 F.3d 446 (5th Cir. 1994).
\textsuperscript{44} \textit{Id.} at 451.
\textsuperscript{45} \textit{Paroline}, 879 F.2d at 104 (citing \textit{Tafoga v. Adams}, 612 F. Supp. 1097, 1105 (D.Colo. 1985), \textit{aff'd}, 816 F.2d 555 (10th Cir.)).
C. Courts That Fall Somewhere in the Middle

While some circuits clearly fall on one side of the issue of supervisor liability, others struggle to articulate unified principles. For example, the Fifth Circuit has issued conflicting decisions regarding supervisor liability.\(^{46}\) In *Grant v. Lone Star Co.*,\(^{47}\) the court refused to extend liability for an individual supervisor because individual liability was contrary to Congressional intent.\(^{48}\) However, approximately two months later, the Fifth Circuit stated that a supervisor who exercises “power over the plaintiff which exceeds that of mere co-workers” is individually liable under Title VII.\(^{49}\)

Like the Fifth Circuit, the Fourth Circuit is also in conflict on the issue of supervisor liability. In *Paroline v. Unisys Corp.*,\(^{50}\) the Fourth Circuit determined that an individual clearly qualifies as an employer under the definition outlined in Title VII.\(^{51}\) A few years later, the Fourth Circuit appeared to reverse *Paroline* in *Birkbeck v. Marvel Lighting Corp.*,\(^{52}\) by rejecting supervisory liability under an ADEA claim.\(^{53}\) Yet the *Birkbeck* court explicitly stated that its holding was limited to personnel decisions of a “plainly delegable” character and an individual supervisor may be liable in situations falling out of this description.\(^{54}\) Unfortunately, the *Birkbeck* court failed to explain what qualifies as a “plainly delegable” decision.\(^{55}\) The only guidance available is that a decision to fire an employee is “plainly delegable” and, therefore, a supervisor would not be individually liable in this situation.

\(46\) Compare *Grant v. Lone Star Co.*, 21 F.3d 649 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 374 (1994), *with* *Garcia*, 28 F.3d at 446.
\(47\) 21 F.3d 649 (5th Cir. 1994).
\(48\) *Grant*, 21 F.3d at 652-53.
\(49\) *Garcia*, 28 F.3d at 451.
\(50\) 879 F.2d 100 (4th Cir. 1989).
\(51\) *Id.* at 104.
\(53\) *Id.* at 510.
\(54\) *Id.* at 510 n. 1 (citing *Paroline*, 879 F.2d at 104; *see also* *Shoemaker v. Metro Info. Services*, 910 F. Supp. 259, 265 (E.D. Va. 1996).
In a recent case attempting to clarify the Birkbeck holding and its effect on Paroline, a federal district court stated that "supervisors may be individually liable in Title VII cases where they wield significant control over plaintiffs and their conduct cannot be categorized as a plainly delegable duty." In effect, these cases are saying that where a supervisor exercises employer-like functions that are not plainly delegable, that supervisor may be liable. The confusion in these cases reinforces the need for the Supreme Court to articulate a set of principles for lower courts to follow.

III. LEGAL PRINCIPLES THAT COMPEL SUPERVISOR LIABILITY

The confusion generated by federal court decisions stems from their improper application of the legal principles affecting the interpretation of Title VII. Applying the proper rules of statutory construction, the plain meaning of § 2000e(b) should be construed to impose individual supervisor liability. Although an inquiry beyond the language seems unnecessary, the legislative intent surrounding the passage of Title VII supports supervisor liability as well.

A. Plain Meaning of Title VII

The literal, plain language of Title VII confirms individual supervisor liability and the statute should be enforced as written by Congress. As mentioned earlier, Title VII defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such person." A cardinal rule of statutory construction, as articulated by the Supreme Court, requires that "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed." Thus, the ordinary meaning of words should not be abandoned unless there are compelling circumstances. Compelling circumstances would include a situation where the plain language of a statute will lead to absurd results that are devoid of any common sense.

Despite the applicable rules of statutory construction, courts
continually misconstrue § 2000e(b) to impose only respondeat superior principles rather than pure agency principles. Courts abandon the plain meaning of § 2000e(b) and fail to justify their decision by demonstrating any absurd results that would occur if the "any agent" language was given its literal meaning.

1. Respondeat Superior is an Incorrect Interpretation of § 2000e(b)

In *Miller v. Maxwell's International Inc.*, the court said the "any agent" language did not impose agency principles on supervisors, rather it was a mere statement of respondeat superior. To support this assertion, the *Miller* court looked to previous cases that accepted supervisor liability and decided that those decisions "held individuals liable only in their official capacities and not in their individual capacities." The court felt this distinction warranted an interpretation of § 2000e(b), particularly the "any agent" language, to only impose respondeat superior principles. In other words, a supervisor's actions are imputed to the employer, but the supervisor is not individually liable. Though *Miller* was one of the first courts to reject supervisor liability, other courts have followed *Miller* blindly on this issue. However, the *Miller* court's distinction between a supervisor's "official" capacity and "individual" capacity is a distinction without merit. Under an appropriate theory of supervisor liability, a supervisor will never be sued only as an individual, he or she must be acting with authority from the employer. A supervisor and employer will be joined in a lawsuit, liable both jointly and severally.

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62. For a general discussion of agency principles, see *infra* notes 71-82 and accompanying text.
63. *991 F.2d 583* (9th Cir. 1993).
64. *Miller v. Maxwell's Int'l. Inc.*, 991 F.2d 583, 587 (9th Cir. 1993). *See also* Birkbeck v. Marvel Lighting, 30 F.3d 507, 510 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 666 (1994). When interpreting the definition of an employer in the ADEA, the court said, "we read § 630(b) as an unremarkable expression of respondeat superior—that discriminatory personnel actions taken by an employer's agency may create liability for the employer." *Id.* For a definition of respondeat superior, see *supra* note 27.
66. *Id.*
67. *See, e.g.*, Grant v. Lone Star Co., 21 F.3d 649, 652 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 574 (1994). "In *Miller*, the court observed that the purpose of the 'agent' provision in § 2000e(b) was to incorporate respondeat superior liability into [T]itle VII." *Id.*; *see also* Greenlaw v. Garrett, 59 F.3d 994, 1001 (9th Cir. 1995); Lenhardt v. Basic Inst. of Tech., Inc., 55 F.3d 377, 381 (8th Cir. 1995). As one author commented, "[i]n many cases it [case law] involves little real legal analysis or appropriate policy considerations." *Franke, supra* note 21, at 57.
In addition, by imposing respondeat superior principles as the meaning of "any agent," the language is reduced to superfluous words without any apparent purpose. If Congress had not included the "any agent" language in § 2000e(b), respondeat superior liability against employers would still be imposed under common law principles. However, at least one court commented that the reason for the "any agent" language was to "ensure" that courts would impose respondeat superior liability upon employers when an agent engaged in discriminatory conduct. As a result, courts abandon the plain meaning of § 2000e(b) as well as the canons of statutory construction and impose respondeat superior principles, reducing the "any agent" language to words without any apparent purpose.

2. Agency Principles are the Correct Interpretation of § 2000e(b)

The plain language of Title VII's definition of employer invokes individual supervisor liability under the agency theory. The words "and any agent" in their true, ordinary everyday meaning clearly support the use of agency principles. When drafting a statute, Congress chooses words carefully. The words "any agent" indicate that principles of agency are appropriate. More importantly, the Supreme Court endorsed the use of agency principles in *Meritor Savings Bank v. Vinson.*

a. Restatement (Second) of Agency

The Restatement (Second) of Agency recognizes personal liability for agents. According to the Restatement (Second) of Agency, an agent "is not relieved from liability by the fact that he acted at the command of the principal." Applied in the context of Title VII, a supervisor is not relieved from liability just because he or she was acting on behalf of the employer. Instead, a supervisor who engages in discriminatory conduct should be joined with the employer in Title VII actions.

The Restatement (Second) of Agency provides that "[p]rincipal and

69. *Id.* Congress' inclusion of the "any agent" language to inform courts that respondeat superior principles apply would be unnecessary and repetitious.
70. EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1281 (7th Cir. 1995).
73. *Id.* Similarly, absent a privilege, "[a]n agent who enters the land of another, defames or arrests another, or does any similar act, is not excused by the mere fact that he is acting as an agent." *Id.* § 343 cmt. b.
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." In other words, under agency principles, agents are personally liable for their actions. Given this language, a plaintiff should be able to join an individual supervisor and employer in a single action to hold both jointly and severally liable. However, only a supervisor who actually engaged in prohibited discriminatory conduct will be joined in a suit. The supervisor and employer are, in a sense, considered a single actor and held liable for a single award.

b. Agency Principles Favored by Supreme Court

Although the Supreme Court has yet to decide the issue of supervisor liability, the Court already endorsed agency principles in the context of Title VII in Meritor Savings Bank v. Vinson. In Meritor, the Supreme Court acknowledged that Congress intended agency principles to impose liability upon an employer for the acts of an individual supervisor. Meritor was a pivotal case in which an employee sued her employer after being subjected to unwanted sexual attention from her supervisor over a four year period. One of the issues before the Court concerned whether, under the definition of "employer" in Title VII, an employer could be liable for the actions of a supervisor in a hostile work environment claim.

The Court concluded that "Congress wanted courts to look to agency principles for guidance in this area." The Court particularly referenced Restatement (Second) of Agency §§ 219-237. Accordingly, Meritor stands for the proposition that a plaintiff may hold a principal liable for discriminatory conduct of an agent under agency principles. Therefore, agency principles should be applied in the reverse situation;

74. Id. § 359C(1) (1958).
77. Id. at 72.
78. Id. at 72.
79. Id. at 72.
80. Id. at 72.
81. Id.

Tomka, 66 F.3d at 1320 (Parker, J., dissenting).
an agent should be held individually liable for his or her actions, as well as the principal. Any ruling to the contrary would conflict with the precedent set forth in *Meritor*.

B. Legislative History/Legislative Intent

An inquiry beyond the statutory language should not proceed unless there is "a clear showing that a literal reading of Title VII is at war with itself, or an articulation of exceptional circumstances to justify further judicial inquiry." It is critical that the judiciary not go beyond the words of a statute unnecessarily. However, when the plain language of the statute fails, legislative history and legislative intent are useful tools to determine the proper interpretation of statutory language. Although it is unnecessary to go beyond the plain language of § 2000e-(b), the legislative intent of Title VII clearly shows that supervisor liability is warranted. The legislative history of Title VII is unique because only two committees in the House of Representatives reviewed the legislation before it was sent to Congress for a final vote. As a result, the Congressional Record, rather than committee reports, contains the legislative history of Title VII.

Legislative intent is expressed through the fifteen employee threshold requirement, the remedies available under Title VII, the passage of the Civil Rights Act of 1991, and the liability imposed under § 1981 of the Civil Rights Acts of 1866.

1. Fifteen Employee Threshold

Courts that reject individual supervisor liability under Title VII combat the plain meaning of the statute by pointing to the fact that Title

83. *Tomka*, 66 F.3d at 1319 (Parker, J., dissenting).
84. *Id.*
85. *Id.* “Here, the statute speaks with such clarity that there is no need to look beyond the statutory language in an attempt to divine Congressional intent.” *Id.*
87. *Id.* at 426 (citing Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 457-58 (1966)).
88. See, e.g., *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583 (9th Cir. 1993). *Miller* was one of the first well-known cases that eliminated supervisors as possible defendants in an employment discrimination suit. For a more in-depth discussion of *Miller* and subsequent cases see Cristopher Greer, "Who Me?: A Supervisor's Individual Liability for Discrimination in the Workplace*, 62 FORDHAM L. REV. 1835, 1839-1845 (1994). For a discussion of the shortcomings of the *Miller* decision, see *Tomka*, 66 F.3d at 1318-24 (Parker, J., dissenting).
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VII limits liability to employers who have fifteen or more employees. Accordingly, courts have asserted that an individual supervisor is not included within Title VII's definition of employer because of the fifteen employee threshold requirement. These courts state that Congress apparently did not want to burden small businesses and individual employees with the costs associated with litigating employment discrimination claims. According to the Miller court, "if Congress decided to protect small entities with limited resources from liability, it is inconceivable that Congress intended to allow civil liability to run against individual employees." 

Yet, there are other more credible interpretations of why Congress included the fifteen employee threshold requirement within Title VII. When Title VII was enacted, small businesses comprised a substantial portion of the economy and Congress did not want to disrupt the overall stability of the economy. In other words, Congress was concerned about the overall effect Title VII would have on the economy, not the potential burden placed on businesses to litigate Title VII claims. For example, an amendment was added to Title VII to raise the minimum employee threshold to 100 employees because some members of the Senate were concerned about Title VII's effect on free enterprise. In response to the amendment, Senator Humphrey remarked, "under the bill as now drafted [with a twenty-five employee threshold, later amended to fifteen], 92 percent of the employers of America would not be covered . . . . That cannot be regarded as a drastic imposition on the business community." Furthermore, Congress was concerned about intruding upon small family-run businesses that have very few employees, many of whom are often relatives. 

A more persuasive reason for the fifteen employee threshold requirement included in Title VII is evidenced by the Congressional Record. The fifteen employee threshold was included in Title VII to

89. See supra note 11 and accompanying text.
90. See Williams v. Banning, 72 F.3d 552, 555 (7th Cir. 1995); Tomka, 66 F.3d at 1314; Lenhardt, 55 F.3d at 381.
91. See Tomka, 66 F.3d at 1314; Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 510 (4th Cir. 1994).
92. Miller, 991 F.2d at 587; see also Grant v. Lone Star Co., 21 F.3d 649, 652 (5th Cir. 1994).
93. See 110 CONG. REC. 13088 (1964) (remarks of Sen. Humphrey). In 1964, businesses with less than 25 employees comprised 92% of businesses. Id.
94. 110 CONG. REC. 13,088 (1964).
95. Id.
96. Id.
justify the passage of Title VII under the Commerce Clause.\textsuperscript{97} Given the fact Title VII was the first wide-sweeping employment legislation of its time, Congress was obviously concerned about its constitutionality under the Commerce Clause. Clearly, by limiting Title VII liability to employers who had over fifteen employees, Congress felt more confident that Title VII would pass constitutional muster.

Some critics argue that if supervisor liability was intended, that intent surely would be evidenced in the Congressional Record or the committee reports.\textsuperscript{98} But why should Congress debate an issue that was so clearly expressed through their use of the language "and any agent"? The lack of debate over the issue instead points to the opposite conclusion: Congress intended agent liability all along. Congress's silence, coupled with the fact Congress has never amended Title VII to exclude supervisor liability, is further proof that supervisors are liable under Title VII.

2. Remedial Scheme of Title VII

As enacted, and later amended in 1972, Title VII outlines the remedies available to plaintiffs in § 2000e-5(g).\textsuperscript{99} In particular, a court can issue an injunction to stop an unlawful employment practice, order the reinstatement or hiring of employees, authorize back pay, or provide other suitable relief deemed appropriate by the court.\textsuperscript{100} At least one court stated that these remedies, like back pay and reinstatement, could only be provided by an employer. Therefore, individuals could not be held liable under Title VII.\textsuperscript{101} However, the fact that the remedies are not symmetrical is not a reason to deny individual liability. An individual could easily be assessed a portion of back pay along with the employer in an adverse judgment.

It is also helpful to consider how the remedial scheme of Title VII evolved through the legislative process.\textsuperscript{102} The final version of Title VII

\textsuperscript{97.} U.S. CONST. art. I, § 8, cl. 3. \textit{See}, e.g., 110 CONG. REC. 6566 (1964); 110 CONG. REC. 6548 (1964); \textit{Id.} at 7052, 7054 (remarks of Sen. Humphrey); \textit{Id.} at 7088 (remarks of Sen. Stennis); \textit{Id.} at 7207-12 (remarks of Sen. Clark). Understandably, Congress was concerned about the constitutionality of Title VII legislation, especially given the current political and societal climate in the country at the time.


\textsuperscript{100.} \textit{Id.} This section was later amended further by the Civil Rights Act of 1991, see \textit{infra} notes 109-121 and accompanying text.

\textsuperscript{101.} \textit{Tomka}, 66 F.3d at 1314.

\textsuperscript{102.} \textit{See generally} Franke, \textit{supra} note 21, at 40-47.
VII was a series of compromises put together on the floor of the chamber. In effect, the compromises resulted in Title VII being enforced by private individuals through private lawsuits, rather than a public right enforced through a federal agency with strong enforcement powers, as originally written. Despite this compromise, Title VII's remedial provisions were never redrafted to correspond with the shift to private, rather than public enforcement. As one scholar stated, "although the responsibility of enforcement was shifted to the shoulders of private individuals, the remedy conceived in conjunction with public agency enforcement was all that was granted." Despite Congress' attempt to reconcile these differences in 1972, Title VII was only amended to allow the Equal Employment Opportunity Commission to bring suit against employers. While this string of compromises does not, per se, demonstrate Congressional intent to hold individuals liable under Title VII, it does show why particular remedies remained in the final version of Title VII. Therefore, by declaring that the remedies available under Title VII are only applicable to employers, those who reject supervisor liability fail to take into account the complex history of Title VII's passage.


The passage of the Civil Rights Act of 1991 (hereinafter the CRA of 1991) further supports the notion that individual supervisors are liable under Title VII. The CRA of 1991 expands the remedies available to plaintiffs in cases of intentional discrimination. In addition to the

104. Id. at 1315-16.
105. Id. at 1316.
106. Franke, supra note 21, at 43.
107. The Equal Employment Opportunity Commission (EEOC) is the federal agency charged with overseeing the administration of anti-discrimination laws.
108. Franke, supra note 21, at 44-45.
109. Title VII outlines the relief available to plaintiffs: If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.
remedies already recognized under Title VII, the CRA of 1991 allows plaintiffs to recover punitive damages and compensatory damages. Compensatory and punitive damages are just as easily enforced against individuals as employers, and, therefore, infer individual liability for Title VII claims. However, in Miller, the court stated that the caps imposed on compensatory damages, which staggered according to the size of the employer, prove that Congress did not intend individual liability. It is impossible to know what Congress intended by imposing caps on compensatory damages as there is no discussion of the caps in the official legislative history. It has been suggested that the floor debate on the CRA of 1991 revolved around the overall economic effect of imposing compensatory and punitive damages on employers, rather than avoiding liability for individuals. The

110. 42 U.S.C. § 1981a(b)(1). "A complaining party may recover punitive damages... if the complaining party demonstrates that the respondent engaged in a discriminatory practice... with malice or with reckless indifference to the federally protected rights of an aggrieved individual." Id.

111. Title VII, as originally enacted, allowed injunctive relief, appropriate affirmative action, reinstatement or hiring of an employee, back pay, or other suitable relief. 42 U.S.C. § 2000e-5(g).


113. For a general discussion regarding the impact of the Civil Rights Act of 1991 on supervisor liability, see Michael D. Moberly & Linda H. Miles, The Impact of the Civil Rights Act of 1991 on Individual Title VII Liability, 18 OKLA. CITY U. L. REV. 475 (1993). The authors argue that the Act does not necessarily impose liability on individuals and that the decision should be left to Congress, not the courts. Id. at 501-503.

114. See 42 U.S.C. § 1981a(b)(3). The statute provides:

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party.

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000.

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

Id.

115. Miller, 991 F.2d at 587-88 n.2.

116. Tomka, 66 F.3d at 1323 (Parker, J., dissenting) (citations omitted).

117. See Tomka, 66 F.3d at 1323 (Parker, J., dissenting).
concerns expressed by Congress when enacting the CRA of 1991 were very similar to the concerns expressed about imposing the fifteen employee threshold when Title VII was originally enacted. The overriding concern was protecting the overall economy rather than protecting individuals from liability. Moreover, individuals will not bear the damages alone as their liability is imputed to the employer. Under agency principles, both employer and employee are jointly and severally liable. Still, some argue that Congress's silence in the CRA of 1991 regarding individual liability is conclusive proof that individual liability was not intended. However, this argument assumes that individuals were not liable prior to the passage of the CRA of 1991. Clearly, based on the original language of Title VII, individual supervisors were liable prior to the enactment of the CRA of 1991, and Congress had no reason to clarify its position. More importantly, Congressional silence is not conclusive of any argument.

4. Section 1981 Remedial Measures

Section 1981 of the Civil Rights Acts of 1866 gives all persons, regardless of race, the right to make and enforce contracts. Section 1981 has been interpreted to prohibit intentional race discrimination by both public and private employers. Consequently, an employee who is the subject of intentional discrimination may bring an action under § 1981 as well as Title VII. Under § 1981, an individual is personally liable for intentional discrimination. Therefore, in a jurisdiction that does not recognize individual liability under Title VII, a plaintiff could bring a claim against a supervisor under § 1981. Because Congress

118. See supra notes 88-98 and accompanying text.
119. Tomka, 66 F.3d at 1323 (Parker, J., dissenting).
120. See Montanari, supra note 98, at 365-68.
121. See supra notes 58-82 and accompanying text.
All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id. § 1981(a).
123. Id.
125. See Kotkin, supra note 103, at 1348.
127. Lamberson, supra note 86, at 429.
recognizes individual liability under § 1981, a statute with objectives similar to Title VII, it seems logical that Congress would also endorse individual liability under Title VII. As one justice noted, "[i]f individual liability for discriminatory acts was truly beyond the contemplation of Congress, it had ample opportunity to correct those courts which have permitted such liability. Instead, [Congress] reaffirmed the breadth of liability under § 1981."128

IV. SUPERVISOR LIABILITY IS SOUND PUBLIC POLICY

Imposing liability on individual supervisors as well as employers achieves important social goals. Supervisor liability deters supervisors from engaging in unlawful discrimination. Also, supervisor liability provides plaintiffs with an alternative remedy when an employer is unable to fully compensate the plaintiff. Lastly, supervisor liability is consistent with notions of fairness and justice inherent in our legal system.

A. Deterrence

Supervisor liability deters individual employees from violating anti-discrimination laws because supervisors will fear exposure to liability.129 Common sense dictates that if an employee will be held personally responsible for his or her wrongful actions, he or she will be less likely to act in a wrongful manner. However, some argue that supervisor liability is not necessary to deter individual employees.130 Rather, the market place will take care of these wrong-doers.131 For instance, in Miller, the court opined that an employer would likely fire an employee who violates Title VII. "An employer that has incurred civil damages because one of its employees believes he can violate Title VII with impunity will quickly correct that employee's erroneous belief."132 While there is some credence to allowing the free market to take care of supervisors who discriminate, this argument misses the point of Title


130. See Montanari, supra note 98, at 371. The author argues, in effect, that supervisors terminated for engaging in discrimination will be unable to secure other employment. Id.

131. See Lenhardt v. Basic Inst. of Tech., Inc., 55 F.3d 377, 381 (8th Cir. 1995); see also Miller v. Maxwell's Int'l. Inc., 991 F.2d 583 (9th Cir. 1993).

132. Miller, 991 F.2d at 588.
VII. Anti-discrimination laws seek to provide a remedy to disadvantaged groups in the workforce when market forces are ill-equipped to address the unfair discrimination. As one court noted, "[t]he spirit of Title VII would become attenuated if it were forced to rely on market to persuade employers to correct the discriminatory conduct of their employees." If the best employees were always hired, retained, and treated fairly, there would be no need for laws like Title VII. Therefore, to hope that market forces will take care of supervisors who discriminate is not only naive, but misguided based on our country's history.

B. Supervisor Liability Increases Chances of Recovery

Plaintiffs should not be denied recovery merely because an employer is unable to compensate the victim due to bankruptcy or some other hardship. It is easy to imagine a situation where an employee is awarded a judgment and the employer subsequently goes bankrupt, leaving the plaintiff without a remedy. Similarly, supervisor liability provides an additional remedy for plaintiffs when an employer is "capable of only partial satisfaction of [an] adverse judgment[]." Meanwhile, the actual wrong-doer, the individual supervisor is allowed to escape any liability. Rather than leave the plaintiff without recourse, a plaintiff should be allowed to seek compensation or other relief from an individual supervisor who engaged in discriminatory conduct.

C. Tortfeasors Should be Held Responsible

The foundation of our legal system is that wrongdoers should be held responsible for their actions. By immunizing supervisors from answering for their discriminatory tactics, a supervisor is allowed to keep acting in this manner. The employer/employee relationship should not protect supervisors when they engage in reprehensible conduct. By protecting supervisors, the courts are sending the wrong message to supervisors. In effect, the message being sent is that it is okay to violate Title VII because the employer will bear any responsibility for discriminating acts, not the employee. If this is the case, supervisors are free to either remain at their present employment, or look for new employment, where they are capable of discriminating again. Our legal system should not protect this kind of conduct.

134. Goldberg, supra note 129, at 583.
135. See generally, e.g., OLIVER WENDELL HOLMES, THE COMMON LAW & OTHERWRITINGS 80-84 (1881) cited with an approval in Goldberg, supra note 129, at 571 n.2.
A common question is why an employee might name an individual supervisor when, most likely, an employer is the one who has the resources to compensate a wronged employee. Employees name individual supervisors in lawsuits for a variety of reasons, but mostly because they want a supervisor to answer for his or her actions. A plaintiff will rarely receive additional damages by naming an individual supervisor in a Title VII claim, unless the employer is unable to compensate the plaintiff fully for his or her damages. Understandably, some plaintiffs may be motivated by revenge after suffering humiliating and demeaning harassment from a supervisor.

IV. Judicial Test for Supervisor Liability

Based on the above arguments, supervisors should be liable under Title VII when they engage in discriminatory conduct. Accordingly, the courts need to develop a practical test to determine under what circumstances a supervisor will incur liability. In Schallehn v. Central Trust, the court fashioned a three-prong test for individual supervisor liability under an ADEA claim. Under this test, a supervisor is liable when: (1) the supervisor is an agent of the employer, such that he or she meets the definition of agency, (2) the employer satisfies the requisite minimum threshold requirement for employees, and (3) the agent violated a portion of Title VII. If these three prongs are satisfied, an employer and employee can be joined in an action and be held jointly and severally liable.

The first prong requires the supervisor to be an "agent" of the employer. Several courts have created criteria to determine when a supervisor qualifies as an agent. In addition to looking to agency

136. See Lamberson, supra note 86, at 420. A plaintiff may be unable to recover damages from an employer if that employer subsequently goes bankrupt.
137. Id. at 420-21.
138. For example, in Shoemaker, a supervisor continually propositioned the plaintiff for sexual favors at an office social function. Shoemaker, 910 F. Supp. at 262. The supervisor followed her to her car, asked that they get a hotel room, and made additional offensive comments to her. Id.
140. Id. at 1337-38. The test is easily applied to a Title VII claim or an ADA claim as well.
141. This test was outlined by the court in Schallehn, 877 F. Supp. at 1333.
142. See RESTATEMENT (SECOND) OF AGENCY § 359C (1957).
143. See, e.g., Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451 (5th Cir. 1994); Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993)
principles for guidance, the court in *Sauers v. Salt Lake County*\(^ {144}\) said an individual is an “employer” for purposes over § 2000e(b) “if he or she serves in a supervisory position and exercises significant control over the plaintiff’s hiring, firing or conditions of employment.”\(^ {145}\) Another court said “agents must be the equivalent or near-equivalent of true employers: persons who exercise employer-like functions vis-à-vis the employees who complain of those persons’ unlawful conduct.”\(^ {146}\) By requiring the agent to engage in similar tasks as an employer, liability for mere co-workers is eliminated.\(^ {147}\) Only those supervisors that exercise significant control over an employee will be held liable. There is no legitimate reason why supervisors who accept additional responsibilities from an employer should not be held responsible for unlawfully discriminating against subordinates. In addition, this prong eliminates the confusion resulting from the *Birkbeck v. Marvel Lighting Corp.*\(^ {148}\) holding that supervisors are not liable when they engage in plainly delegable duties.\(^ {149}\) As “plainly delegable” duties is an ambiguous concept, it provides little guidance for courts.

The second prong of the test requires the employer to meet the requisite employee threshold requirement outlined in § 2000e(a). Therefore, the employer must have at least fifteen employees in order for an individual supervisor to be liable. This prong maintains the Congressional objectives of constitutionality under the Commerce Clause and protecting the overall economy.\(^ {150}\) If the employer does not meet the minimum threshold, neither the employer nor the individual can be held liable under Title VII.

The third prong requires the plaintiff to show that the individual supervisor violated Title VII by engaging in conduct prohibited by Title VII.\(^ {151}\) A plaintiff could not name a supervisor in a suit merely because he or she was a supervisor. That supervisor must have individually violated a portion of Title VII. While the agent’s conduct is imputed to the employer by the wording of § 2000e(b), it would be

\(^{144}\) 1 F.3d 1122 (10th Cir. 1993).

\(^{145}\) *Sauers*, 1 F.3d at 1125 (citations omitted) (quoting *Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989)).

\(^{146}\) *Ball v. Renner*, 54 F.3d 664, 668 (10th Cir. 1995).

\(^{147}\) The court in *Garcia* was careful not to extend liability to the extent that mere co-workers would be held liable. *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451 (5th Cir. 1994).


\(^{149}\) *See supra* notes 52-58 and accompanying text.

\(^{150}\) *See supra* notes 88-98 and accompanying text.

\(^{151}\) *See supra* note 3 and accompanying text.
contrary to public policy to hold an individual supervisor liable when he or she did not violate the law. An analysis similar to that which is applied to employers when determining a violation of Title VII would apply when determining individual liability.

V. CONCLUSION

Individual supervisors should be liable under Title VII. The widespread inconsistencies in the federal courts about the proper interpretation of § 2000e(b) requires the Supreme Court to resolve the question. Many courts have ignored the plain meaning of the statute, the legislative intent of Congress, and the compelling public policy arguments favoring supervisor liability.

The three prong test to determine supervisor liability is both equitable and easy to administer. The test is fair because it holds supervisors responsible when they act like employers. Secondly, the test still follows the mandate by Congress to only impose liability on employers with more than fifteen employees. The test holds the supervisor liable for his or her actions, not just the employer who may have had little or no control over the supervisor’s actions.

Although some critics may argue that this test will push supervisors into bankruptcy satisfying adverse judgments, the practical effects of this test, in all actuality do not change the dynamics of Title VII suits. Employers are still the entities with “deep pockets” and will be the entities responsible for satisfying the judgment. Although there may be issues of contribution from the supervisor, that inquiry requires further interpretation and scrutiny. To eradicate discrimination from the workplace, supervisors must be part of the equation. By holding individual supervisors liable, we can finally hope to end discrimination in the workplace.

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