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Vicarious and Personal Liability for Employment Discrimination

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VICARIOUS AND PERSONAL LIABILITY FOR EMPLOYMENT DISCRIMINATION

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I. INTRODUCTION

It is by now commonplace under Title VII,[1] the Age Discrimination in Employment Act (ADEA),[2] and the Americans with Disabilities Act (ADA)[3] that employers are legally responsible for the discriminatory acts of their supervisory employees. Vicarious employer liability has long been an unquestioned component of these statutory schemes.[4]

Vicarious liability imposes liability on a principal for the torts of his agents.[5] As applied in the context of employment discrimination, it renders the employer/principal liable for prohibited

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[1] Civil Rights Act of 1964 tit. VII, 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. V 1993). Title VII prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin.

[2] Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1988 & Supp. V 1993). The ADEA protects persons age 40 and over from discrimination on the basis of age.

[3] Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (Supp. V 1993). The ADA prohibits discrimination against a qualified individual with a disability on the basis of the disability.

[4] *See, e.g.*, Horn v. Duke Homes, 755 F.2d 599, 604-06 (7th Cir. 1985) (holding employer strictly liable for supervisory harassment); Miller v. Bank of Am., 600 F.2d 211, 213 (9th Cir. 1979) (finding employer liable for supervisor's acts); Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1282 (7th Cir. 1977) (imposing liability on corporate defendant as principal for acts of supervisory employee).

[5] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 69-70, at 499-507 (5th ed. 1984). " 'Vicarious liability' may be defined as the imposition of liability upon one party for a wrong committed by another party. One of its most common forms is the imposition of liability on an employer for the wrong of an employee or agent." Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 563 (1988).

discrimination by its employee/agent.[6] Thus, even when discrimination is the product of an individual supervisor's discriminatory animus, occurring contrary to company policy and without the knowledge of corporate management, the employer nonetheless shoulders responsibility for the discrimination.[7]

However, even ostensibly well-settled law can be called into question.[8] Such, I suspect, may soon be the fate for the principle of vicarious employer liability.

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[6] According to RESTATEMENT (SECOND) OF AGENCY § 2 (1958),

> (1) A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.
> (2) A servant is an agent employed by a master to perform services in his affairs whose physical conduct in the performance of the service is controlled or subject to the right to control by the master.

For purposes of Title VII, the ADEA, and the ADA, courts have deemed employees to be agents if they "participated in the decision-making process that forms the basis of the discrimination." Hamilton v. Rodgers, 791 F.2d 439, 443 (5th Cir. 1986) (citation omitted). Accordingly, the term "agent" generally is construed "to include supervisory or managerial employees to whom some employment decisions have been delegated by the employer." Barger v. Kansas, 630 F. Supp. 88, 90 (D. Kan. 1985).

[7] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 75 (1986) (Marshall, J., concurring) (observing that under general Title VII principles, supervisor's discriminatory acts routinely are imputed to employer); Miller v. Bank of Am., 600 F.2d 211, 213 (9th Cir. 1979) (imputing to employer as principal acts violating Title VII).

As one student commentator noted in the late 1970s, after surveying the case law developed under Title VII, "Title VII cases . . . generally hold the employer liable for discriminatory acts of supervisors and managers. Employers have been held liable even when they were unaware of the discrimination, even when they had anti-discrimination policies, and even though they had exemplary anti-discrimination records." Note, *Sexual Harassment and Title VII: The Foundation for the Elimination of Sexual Cooperation as an Employment Condition*, 76 MICH. L. REV. 1007, 1025 (1978) [hereinafter Note, *Sexual Harassment and Title VII*].

[8] *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 655 (1989) (holding defendants shoulder only burden of production, not persuasion, once prima facie case of disparate impact has been established). This ruling upset what the lower courts had considered to be well-settled law. *See, e.g.*, EEOC v. Rath Packing Co., 787 F.2d 318, 327-28 (8th Cir.) (holding defendant bears burden of proving business necessity), *cert. denied*, 479 U.S. 910 (1986); Craig v. Alabama State Univ., 804 F.2d 682, 689 (11th Cir. 1986) (same); Spurlock v. United Airlines, 475 F.2d 216, 218 (10th Cir. 1972) (same). Congress legislatively overruled this aspect of Wards Cove, placing the burden of persuasion on the defendant once plaintiff has demonstrated a particular practice causes a disparate impact. 42 U.S.C. § 2000e-2(k)(1) (Supp. V 1993).

Vicarious employer liability in one small corner of employment discrimination law, hostile work environment sexual harassment,[9] already has provoked extensive debate.[10] The Supreme Court's suggestion in *Meritor Savings Bank v. Vinson* that courts should look to agency law in developing employer liability rules for hostile work environment cases[11] has resulted in a rejection of vicarious employer liability by most circuit courts confronting hostile work environment claims. These courts have held instead that employers can be only *directly* liable in hostile work environment cases.[12]

So far, this rejection of vicarious liability has been confined to the hostile work environment context. A broader attack on vicarious employer liability may soon occur, however, given the contention by some courts and commentators that agency law does not warrant

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[9] A hostile work environment claim for sexual harassment is stated when unwelcome conduct of a sexual nature is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' " *Meritor*, 477 U.S. at 67. The victim need not suffer any tangible economic harm in order to state a claim, *id.* at 65, nor need she show any psychological injury. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 371 (1993).

[10] *See, e.g.*, Karibian v. Columbia Univ., 14 F.3d 773, 779 (2d Cir.) ("[T]he 'specific basis' of employer liability for a hostile work environment remains elusive."), *cert. denied*, 114 S. Ct. 2693 (1994); Kauffman v. Allied Signal, 970 F.2d 178, 181-82 (6th Cir.) (noting courts' different standards for hostile work environment than for other forms of discrimination), *cert. denied*, 113 S. Ct. 831 (1992); Sparks v. Pilot Freight Carriers, 830 F.2d 1554, 1557-60 (11th Cir. 1987) (same); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 621 (6th Cir. 1986) (noting Court's failure to issue definitive rule on hostile work environment standard), *cert. denied*, 481 U.S. 1041 (1987); Henson v. City of Dundee, 682 F.2d 897, 901-02 (11th Cir. 1982) (noting vicarious liability standard different in hostile work environment claims). For a collection of relevant cases, broken down by circuit, see Frederick J. Lewis & Thomas L. Henderson, *Employer Liability for "Hostile Work Environment" Sexual Harassment Created by Supervisors: The Search for an Appropriate Standard*, 25 U. MEMPHIS L. REV. 667, 687-730 (1994).

[11] *Meritor*, 477 U.S. at 72 ("[W]e do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area.").

[12] *See* Lewis & Henderson, *supra* note 10, at 674-75 (stating most circuits hold employer liable for hostile work environment sexual harassment only when it knew or should have known of harassment and failed to correct it).

This form of liability is not vicarious but direct. It is the employer's own failure to act that results in liability. The harassing acts of the employee are alone deemed an insufficient basis for liability. *See* Ronald Turner, *Title VII and Hostile Environment Sexual Harassment: Mislabelling the Standard of Employer Liability*, 71 U. DET. MERCY L. REV. 817, 829-32 (1994) (discussing standard for imposing vicarious liability on employer for hostile work environment claim).

different liability rules for hostile work environment claims.[13]

Ironically, the 1991 Civil Rights Act,[14] a statute intended to strengthen the remedies for on-the-job discrimination,[15] may also serve as a catalyst for reexamining employer liability principles. Now that compensatory and punitive damages are available under Title VII and the ADA,[16] employers have a heightened incentive to disclaim responsibility for a supervisor's discriminatory acts, particularly when the act violates a company's anti-discrimination policy.[17] Moreover, courts that are willing to impose vicarious liability on employers for equitable relief—relief an employer is uniquely situated to provide[18]—may be more reluctant to hold

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[13] *See, e.g., Meritor*, 477 U.S. at 77 (Marshall, J., concurring) (arguing no justification exists for "special rule" in hostile work environment cases); Rachel E. Lutner, Note, *Employer Liability for Sexual Harassment: The Morass of Agency Principles and Respondeat Superior*, 1993 U. ILL. L. REV. 589, 624 (criticizing use of agency principles to distinguish hostile work environment claims). *See infra* notes 95-96 and accompanying text (discussing view that hostile work environment cases merit no different liability rules).

[14] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (Supp. V 1993) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

[15] *See* Civil Rights Act of 1991 §§ 2-3 (stating "Findings" and "Purposes" of Act).

[16] The 1991 Civil Rights Act amends Title VII and the ADA to permit recovery of compensatory and punitive damages in cases of intentional discrimination. The statute places caps on the amount of such damages that may be recovered, ranging from $50,000 to $300,000, depending on the size of the employer. 42 U.S.C. § 1981a (Supp. V 1993).

Compensatory and punitive damages are not recoverable under the ADEA. Instead, a plaintiff may recover liquidated damages for a willful violation of the statute. 29 U.S.C. § 626 (1988 & Supp. V 1993).

[17] *See* Maria M. Carrillo, *Hostile Environment Sexual Harassment by a Supervisor Under Title VII: Reassessment of Employer Liability in Light of the Civil Rights Act of 1991*, 24 COLUM. HUM. RTS. L. REV. 41, 42 (1992-93) (noting "greater stakes" now at issue in harassment cases).

The statute imposes punitive damages when the respondent engages in a discriminatory act "with malice or reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(6)(1) (Supp. V 1993). Employers, relying on common-law principles, may argue that vicarious liability should not attach to punitive damages. *See* KEETON ET AL., *supra* note 5, § 69, at 499 & n.3 (discussing imputation of punitive damages). At least one employer already has made this argument, which was summarily rejected by the court. Preston v. Income Producing Mgmt., 871 F. Supp. 411, 415 (D. Kan. 1994).

[18] Important equitable remedies, such as instatement, reinstatement, and most fringe benefits, can come only from the employer. Thus, without vicarious liability, no meaningful remedy would be available in many cases. *See infra* notes 171-174 and accompanying text (discussing further employer's unique ability to provide full range of compensation to employees).

employers vicariously liable for compensatory and punitive damages.[19]

At the same time, the addition of these new damages has provoked renewed interest in an issue that has never been well-settled: personal liability for employment discrimination.[20] At common law, an agent may be liable for his own torts, even when his employer is vicariously liable for them as well.[21] It is unclear whether a supervisor who intentionally discriminates on the basis of race, sex, or disability in making employment decisions will be personally liable for his actions under federal employment discrimination statutes.

From Title VII's effective date[22] until its amendment in 1991, the question of personal liability under the Act was sporadically raised and perfunctorily answered, with mixed results.[23] However, in the brief period since passage of the 1991 Act, this issue has gained considerable attention, and courts have continued to

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[19] For example, some courts have refused to hold an employer vicariously liable for punitive damages under § 1981 unless the discriminatory supervisor was employed in a managerial capacity. *E.g.*, Mitchell v. Keith, 752 F.2d 385, 390 (9th Cir.), *cert. denied*, 472 U.S. 1028 (1985). *See also* RESTATEMENT (SECOND) OF AGENCY § 217C (1958) (stating employer can be liable for punitive damages only if employee was employed in managerial capacity and was acting within his scope of employment). *But see Preston*, 871 F. Supp. at 415 (rejecting contention that employer should not be held vicariously liable for punitive damages under Title VII).

[20] *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, 483 (1993) (discussing possibility of personal liability under 1991 Civil Rights Act). Personal liability as used here signifies the liability of the discriminating employee in his personal capacity, *i.e.*, a judgment that would run against the agent personally.

[21] RESTATEMENT (SECOND) OF AGENCY § 343 (1958).

[22] Title VII became effective July 2, 1965.

[23] *See* Harvey v. Blake, 913 F.2d 226, 227 (5th Cir. 1990) (stating liability premised on individual's role as employer's agent is in official, not individual, capacity); Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989) ("An individual qualifies as an 'employer' under Title VII if he or she serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment."); Hamilton v. Rodgers, 791 F.2d 439, 442-43 (5th Cir. 1986) (upholding individual liability); Jones v. Continental Corp., 789 F.2d 1225, 1231 (6th Cir. 1986) (same); Padway v. Palches, 665 F.2d 965, 968 (9th Cir. 1981) (stating individuals cannot be liable for backpay); *see also* Bertoncini v. Schrimpf, 712 F. Supp. 1336, 1339-40 (N.D. Ill. 1989) (collecting relevant cases).

disagree on its proper resolution.[24]

To date, courts have considered the question of individual liability against a background assumption that vicarious employer liability exists.[25] But if courts hold individuals personally liable for backpay or compensatory and punitive damages, the question of whether Congress intended only a direct liability scheme may soon be raised.[26]

Both the question of vicarious employer liability for hostile work environment sexual harassment and the question of personal liability for employment discrimination have generated much interest in the courts and law reviews.[27] Interestingly, each

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[24] *Compare* Tomka v. Seiler Corp., 66 F.3d 1295 (2d Cir. 1995) (stating personal liability not intended by statutes); EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276 (7th Cir. 1995) (same); Birkbeck v. Marvel Lighting Corp., 30 F.3d 507 (4th Cir.) (same), *cert. denied*, 115 S. Ct. 666 (1994); Grant v. Lone Star Co., 21 F.3d 649, 653 (5th Cir.) (same), *cert. denied*, 115 S. Ct. 574 (1994); Miller v. Maxwell's Int'l Inc., 991 F.2d 583 (9th Cir. 1993) (same), *cert. denied*, 114 S. Ct. 574 (1994); Sauers v. Salt Lake County, 1 F.3d 1122 (10th Cir. 1993) (same); Clark v. Pennsylvania, 885 F. Supp. 694 (E.D. Pa. 1995) (same); Saville v. Houston County Healthcare Auth., 852 F. Supp. 1512 (M.D. Ala. 1994) (same); Crawford v. West Jersey Health Sys., 847 F. Supp. 1232 (D.N.J. 1994) (same); Johnson v. Northern Indiana Public Serv. Co., 844 F. Supp. 466, 469 (N.D. Ind. 1994) (same); Lowry v. Clark, 843 F. Supp. 228, 231 (E.D. Ky. 1994) (same) *with* Matthews v. Rollins Hudig Hall Co., 874 F. Supp. 192 (N.D. Ill. 1995) (finding individual liability available under statutes); Griffith v. Keystone Steel & Wire, 887 F. Supp. 1133 (C.D. Ill. 1995) (same); Johnson v. University Surgical Group Assocs., 871 F. Supp. 979 (S.D. Ohio 1994) (same); Bishop v. Okidata, Inc., 864 F. Supp. 416 (D.N.J. 1994) (same); Dirschel v. Speck, 66 Empl. Prac. Dec. (CCH) ¶ 43,490 (S.D.N.Y. 1994) (same); Lamirande v. Resolution Trust Corp., 834 F. Supp. 526 (D.N.H. 1993) (same).

[25] *See, e.g.*, Vakharia v. Swedish Covenant Hosp., 824 F. Supp. 769, 784-85 (N.D. Ill. 1993) (stating when manager fires employee because of race, both individual manager and employer are liable).

[26] *See infra* notes 250-256 and accompanying text (discussing impact on doctrine of vicarious liability if courts hold employees personally liable).

[27] The cases and articles discussing employer liability for sexual harassment, while too numerous to cite in full, include Carillo, *supra* note 17; Lewis & Henderson, *supra* note 10; Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at* Meritor Savings Bank, FSB v. Vinson, 44 VAND. L. REV. 1229 (1991); Turner, *supra* note 12; Lutner, *supra* note 13; Glen A. Staszewski, Note, *Using Agency Principles for Guidance in Finding Employer Liability for a Supervisor's Hostile Work Environment Sexual Harassment*, 48 VAND. L. REV. 1057 (1995); Justin S. Weddle, Note, *Title VII Sexual Harassment: Recognizing an Employer's Non-Delegable Duty to Prevent a Hostile Workplace*, 95 COLUM. L. REV. 724 (1995).

The issue of individual liability has only recently gained attention in law reviews but is rapidly grabbing its share of ink. *See* Janice R. Franke, *Does Title VII Contemplate Personal Liability for Employee/Agent Defendants?*, 12 HOFSTRA LAB. L.J. 39 (1994) (concluding

question has been considered only separately, and to date, neither has drawn into serious question the broader issue of vicarious employer liability for workplace discrimination.[28]

The two issues are obviously connected, however, for each addresses the question of whom Congress intended to hold responsible for workplace discrimination. Limiting an employer's vicarious liability for sexual harassment ultimately provokes questions about employer liability for other forms of discrimination. If agency theory will not support employer vicarious liability for a supervisor's sexual harassment of subordinates, will it support vicarious liability for a supervisor's racially motivated discharge decision? Moreover, whether individuals are personally liable for their discriminatory actions may affect judicial analysis of *employer* responsibility for those acts. If Congress intended to hold the individual discriminator personally responsible for paying compensatory and punitive damages, did it thereby intend to impose liability only on that individual?

This Article addresses the issues of vicarious and personal liability for employment discrimination as a coherent whole. Part II examines the prevailing view on an employer's vicarious liability for employment discrimination under Title VII, the ADEA, and the ADA. Part II further discusses the exception to vicarious liability that has developed in hostile work environment cases and examines the justifications advanced for that exception. My point here is not

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individual liability should be imposed); Moberly & Miles, *supra* note 20 (arguing against individual liability); Scott B. Goldberg, Comment, *Discrimination by Managers and Supervisors: Recognizing Agent Liability Under Title VII*, 143 U. PA. L. REV. 571 (1994) (arguing in favor of individual liability); Christopher Greer, Note, *"Who Me?": A Supervisor's Individual Liability for Discrimination in the Workplace*, 62 FORDHAM L. REV. 1835 (1994) (arguing individual liability should be imposed); Phillip Lamberson, Comment, *Personal Liability for Violations of Title VII: Thirty Years of Indecision*, 46 BAYLOR L. REV. 419 (1994) (same); Steven K. Sanborn, Note, Miller v. Maxwell's International, Inc.*: Individual Liability for Supervisory Employees Under Title VII and the ADEA*, 17 W. NEW. ENG. L. REV. 143 (1995) (same).

[28] An exception is J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273 (1995). Professor Verkerke contends that agency law principles do not support the current judicial approach to vicarious employer liability for employment discrimination. He urges rejection of vicarious liability in favor of a notice liability rule, essentially contending the "knew or should have known" direct liability standard developed in hostile work environment cases should be extended across the board to all individual disparate treatment claims. Professor Verkerke's article, however, expressly disclaims consideration of the issue of individual liability for discrimination. *Id.* at 288 n.41.

so much to debate whether such an exception should exist but to determine whether the arguments against vicarious liability in hostile work environment cases justifiably can be limited to that context.

I conclude they can and should be. As discussed in Part III, vicarious employer liability is the congressionally chosen method for remedying employment discrimination, and courts have acted correctly in applying this approach to Title VII and its companion statutes. Any attempt to have the hostile work environment tail wag the employment discrimination dog should be rejected as out of step with the statute's wording, history, and purpose.

At the same time, many of the arguments in favor of vicarious employer liability are inconsistent with imposition of personal liability. Part IV addresses the issue of personal liability and concludes that it is at odds with both the statutory structure and the National Labor Relations Act precedent on which Title VII was modeled and is unnecessary as a deterrent in light of vicarious employer liability. Therefore, the statutes should be interpreted to reject personal liability.

II. THE DEVELOPMENT OF VICARIOUS EMPLOYER LIABILITY

A. THE GENERAL RULE

Title VII, the ADEA, and the ADA combine to make it unlawful for *employers* to discriminate on the basis of race, color, religion, sex, national origin, age, or disability with respect to terms, conditions, or privileges of employment.[29] With certain exceptions not relevant here, only employers are prohibited from discriminating.[30] Aside from these exceptions, if one is not a statutory

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[29] *See* 42 U.S.C. § 2000e-2(a) (1988 & Supp. V 1993) (prohibiting employer from discriminating because of employee's race, color, religion, sex or national origin); 29 U.S.C. § 623 (1988 & Supp. V 1993) (prohibiting employer from discriminating because of employee's age); 42 U.S.C. § 12112 (Supp. V 1993) (prohibiting employer from discriminating because of otherwise qualified individual's disability).

[30] The statutes also prohibit discrimination by employment agencies and labor organizations. *See* 29 U.S.C. § 623(b)-(c) (1988 & Supp. V 1993) (prohibiting age discrimination by employment agencies and labor organizations); 42 U.S.C. § 2000e-2(b)-(c) (1988 & Supp. V 1993) (prohibiting Title VII discrimination by employment agencies and labor organizations); 42 U.S.C. § 12111(2) (Supp. V 1993) (including employment agencies and

employer, then one's discriminatory acts are outside the reach of these statutes.

Title VII defines employer to mean "a person[31] engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, *and any agent of such a person.*"[32] The ADEA and ADA definitions of employer essentially mirror that found in Title VII.[33] Although, as discussed below, an agent could be considered a statutory employer,[34] this Article uses the term "employer" to refer to the employing entity,[35] as distinct from individual employees acting as agents for that employer,[36] in discussing questions of employer and personal liability.

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labor organizations as covered entities under ADA).

The substance of this Article, however, is limited to liability questions vis-à-vis employers and their employees.

[31] "The term 'person' includes one or more individuals, governments, government 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." 42 U.S.C. § 2000e(a) (1988 & Supp. V 1993).

[32] 42 U.S.C. § 2000e(b) (1988 & Supp. V 1993) (emphasis added).

[33] *See* 29 U.S.C. § 630(b) (1988 & Supp. V 1993) (defining "employer" under ADEA) and 42 U.S.C. § 12111 (5)(A) (Supp. V 1993) (defining "employer" under ADA). The ADEA, however, only covers employers with 20 or more employees. 29 U.S.C. § 630(b).

Recognizing that the language of the ADEA and the ADA "mirrors" that found in Title VII, the lower courts have considered precedent under one statute persuasive to liability issues under the others. *See* EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1279-80 (7th Cir. 1995) (comparing ADA with Title VII and ADEA); Matthews v. Rollins Hudig Hall Co., 874 F. Supp. 192, 194 (N.D. Ill. 1995) (analogizing ADEA to Title VII and ADA); Jendusa v. Cancer Treatment Ctrs. of Am., 868 F. Supp. 1006, 1008 n.2 (N.D. Ill. 1994) (comparing ADA with Title VII and ADEA). *But see* Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 588-89 (9th Cir. 1993) (Fletcher, J., dissenting) (distinguishing individual liability issues under ADEA from those under Title VII), *cert. denied*, 114 S. Ct. 1049 (1994).

[34] *See infra* notes 51, 158-159 and accompanying text (noting statutes could be interpreted as imposing individual liability on theory that agent is statutory employer).

[35] By this, I refer to the employer as the owner of the enterprise, *i.e.*, the one that pays the wages or salary. *See* Low v. Hasbro, Inc., 817 F. Supp. 249, 250 (D.R.I. 1993) (defining "employer" as "one who utilizes the services of others and pays them wages or salaries"). Certainly, an individual can be an employer under this description and thus can be liable under these statutes, but I am distinguishing this "individual" employer from the individuals who work for him.

[36] *See* York v. Tennessee Crushed Stone Ass'n, 684 F.2d 360, 362 (6th Cir. 1982) ("Generally, an agent of an employer who may be sued as an employer in Title VII suits has been construed to be a supervisory or managerial employee to whom employment decisions have been delegated by the employer.").

When prohibited discrimination is systemic, that is, when it is the product of an employment policy or when there is a pattern or practice of discrimination,[37] the question of vicarious employer liability is rarely at issue. In most systemic cases, the employer can easily be viewed as directly liable.[38] For example, when TWA formally adopts a policy that precludes pilots over age 60 from bidding on flight engineer positions,[39] or when T.I.M.E. has failed to place virtually any minorities in line driver positions at any of its facilities throughout the country,[40] or when Duke Power Company insists that successful job applicants have a high school diploma,[41] it is the actions of the employer as an entity that have violated the statute.[42]

The issue of employer liability becomes somewhat more complex in cases of individual disparate treatment. These cases, which represent the bulk of employment discrimination claims,[43] frequently involve an allegation that the plaintiff suffered an adverse employment action because of his race, age, or other protected

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[37] Systemic discrimination—discrimination that is system-wide or that otherwise affects a number of employees—comes in two forms. Systemic disparate treatment claims allege intentional discrimination by the employer, and proof of an unlawful motive is necessary. Disparate impact claims involving facially neutral employment policies or practices that adversely affect a particular group are also systemic claims, but no proof of unlawful motive must be shown. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977) (distinguishing treatment from impact claims).

[38] *See* Monell v. Department of Social Servs., 436 U.S. 658, 691-92 (1978) (describing when employer will be directly liable under § 1983, under which no vicarious liability exists). Municipal employers, for example, are liable for acts taken pursuant to official municipal policy and for a municipal custom or practice. *Id.* at 691. Similarly, whether one views systemic cases as encompassing (1) a company policy that discriminates or (2) a negligent failure to preclude a pattern of discrimination by agents, the liability is direct.

[39] Trans World Airlines v. Thurston, 469 U.S. 111, 120-21 (1985) (characterizing TWA's policy as facially discriminatory).

[40] *Teamsters*, 431 U.S. at 342 n.23 (finding pattern and practice of race discrimination evidenced by "inexorable zero" of minorities hired).

[41] Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971) (finding requirement of high school diploma and standardized test scores adversely impacted black applicants).

[42] Obviously, individuals in each of these cases made employment decisions, but those decisions were in conformance with an overall policy or practice of the employer as a whole, policies or practices which the employer directly authorized or ratified, or of which it clearly knew or should have known. In such cases, the employer's liability is direct, not vicarious.

[43] *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 998 n.57 (1991) (noting decline of systemic cases).

factor due to intentional discrimination by the individual making the employment decision.[44] The employer as an entity may have had a policy prohibiting discrimination and may have been unaware of the individual decisionmaker's unlawful animus. Nonetheless, the employer, as an entity, is liable.[45]

This principle is underscored by the first case featured in a leading employment discrimination casebook.[46] In *Slack v. Havens*,[47] the plaintiffs were fired after they refused to accept a discriminatory work assignment from their supervisor, Ray Pohasky.[48] The company attempted to disclaim liability under Title VII, claiming upper management had no knowledge Pohasky's work assignment, which plaintiffs admittedly had refused to perform, had been racially motivated.[49] Liability nonetheless was imposed. As the court noted, Pohasky was an agent of the employer, and Title VII "expressly includes 'any agent' of an employer within the definition of employer."[50]

True enough, but that statutory language could have been read only to mean that Pohasky himself was liable under Title VII

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[44] *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993) (involving individual disparate treatment allegedly based on race); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (involving disparate treatment based on sex).

[45] *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 70-71 (1986) (recognizing that, outside of hostile work environment context, lower courts routinely hold employers vicariously liable for supervisory discrimination); Horn v. Duke Homes, 755 F.2d 599, 604 (7th Cir. 1985) (same); *EEOC: Policy Guidance on Sexual Harassment*, 405 Fair Empl. Prac. Man. (BNA) 6681, 6694 (March 19, 1990) [hereinafter *Policy Guidance on Sexual Harassment*] (same); Nancy F. Chudacoff, *Significant Developments, New EEOC Guidelines on Discrimination Because of Sex: Employer Liability for Sexual Harassment Under Title VII*, 61 B.U. L. REV. 535, 540-41 (1981) (same); *see also supra* note 7 (listing additional sources generally recognizing vicarious liability in discrimination cases).

[46] MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 94 (3d ed. 1994).

[47] 7 Fair Empl. Prac. Cas. (BNA) 885 (S.D. Cal. 1973), *aff'd as modified*, 522 F.2d 1091 (9th Cir. 1975).

[48] *Id.* at 886-87. Plaintiffs, four black females regularly assigned to production work, were ordered to perform heavy cleaning in the bonding and coating department. *Id.*

[49] *Id.* at 889-90.

[50] *Id.* at 889 (citing 42 U.S.C. § 2000e(b)). The court also noted the company had ratified Pohasky's discriminatory conduct by backing up his ultimatum that the workers perform the work or be fired. *Id.* at 890.

because he met the statutory definition of employer.[51] After all, the only discriminatory motive present in the case resided with Pohasky and not with Havens, a sole proprietor doing business as Havens Industries.[52] Nevertheless, the court understood the statutory language to embrace the concept of vicarious liability and held Havens Industries liable for the discriminatory acts of its agent, Ray Pohasky.

The courts have unanimously accepted this analysis.[53] Because Title VII, the ADEA, and the ADA define employer to include "any agent" of the employer, the statutes are understood to have incorporated the principle of respondeat superior.[54] Respondeat superior, the most well-known form of vicarious liability, holds a master liable for the torts of his servant committed within the scope of employment.[55]

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[51] As some courts have noted, the statutory language could be read only to impose direct liability on agents for their own discrimination. *E.g.*, Shager v. Upjohn Co., 913 F.2d 398, 404 (7th Cir. 1990); Hernandez v. Miranda Velez, No. 92-2701, 1994 WL 394855, at *5 (D.P.R. July 20, 1994). Some commentators contend this is the most natural reading of the statute. *See, e.g.*, Phillips, *supra* note 27, at 1258 ("In other words, Section 701(b) is an individual liability provision, not a vicarious liability provision under which agents' discriminatory actions are imputed to their employers."); Verkerke, *supra* note 28, at 287-88 ("The text of Title VII thus appears to hold a corporation's employee agents personally liable for their discriminatory acts without necessarily imposing any vicarious liability on the corporation."); Greer, *supra* note 27, at 1848 (noting "and any agent" language is "more likely intended to apply to supervisors who intentionally discriminate").

[52] *Havens*, 7 Fair Empl. Prac. Cas. (BNA) at 886.

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

[54] "[T]he actual reason for the 'and any agent' language in the definition of 'employer' was to ensure that courts would impose respondeat superior liability upon employers for the acts of their agents." EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1281 (7th Cir. 1995). The *AIC* court applied respondeat superior to an ADA claim, relying on decisions under Title VII and the ADEA. *Id.* at 1280-82; *see also* Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 510 (4th Cir.) (finding respondeat superior applicable to ADEA), *cert. denied*, 115 S. Ct. 666 (1994); Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990) (same); Miller v. Bank of Am., 600 F.2d 211, 213 (9th Cir. 1979) (holding respondeat superior applicable to Title VII); Barb v. Miles, Inc., 861 F. Supp. 356, 359 (W.D. Pa. 1994) (same).

[55] *See* KEETON ET AL., *supra* note 5, §§ 69-70, at 499-507 (discussing respondeat superior generally). For respondeat superior to apply, the agent's tort must be within the scope of his employment. *Id. See also infra* notes 104-117 and accompanying text (discussing when discrimination is within scope of agent's employment).

What is surprising is how little discussion the adoption of vicarious liability has provoked.[56] As stated above, the statutory language could be read to impose personal liability on agents by making them statutory employers, not to impose vicarious liability on employers for the acts of their employees.[57] A search of the legislative history of these statutes reveals no congressional debate over vicarious employer liability.[58] Few judicial decisions have raised the question, and when it has been confronted, it has elicited little analysis.[59]

Although the United States Supreme Court has not directly addressed the question of vicarious liability,[60] the Court, in

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[56] Vicarious employer liability for supervisory discrimination has no "consistent rationale for the imputation. Some of the decisions employ weak analogies to agency law, some combine these with appeals to Title VII's purposes, and some just flatly announce the rule." Phillips, *supra* note 27, at 1260-61.

Virtually all discussions of vicarious liability by the courts (and commentators) occur in one of two contexts: cases asserting claims of sexual harassment or claims of individual liability. Vicarious liability for other forms of discrimination has pretty much been assumed. Moreover, almost all of the discussion of both individual liability and vicarious liability for sexual harassment has occurred within the last 10 years. *See supra* notes 10 & 24 (citing relevant sources).

[57] *See supra* note 51 and accompanying text.

[58] More than a few courts and commentators have made this search and come up empty-handed. *E.g.*, Vinson v. Taylor, 753 F.2d 141, 148 (D.C. Cir. 1985), *aff'd sub nom.* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); Chudacoff, *supra* note 45, at 540; Phillips, *supra* note 27, at 1261-62.

[59] *See, e.g.*, Flowers v. Crouch-Walker Corp. 552 F.2d 1277, 1282 (7th Cir. 1977) ("The defendant is liable as principal for any violation of Title VII or Section 1981 by Kolkau in his authorized capacity as supervisor."); Slack v. Havens, 7 Fair Empl. Prac. Cas. (BNA) 885, 885 (S.D. Cal. 1973) (noting that Title VII "expressly includes 'any agent' of an employer within the definition of 'employer' "). As one commentator correctly summarized the law:

> [Some] courts concluded that a supervisor acts within his scope of employment when he discriminates. Other courts considered this standard [vicarious liability] to be consistent with the remedial nature of Title VII and have rejected the application of common law principles altogether. On many occasions, however, courts did not provide an explicit rationale for the conclusion that employers are vicariously or strictly liable for acts of supervisors. Thus, there was a consensus prior to the development of harassment (both sex and non-sex) as a violation of Title VII that an employer under Title VII would be held vicariously liable for the discriminatory acts of his or her supervisor.

Carrillo, *supra* note 17, at 54-55 (footnotes omitted).

[60] Vinson v. Taylor, 760 F.2d 1330, 1331 (D.C. Cir. 1985) (Bork, J., dissenting from denial of rehearing en banc). The Supreme Court, however, frequently has assumed the doctrine's applicability. *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2751 (1993) (stating

Meritor Savings Bank v. Vinson,[61] appeared to agree that Congress's use of the term "agent" in defining statutory employers was intended to embrace, to some degree, vicarious liability.[62] Congress, stated the Court, "wanted courts to look to agency principles for guidance in this area."[63] The Court added, however, that "Congress' decision to define 'employer' to include any 'agent' of an employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible."[64]

What are those limits? The Court declined to say.[65] And to date, the Court's invitation to look to agency law for limits on an employer's vicarious liability for employment discrimination has been accepted in only one context: hostile work environment harassment claims.[66]

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if factfinder finds employer's reason for alleged discriminatory act invalid, factfinder "must assess damages against *the company*") (emphasis added).

[61] 477 U.S. 57 (1986).

[62] *Id.* at 72; *see also* Weddle, *supra* note 27, at 733 ("The use of the word 'agent' demonstrates that Congress intended courts to use vicarious theories of liability. . . ."). *But see* Verkerke, *supra* note 28, at 289 n.45 (contending that no textual basis for vicarious liability exists in statute).

[63] *Meritor*, 477 U.S. at 72. The Court's directive to look to agency law for guidance has come under heavy criticism. *See, e.g.*, Phillips, *supra* note 27, at 1257 (arguing *Meritor*'s command to consult agency principles fails to promote national court evaluation of alternative approaches to employer liability issue). The use of agency principles, however, is consistent with the legislative history of the National Labor Relations Act, on which Title VII was modeled. *See infra* notes 144-154 and accompanying text (borrowing NLRA's legislative history to interpret Title VII).

[64] *Meritor*, 477 U.S. at 72.

[65] "We . . . decline the parties' invitation to issue a definitive rule on employer liability. . . ." *Id.*

[66] *See supra* notes 9-12 and *infra* notes 67-91 (discussing harassment claims).

Almost all hostile work environment claims involve sexual harassment, but hostile work environment claims can exist outside the sexual harassment context. *See, e.g.*, Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971) (alleging harassment based on national origin), *cert. denied*, 406 U.S. 957 (1972); EEOC Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606.8(c) (1995) (stating employers are responsible for maintaining workplace free of national origin harassment); Proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed Reg. 51,266, 51,268-69 (1993) (describing standards for determining discriminatory harassment) (withdrawn Oct. 1994).

Because most hostile work environment cases involve sexual harassment, this Article discusses hostile work environment claims in that context. Unless otherwise noted, however, the discussion herein is equally applicable to other hostile work environment claims.

B. THE HOSTILE WORK ENVIRONMENT EXCEPTION

Sexual harassment, a type of sex discrimination prohibited by Title VII, has been recognized in two forms. The first, quid pro quo sexual harassment, occurs when a job benefit or detriment is conditioned on the receipt or rejection of unwelcome sexual advances.[67] The second, hostile work environment sexual harassment, occurs when unwelcome sexual advances are sufficiently severe or pervasive so as to alter working conditions and create a hostile or abusive environment.[68]

The lower courts unanimously have held employers vicariously liable for quid pro quo sexual harassment.[69] Because, by definition, only those with some authority over the terms and conditions of employment can engage in quid pro quo harassment, courts have reasoned that supervisory workers necessarily are acting as agents of their employers when they exercise that authority to make employment decisions, regardless of their motivations.[70] The courts view quid pro quo sexual harassment no differently than other forms of statutorily prohibited discrimination, for which employers routinely have been held vicariously liable.[71]

In contrast, hostile work environment claims, from the outset of their recognition, have raised questions about vicarious liability.[72] Because hostile work environment claims do not involve the granting or withholding of a job benefit or detriment, co-workers, as well as supervisors, can create a hostile working environment.[73] Moreover, when supervisors engage in hostile work environment

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[67] *See* 29 C.F.R. § 1604.11 (1995) (defining sexual harassment).

[68] Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986).

[69] *E.g.*, Miller v. Bank of Am., 600 F.2d 211, 213 (9th Cir. 1979); *see also* Horn v. Duke Homes, 755 F.2d 599, 604 (7th Cir. 1985) (noting all circuits reaching issue have held employers strictly liable for quid pro quo harassment); Lewis & Henderson, *supra* note 10, at 669 (stating courts "uniformly" hold employers liable for quid pro quo sexual harassment).

[70] *See* Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982) (discussing liability based on employee/agent's apparent authority); *Policy Guidance on Sexual Harassment*, *supra* note 45, at 6693-95 (explaining and agreeing with courts' approach to quid pro quo liability).

[71] *Policy Guidance on Sexual Harassment*, *supra* note 45, at 6694 n.27.

[72] Note, *Sexual Harassment and Title VII*, *supra* note 7, at 1025-30.

[73] *See, e.g.*, Carr v. Allison Gas Turbine Div., 32 F.3d 1007, 1009 (7th Cir. 1994) (discussing co-worker harassment).

harassment, they are not directly exercising their authority to hire, fire, promote, or demote when they make unwelcome sexual advances to their subordinates.[74] Lewd remarks or offensive touchings that do not result in any tangible job detriment when rebuffed are often viewed as the supervisor's own wrongdoing for which, most courts have found, his employer is not vicariously liable.[75]

In *Vinson v. Taylor*, however, the D.C. Circuit found no reason to distinguish hostile work environment claims from other forms of discrimination.[76] Employers, stated the court, should be held vicariously liable for *any* sexual harassment by supervisors.[77] In doing so, it acknowledged that were the common-law doctrine of respondeat superior to apply, an employer may be able to avoid liability by arguing successfully that the harassment was outside the scope of the agent's employment.[78] The court found strict vicarious liability more consistent with Title VII's purposes.[79]

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[74] At times, however, a supervisor may directly use his authority to create a hostile environment by threatening the employee with adverse job actions if she does not accept his advances. Such cases more closely resemble quid pro quo cases and do result in respondeat superior liability attaching. *See* Karibian v. Columbia Univ., 14 F.3d 773, 780 (2d Cir.) (holding employer liable for discriminatory environment created by supervisor having actual authority over discriminator), *cert. denied*, 114 S. Ct. 2693 (1994); Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1559 (11th Cir. 1987) (same); James D. Douglas, *Personal Liability in Sexual Harassment Cases*, C989 A.L.I.-A.B.A. 285, 293 (1995) (discussing application of respondeat superior liability).

[75] "The dominant standard in the lower courts is one of direct liability—the knew or should have known standard, which resembles a standard of negligence." Weddle, *supra* note 27, at 734.

[76] 753 F.2d 141, 149 (D.C. Cir. 1985); *see also* Weddle, *supra* note 27, at 732-34 (discussing in detail *Vinson* opinion).

[77] *Vinson*, 753 F.2d at 150.

[78] The court rejected respondeat superior in favor of a blanket rule of strict liability for supervisory discrimination. Respondeat superior, said the court, is "not altogether suitable for resolution of questions of Title VII law" because a "scope of employment test could limit employer liability, which would be inconsistent with Title VII's purposes." *Id.* at 150-51.

[79] *Id.*; *see also* Horn v. Duke Homes, 755 F.2d 599, 605 (7th Cir. 1985) ("Title VII demands that employers be held strictly liable for the discriminatory employment decisions of their supervisory personnel. . . .").

While respondeat superior is the most common form of vicarious liability, it does not impose unlimited liability on employers. Rather, under respondeat superior, an employer is liable only for employee actions within the scope of employment. Under the strict vicarious liability standard advocated by the *Vinson* court, however, an employer would automatically be liable for the discriminatory acts of its supervisory employees, whether or not those acts were within the scope of employment.

Holding employers vicariously liable for supervisory misconduct, concluded the court, gives employers an incentive to deter discrimination by their supervisory personnel and ensures that victims have access to whatever remedies are statutorily available.[80] The Equal Employment Opportunity Commission (EEOC), moreover, had adopted interpretive guidelines on sexual harassment calling for vicarious employer liability for supervisor harassment,[81] and the court gave "great weight" to those guidelines.[82]

On appeal, the Supreme Court, after agreeing that a sexually hostile work environment can form the basis for a Title VII claim,[83] refused to endorse the D.C. Circuit's views on strict vicarious liability for that harassment. The D.C. Circuit "erred in concluding that employers are always automatically liable for sexual harassment by their supervisors," stated the Supreme Court,[84] citing sections 219 through 237 of the Restatement (Second) of Agency.[85] However, the Court declined to lay down

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[80] *Vinson*, 753 F.2d at 151. The court noted:

> Employer responsiveness to on-the-job discrimination at the supervisory level is an essential aspect of the remedial scheme embodied in Title VII. It is the employer alone who is able promptly and effectively to halt discriminatory practices by supervisory personnel, and only the employer can provide reinstatement, backpay or other remedial relief contemplated by the Act. Much of the promise of Title VII will become empty if victims of unlawful discrimination cannot secure redress from the only source capable of providing it.

Id. (footnote omitted).

[81] 29 C.F.R. § 1604.11 (1995).

[82] *Vinson*, 753 F.2d at 149; *see also Horn*, 755 F.2d at 606 (applying similar reasoning).

[83] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986). Prior to *Meritor*, it was unclear whether a hostile work environment claim for sexual harassment—*i.e.*, one involving no tangible economic loss—was viable. The court unanimously concluded that it was. *Id.* at 66-67.

[84] *Id.* at 72.

[85] *Id.* Section 219 of the Restatement (Second) of Agency sets forth the general rules on when a master is liable for the torts of his servant. Section 219(1) states the common law principle of respondeat superior. Section 219(2) outlines when a master may be liable for his servant's torts even when they are not within the scope of employment. Sections 220-227 define who constitutes a servant. Sections 228-237 describe scope of employment. RESTATEMENT (SECOND) OF AGENCY §§ 219-37 (1958).

Because respondeat superior, with its scope-of-employment rule, was expressly rejected by the D.C. Circuit for Title VII claims, *see supra* notes 78-79 and accompanying text (discussing *Vinson* strict vicarious liability standard), and because the Supreme Court, with citation to the Restatement sections on scope of employment, expressly rejected the D.C. Circuit's automatic liability rule, *Meritor* has been read and criticized by some as embracing

liability rules of its own, saying only that "Congress wanted courts to look to agency principles for guidance in this area."[86]

Justice Marshall, concurring in the judgment, argued in favor of vicarious liability for supervisory harassment.[87] According to Justice Marshall, it is the supervisor's authority over the workplace that allows him to impose his unwelcome sexual conduct on his subordinates; thus, the employer should be vicariously liable for these supervisory acts.[88] Justice Stevens joined both the Court's and Justice Marshall's opinions, finding no "inconsistency between the two opinions."[89]

The *Vinson* opinion notwithstanding, most lower courts before and after *Meritor* have refused to hold employers vicariously liable in hostile work environment cases. Rather, these courts have deemed an employer liable only if it knew or should have known about the harassment and failed to take prompt remedial action to end the harassment.[90] In other words, the employer is *directly* liable for its own wrongdoing in not stopping harassment of which it was or should have been aware but is not *vicariously* liable for supervisory misconduct. However, vicarious employer liability continues to be the rule for quid pro quo sexual harassment and for other forms of prohibited discrimination under Title VII, the ADEA, and the ADA.[91]

III. ANALYSIS OF VICARIOUS LIABILITY

In his *Meritor* concurrence, Justice Marshall noted there is "no justification for a special rule [against vicarious employer liability] to be applied *only* in 'hostile environment' cases."[92] Most lower

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respondeat superior and rejecting other forms of vicarious liability. Weddle, *supra* note 27, at 732-34.

[86] *Meritor*, 477 U.S. at 72.

[87] *Id.* at 74 (Marshall, J., concurring).

[88] *Id.* at 76-77.

[89] *Id.* at 73 (Stevens, J., concurring).

[90] Carillo, *supra* note 17, at 57; Turner, *supra* note 27, at 830-32; Weddle, *supra* note 27, at 734. *See also supra* notes 72-75 and accompanying text (discussing employer liability for hostile work environment sexual harassment).

[91] *See supra* notes 53-55 and accompanying text (noting courts' adoption of vicarious liability in Title VII, ADEA, and ADA cases).

[92] *Meritor*, 477 U.S. at 77 (Marshall, J., concurring) (emphasis in original).

courts have disagreed and have crafted a special rule for these cases.[93] Their reasons for doing so are examined briefly below.[94]

Numerous commentators and a few courts, however, have agreed with Justice Marshall that no such justification exists.[95] Finding an insufficient basis on which to distinguish hostile work environment claims from other employment discrimination claims, most of these courts and commentators have then argued in favor of vicarious liability in hostile work environment cases involving supervisory misconduct.[96]

But if no justification for a "special rule" for hostile work environment cases exists, then recognizing vicarious liability for other forms of employment discrimination seems suspect. This argument, although tentatively raising its head in the law reviews,[97] has yet to be embraced by any court.[98] Further still, *Meritor*'s directive that courts should look to agency principles in resolving employer liability questions under Title VII legitimately raises the question of when, *if ever*, agency principles support

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[93] As the Seventh Circuit described this exception, sexually harassing 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." Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990).

[94] *See infra* notes 107-109 and accompanying text (explaining courts' reasoning for finding harassing employee's actions outside of scope of employment).

[95] *See, e.g.*, Vinson v. Taylor, 753 F.2d 141, 151 (D.C. Cir. 1985) (stating requirement of employer knowledge of discriminatory acts would effectively eliminate vicarious liability altogether), *aff'd sub nom. Meritor*, 477 U.S. at 57; Carrillo, *supra* note 17, at 75 (criticizing *Meritor*'s special rule for harassment cases); B. Glenn George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U. L. REV. 1, 35-37 (1993) (arguing employer should be held to same standard in hostile environment cases); Lutner, *supra* note 13, at 602-05 (criticizing distinction made in harassment cases); Note, *Sexual Harassment and Title VII*, *supra* note 7, at 1026-27 (arguing traditional agency analysis tends to insulate employers from liability).

[96] *See, e.g.*, Carrillo, *supra* note 17, at 75 (arguing *Meritor* majority failed to explain why common-law agency principles do not support imposition of vicarious employer liability); Lutner, *supra* note 14, at 601, 623-27 (same).

[97] Verkerke, *supra* note 28.

[98] *See* Preston v. Income Producing Mgt., Inc., 871 F. Supp. 411, 414 (D. Kan. 1994) (rejecting employer's argument that it could not be vicariously liable for punitive damages). *But see* Vinson v. Taylor, 760 F.2d 1330, 1331 (D.C. Cir. 1985) (Bork, J., dissenting from denial of rehearing en banc) (noting Supreme Court's failure to address vicarious liability under Title VII).

vicarious employer liability for discrimination.[99]

Agency principles, generally speaking, *do* support vicarious employer liability for employment discrimination.[100] Moreover, there are distinctions between hostile work environment claims and other forms of discrimination that merit a different analysis of the agency issues involved.[101] Thus, even if one ultimately concludes vicarious liability for hostile work environment claims should not exist, vicarious liability for other forms of discrimination should not be implicated by any exception carved out in the hostile work environment context.

A. VICARIOUS LIABILITY AND THE COMMON LAW OF AGENCY

Section 219 of the Restatement (Second) of Agency, cited by the Court in *Meritor*, states the principle of respondeat superior: "[A] master is subject to liability for the torts of his servants committed while acting in the scope of their employment."[102] The statutes' inclusion of agents in the definition of employer has been viewed by the courts as a congressional incorporation of respondeat superior into federal employment discrimination statutes.[103]

Although an unlawful or a forbidden act may be within the scope of employment,[104] under the doctrine's traditional view, an act

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[99] Although *Meritor* was a hostile work environment harassment case, the statutory definition of employer referenced by the Court in *Meritor* applies to all claims of discrimination. Verkerke, *supra* note 28, at 289. Moreover, as Professor Phillips notes, "[a]lthough agency rationales occasionally appeared in pre-*Meritor* decisions on employer liability, they have become much more common since the case was decided." Phillips, *supra* note 27, at 1239. Professor Phillips criticizes the use of common-law agency principles, contending they are at odds with the vicarious liability he concedes is necessary for accomplishment of the statutes' objectives. *Id.* at 1262-63.

[100] *See infra* notes 102-139 and accompanying text (discussing vicarious liability and common-law agency principles).

[101] *See infra* notes 126-139 and accompanying text (distinguishing supervisor harassment from co-worker harassment).

[102] RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

[103] *See supra* notes 53-55 and accompanying text (discussing courts' interpretation of statutes to embrace vicarious liability).

[104] Kauffman v. Allied Signal Inc., 970 F.2d 178, 184 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 831 (1992); Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990); RESTATEMENT (SECOND) OF AGENCY §§ 230-31 (1958); KEETON ET AL., *supra* note 5, at 502-06. As summarized by one court, there would be little left of respondeat superior if an employer could avoid liability by saying to employees "drive carefully" or "don't discriminate." Miller

that is not done for the purpose, at least in part, of serving the master is outside the scope of employment.[105] Accordingly, the motivation for an act can take it outside the scope of employment, inviting an inquiry into the agent's state of mind.[106]

Courts denying liability in hostile work environment cases often find that sexual harassment is not within the scope of an agent's employment.[107] An employee who harasses his subordinates is acting not with any intent to further his employer's business, but rather for his own personal gratification.[108] His acts, courts reason, are therefore outside the scope of employment and relieve the employer of vicarious liability.[109]

Many commentators assert, however, that this argument could be made in most cases of intentional discrimination.[110] A supervi-

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v. Bank of Am., 600 F.2d 211, 213 (9th Cir. 1979).

[105] "(1) Conduct of a servant is within the scope of employment if, but only if:

. . .

(c) it is actuated, at least in part, by a purpose to serve the master, and

. . .

(2) Conduct of a servant is not within the scope of employment if it is . . . too little actuated by a purpose to serve the master."

RESTATEMENT (SECOND) OF AGENCY § 228 (1958).

[106] According to the Restatement (Second) of Agency, conduct may not be for the purpose of serving the master even if

> the servant would be authorized to do the very act done if it were done for the purpose of serving the master, and although outwardly the act appears to be done on the master's account. It is the state of the servant's mind which is material . . . . Conduct is within the scope of employment only if the servant is actuated to some extent by an intent to serve his master.

Id. at § 235 cmt.a; *see also* KEETON ET AL., *supra* note 5, at 506 (stating master not liable when employee acts out of purely personal motive).

[107] *See Policy Guidance on Sexual Harassment*, *supra* note 45, at 6697 ("It will rarely be the case that an employer will have authorized a supervisor to engage in sexual harassment."). Thus, most acts of hostile environment sexual harassment cases will be outside a supervisor's scope of employment.

[108] Bruce C. Smith, Comment, *When Should an Employer Be Held Liable for Sexual Harassment by a Supervisor Who Creates a Hostile Work Environment? A Proposed Theory of Liability*, 19 ARIZ. ST. L.J. 285, 310-11 (1987); Staszewski, *supra* note 27, at 1075 ("It would be an unusual case in which sexual harassment could be thought by the perpetrator to further the employer's business.").

[109] *See* Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990) (stating employer excused of liability where employee's conduct is unrelated to employer's business).

[110] *See* Carrillo, *supra* note 17, at 54 n.72 (arguing if strict common-law approach were applied under Title VII, discrimination would almost always be viewed as outside scope of employment); Verkerke, *supra* note 28, at 294-98 ("The personal motives that animate

sor who makes biased employment decisions toward minorities, women, older workers, or the disabled is not acting to further his employer's interests, it is argued, but instead to indulge his own unlawful "taste for discrimination."[111] Thus, critics counter, an exception to vicarious liability for hostile work environment cases is not supported by the law of agency.[112] If so, either employers should be vicariously liable in all cases, or they should not be vicariously liable at all.

This simply is too glib an approach to the scope-of-employment problem. Contrary to the assertion above, much intentional discrimination may be viewed as within the traditional view of scope of employment.

In many cases of intentional discrimination other than cases of harassment, a supervisor who discriminates often believes, at some level, that he is serving his employer's interests.[113] For example, a supervisor who selects employees based on a stereotypical view that women are too emotional to be effective managers has violated Title VII, but he has also acted (so he believes) to further the business purpose of selecting effective managers.[114]

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bigotry and harassment thus preclude a finding of employer liability for these forms of discrimination under the traditional understanding of respondeat superior doctrine."); Chudacoff, *supra* note 45 at 539 (noting strict application of scope-of-employment test would typically preclude imposition of vicarious liability under Title VII); Smith, *supra* note 108, at 311 n.243 (noting vicarious employer liability unlikely under strict application of respondeat superior); Note, *Sexual Harassment and Title VII*, *supra* note 7, at 1026-27 (noting discrimination rarely would be within scope of supervisors's authority; "[t]hus, traditional agency analysis tends to insulate employers from liability in most supervisory discrimination cases, a result Congress surely could not have intended").

[111] The phrase a "taste for discrimination" is borrowed from Gary J. Becker's classic work, THE ECONOMICS OF DISCRIMINATION 14-17 (2d ed. 1971).

[112] *See supra* note 95 and accompanying text (discussing argument against exception to vicarious liability).

[113] See David B. Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 902 (1993). Professor Oppenheimer further notes that "recent studies support the assertion that most discrimination is not the result of malice, hatred, ill will or bigotry: it is the result of unintended and unconscious stereotyping." *Id.* at 899.

Malice, however, is not an essential element for a disparate treatment claim. A plaintiff needs to show only that the employer has acted, at least in part, because of the plaintiff's protected status. *See* City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 (1978) (stating Title VII "precludes treatment of individuals as simply components of a racial, religious, sexual, or national class").

[114] Oppenheimer, *supra* note 113, at 908-09. As Professor Oppenheimer explains, "The high number of whites who view African Americans as less intelligent and less hard working than whites have particular significance for the issue of employment discrimination, since it is likely that employers selecting employees will choose those they view as the most

Consider again the case of *Slack v. Havens*.[115] There, direct evidence of Pohasky's racial motivation for the work assignment was supplied by his statement to the plaintiffs that "[c]olored folks are hired to clean because they clean better."[116] This statement, while offensive, provides evidence not only of an unlawful motivation but of an intent by Pohasky to further a business purpose. A supervisor who believes minorities or women are inferior, and who acts on that belief in making employment decisions, presumably also believes his employer's interests are furthered by his discriminatory actions, even if the employer has a policy against discrimination. Thus, traditional notions of respondeat superior frequently do support vicarious employer liability for an agent's discriminatory acts.

This reasoning breaks down, however, when applied to sexual harassment, whether of the quid pro quo or hostile work environment form. A supervisor who fires a woman for refusing to sleep with him, or who leers at and grabs his subordinates, is not acting, and cannot believe he is acting, to further his employer's interests.[117] Rather, he is acting for his own sexual gratification. Thus, the traditional scope-of-employment test does support a

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intelligent and hardworking." *Id.* at 909; *see also* Verkerke, *supra* note 28, at 294 (illustrating point with hypothetical of auto sales manager who, believing white males sell more cars, attempts to further employer's business by unlawfully refusing to hire nonwhites and women). The point is not to discount the seriousness, or the unlawfulness, of such discrimination. Rather, it is to dispel the assumption that supervisory discrimination routinely arises from personal ill will that the agent understands is against his employer's interests.

Admittedly, there are situations where such malice or hatred drives the decision and where the agent recognizes that his acts further no business purposes. Such cases would be outside the agent's scope of employment, and any vicarious liability must be analyzed accordingly.

[115] 7 Fair Empl. Prac. Cas. (BNA) 885 (S.D. Cal. 1973), *aff'd as modified*, 522 F.2d 1091 (9th Cir. 1975).

[116] *Id.* at 886.

[117] *See* Horn v. Duke Homes, 755 F.2d 599, 605 (7th Cir. 1985) (discussing motives behind harassment); Phillips, *supra* note 27, at 1243-45 (discussing how harassment fails scope-of-employment test); Staszewski, *supra* note 27, at 1075 (discussing personal motives behind harassment).

However, there can be hostile work environment scenarios in which respondeat superior would apply. For example, a supervisor may direct his subordinates to wear provocative clothing and to tolerate leers and grabs from clients in order to improve client relations. *See, e.g.*, EEOC v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981) (holding employer liable for requiring employee to wear sexually revealing uniform).

distinction between sexual harassment and other forms of prohibited discrimination.

This does not explain why courts have relieved employers of vicarious liability only in hostile work environment cases and not in those involving quid pro quo harassment.[118] Were respondeat superior, with its traditional scope-of-employment test, the only theory of vicarious liability supported by the law of agency, vicarious employer liability for quid pro quo harassment would be suspect.[119] Agency law, however, supports a broader approach to vicarious liability.[120] Even when conduct is outside the scope of employment, a master is vicariously liable if "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation."[121]

Because quid pro quo harassment, by definition, involves the granting or withholding of a job benefit or detriment, it is the supervisor's status as an agent that allows him to engage in the harassment.[122] One who lacks power over another's terms and conditions of employment cannot engage in quid pro quo harassment. Without the agency relationship, and the power it confers, there would be no statutory wrong.

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[118] *See supra* notes 69-71 and accompanying text (discussing vicarious employer liability for quid pro quo harassment).

[119] *See* Phillips, *supra* note 27, at 1243-45 (noting scope-of-employment test would absolve employer of vicarious liability for quid pro quo harassment); Staszewski, *supra* note 27, at 1099 (same).

[120] Katherine S. Anderson, Note, *Employer Liability Under Title VII for Sexual Harassment After* Meritor Savings Bank v. Vinson, 87 COLUM. L. REV. 1258, 1275-77 (1987). While the Court in *Meritor* rejected the D.C. Circuit's attempt to impose strict liability on employers, it did *not* purport to limit vicarious liability under Title VII to respondeat superior. Any attempt to do so would be inconsistent with the NLRA, on which Title VII was modeled. *See infra* notes 143-154 and accompanying text (using NLRA's legislative history to interpret Title VII). Instead, the Court directed application of common-law agency principles, which include, but are not limited to, respondeat superior. *But see* Weddle, *supra* note 27, at 734 (stating Court implied "respondeat superior is the agency principle of choice").

[121] RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958). *See also Policy Guidance on Sexual Harassment*, *supra* note 45, at 6697 (recognizing supervisor is agent not only when acting within scope of his authority, but also when falling within exception to scope-of-employment rules contained in § 219(2)(d)).

[122] Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982); Sykes, *supra* note 5, at 607 (stating "such harassment cannot occur absent the enterprise hierarchy"); *Policy Guidance on Sexual Harassment*, *supra* note 45, at 6694-95.

As others have recognized, this reasoning also explains, on a broader basis, why vicarious liability for intentional discrimination exists.[123] Even when discrimination is outside the scope of employment,[124] vicarious liability is still supported by common-law agency principles because it is the existence of the agency relationship that enables the supervisor to commit a statutory violation.

Discrimination-at-large is not prohibited by federal law. For a violation of Title VII, the ADEA, or the ADA to occur, there must be discrimination in the terms, conditions, or privileges of employment. It is the supervisor's status *as supervisor* that gives him power over the terms, conditions, and privileges of another's

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[123] *See* Shager v. Upjohn, 913 F.2d 398, 403 (7th Cir. 1990) (discussing how violation could not occur without employment status); *Policy Guidance on Sexual Harassment*, *supra* note 45, at 6694 n.27 (same); Douglas, *supra* note 74, at 293 (same); Sykes, *supra* note 5, at 604-08 (same); Smith, *supra* note 108, at 314-18 (same). *But see* Verkerke, *supra* note 28, at 301 (recognizing but criticizing this analysis).

[124] The traditional scope-of-employment doctrine requires that the employee act, at least in part, to further his employer's purposes. *See supra* notes 102-106 and accompanying text (discussing scope-of-employment requirement). However, a number of jurisdictions have, as a matter of common law, abandoned this traditional test in favor of a broader approach to scope of employment. These jurisdictions reason that if the employment relationship *caused* the harm, the act is within the scope of the agent's authority and respondeat superior liability exists. Sykes, *supra* note 5, at 588-89; Anderson, *supra* note 120, at 1272-77. This expanded approach to respondeat superior liability is justified as a means of allocating to the employer the cost of harm caused by the enterprise. Horn v. Duke Homes, 755 F.2d 599, 605 (7th Cir. 1985); KEETON ET AL., *supra* note 5, § 69, at 500; Sykes, *supra* note 5, at 590-93.

This broad approach would bring any discriminatory decision violative of Title VII, the ADA, or the ADEA within the scope of the agent's employment, without regard to motive. Verkerke, *supra* note 28, at 303. It is the supervisor's exercise of his supervisory authority that has caused the plaintiff's harm. A number of courts and commentators have relied on precisely this reasoning to find respondeat superior liability for supervisory discrimination. *E.g.*, Horn v. Duke Homes, 755 F.2d 599, 604-05 (7th Cir. 1985).

However, this reasoning is akin to the strict liability theory articulated by the D.C. Circuit in *Vinson* and rejected by the Supreme Court in *Meritor*. The *Meritor* Court's citation to the Restatement's respondeat superior provisions appears to signal an acceptance of the traditional approach to scope of employment. Weddle, *supra* note 27, at 732.

Accordingly, rather than rely on the more modern and expansive respondeat superior approach to justify vicarious liability, this Article explains why supervisory discrimination, outside of the hostile work environment context, either falls neatly within traditional notions of scope of employment or is nonetheless conduct for which the employer is vicariously liable notwithstanding the scope of the agent's employment.

employment. Without that status, he could not violate the statute.[125]

This explanation also serves to distinguish hostile work environment harassment from other forms of unlawful employment discrimination.[126] For example, all circuits and the EEOC agree that an employer is not vicariously liable for co-worker harassment.[127] First, as with supervisors, any co-worker harassment would fall outside the scope of employment because it would not be motivated by a purpose to further the employer's business.[128] Second, in the usual case the employer has conferred no authority,

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[125] *Cf.* Weddle, *supra* note 27, at 745 (using similar reasoning to argue Title VII imposes nondelegable duty on employers not to discriminate). Weddle, as have others, uses the "nondelegable duty" approach to argue in favor of an employer's strict liability for all employment discrimination, including hostile work environment sexual harassment. *Id.* at 744-46. *See also* Note, *Sexual Harassment and Title VII*, *supra* note 7, at 1028 (arguing Title VII should be read as imposing nondelegable duty on employer to maintain establishment free of unlawful employment practices).

A "nondelegable duty" approach to the statute would be appealing if one were writing on a clean slate. However, such an approach must be rejected as inconsistent with the Court's decision in *Meritor* and with the legislative history of the National Labor Relations Act, the statute on which Title VII was modeled. *See infra* notes 143-154 and accompanying text (interpreting Title VII using legislative history of NLRA).

[126] *But see* Verkerke, *supra* note 28, at 304 (rejecting distinction and arguing "the authority argument is little more than a causation argument dressed up in the language of agency law"). Verkerke states that if employers are to be liable because their delegation of authority has caused harm, then they also should be liable for co-worker harassment because their gathering of co-workers together has enabled the harm. *Id.* Finding no meaningful distinction in agency law between hostile work environment harassment and individual disparate treatment claims, he then argues in favor of applying the notice liability standard used in hostile work environment cases to all individual disparate treatment claims. *Id.*

However, a distinction *does* exist. While an employer has gathered co-workers together, no co-worker possesses power over another. In the absence of delegated authority, co-workers are no more enabled to harass each other on the job than they are off the job. Moreover, when a strong and effective sexual harassment policy is in place, co-workers are (or should be) *less* apt to harass each other on the job than outside the work context because of the threat of employer discipline.

At the same time, Professor Alan Sykes's observations that the employment relationship has not really "caused" harm when co-workers harass each other is a bit overbroad. For example, a formerly all male work crew may harass a new female worker because they resent her working alongside them. In such cases, the employment relationship has caused the harassment, but the employer has clothed these workers with no authority to harass. Sykes, *supra* note 5, at 608-09.

[127] 29 C.F.R. § 1604.11(c) (1995).

[128] Shager v. Upjohn Co, 913 F.2d 398, 405 (7th Cir. 1990). *But see supra* note 73 and accompanying text (noting co-workers, like supervisors, can create hostile work environment).

real or apparent, that enables co-workers to commit a statutory violation when they harass each other.[129]

Of course, co-worker harassment can ultimately result in employer liability if the employer knew or should have known of the harassment and failed to take appropriate steps to remedy it.[130] But such liability is direct, not vicarious.[131] If the employer knew of the harassment and failed to take reasonable steps to correct it, it is the employer's own inaction that is the statutory wrong.[132]

When a supervisor, as opposed to a co-worker, engages in hostile work environment harassment, the question is more difficult. Most circuits apply the direct liability standard in these cases as well, holding an employer liable only if it knew or should have known of the harassment.[133] They reason that, unlike quid pro quo cases, in which a supervisor exerts his actual authority to affect the terms, conditions, or privileges of a subordinate's employment, no actual or apparent authority is wielded when a supervisor engages

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[129] Co-workers, by definition, cannot engage in quid pro quo harassment because they lack power over each other. Nor does a co-worker usually enjoy actual or apparent authority to torment or harass another. *See* Chudacoff, *supra* note 45, at 545 (arguing that without authority, co-worker's harassment falls outside scope of employment); *see also* EEOC Guidelines on Discrimination Because of Sexual Harassment, 29 C.F.R. § 1604.11(c) (1995) (noting EEOC will determine employee's status as supervisor or agent on case-by-case basis).

It is the rare situation, moreover, in which a single incident will give rise to a hostile working environment. *See Policy Guidance on Sexual Harassment supra* note 45, at 6690 (explaining single incidents generally are insufficient to constitute Title VII violation). An employee confronted with sexual misconduct by her co-worker can put her employer on notice of the conduct before it becomes severe or pervasive without the same fear of retaliation that may be present when supervisory harassment is occurring.

This is not to minimize the difficulty victims experience in speaking out when harassment occurs. *See* Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C. L. REV. 499, 522-24 (1994) (discussing reasons why victims may not lodge complaints). But in trying to determine whether an employer should be held vicariously liable, it is appropriate to ask whether the victim could have taken steps to stop the wrongdoing from occurring.

[130] 29 C.F.R. § 1604.11(c) (1995); 29 C.F.R. § 1606.8(c) (1995); Carr v. Allison Gas Turbine Div., 32 F.3d 1007 (7th Cir. 1994); Verkerke, *supra* note 28, at 281.

[131] Carrillo, *supra* note 17, at 57-58; Turner, *supra* note 12, at 843-44.

[132] Guess v. Bethlehem Steel Corp., 913 F.2d 463 (7th Cir. 1990). For a mislabelling of this standard as respondeat superior, see Rabidue v. Osceola Ref. Co., 805 F.2d 611, 621 (6th Cir. 1986).

[133] *See* Lewis & Henderson, *supra* note 10, at 675-78 (collecting relevant cases).

in hostile work environment harassment.[134]

It was this point with which Justice Marshall disagreed in *Meritor*, noting that supervisors, unlike co-workers, *do* have general authority over workplace conditions.[135] This authority, moreover, enables supervisors to engage in hostile work environment harassment because their victims, unlike those of a co-worker, are more apt to suffer in silence.[136] Thus, Justice Marshall would find that agency principles support vicarious employer liability for supervisory, as opposed to co-worker, harassment.[137]

This Article does not attempt to answer the narrow question of supervisory authority over the work place, as that issue has been dealt with exhaustively elsewhere.[138] Reasonable people can and

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[134] However, as the EEOC and some circuits properly recognize, when a supervisor creates a hostile environment through threats or intimidation, the agency relationship has enabled him to violate the statute, and therefore vicarious liability is appropriate. *Policy Guidance on Sexual Harassment*, *supra* note 45, at 6697; *Karibian*, 14 F.3d at 780; Staszewski, *supra* note 27, at 1093-94. *But see* Gary v. Long, 59 F.3d 1391, 1396 (D.C. Cir. 1995) (stating threats alone not enough; "the supervisor must have wielded the authority entrusted to him to subject the victim to adverse job consequences" in order to impose liability on employer).

[135] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 76 (1986) (Marshall, J., concurring). Furthermore, the EEOC contends apparent authority will exist unless the employer has "a strong, widely disseminated, and consistently enforced employer policy against sex harassment, and an effective complaint procedure." *Policy Guidance on Sexual Harassment*, *supra* note 45, at 6697.

[136] "[I]t is the authority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates." *Meritor*, 477 U.S. at 76-77 (Marshall, J., concurring). A number of commentators have agreed with Justice Marshall's approach to employer liability, reasoning that supervisory authority over workplace conditions justifies vicarious liability. *E.g.*, Sykes, *supra* note 5, at 35; Anderson, *supra* note 120, at 1275; Chudacoff, *supra* note 45, at 543-44; Lutner, *supra* note 13, at 601; Smith, *supra* note 108, at 318.

[137] *Meritor*, 477 U.S. at 77 (Marshall, J., concurring). Justice Marshall, however, stopped short of imposing strict liability on the employer for all supervisory harassment. Only if the supervisor has supervisory authority over the victim would he hold the employer liable. *Id.*; *accord* Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451 (5th Cir. 1994) (holding foreman not "employer" because he was not discriminatee's supervisor). This distinction separates Justice Marshall's view from the automatic liability rule endorsed by the D.C. Circuit and rejected by the *Meritor* majority. Presumably it was on this basis that Justice Stevens joined both opinions.

[138] *See generally supra* note 27 (listing sources addressing employer liability for sexual harassment). Moreover, the issue's proper resolution could vary from case to case, depending upon the authority wielded by a particular superior in the context of a particular workplace. *See* Staszewski, *supra* note 27, at 1087-93 (discussing avenues under agency law for

do disagree over whether supervisory personnel have apparent authority to establish a workplace atmosphere or environment, particularly when the employer has in place an effective and publicized policy against harassment.[139]

My point is that this debate should cast no shadow on the question of vicarious liability outside the hostile work environment context. Other forms of employment discrimination are either within the agent's scope of employment, making respondeat superior applicable, or are unquestionably enabled by the agency relationship, rendering the employer vicariously liable even though the act was outside the scope of employment. Agency principles thus support vicarious employer liability for employment discrimination. Agency principles also explain a distinctive treatment for hostile work environment claims, although they do not dictate how

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employer liability for supervisor discrimination).

[139] *Compare Policy Guidance on Sexual Harassment*, *supra* note 45, at 6697 (asserting that although supervisor has apparent authority to control work environment, employer may divest supervisor of that authority through effective sexual harassment policy); Turner, *supra* note 27 (same); Staszewski, *supra* note 27, at 1088-89 (same) *with* Lutner, *supra* note 13, at 601 (commenting supervisor has "delegated power to define acceptable workplace conditions"); George, *supra* note 95, at 36 (same).

The EEOC itself has vacillated on this issue. Its 1980 Interpretative Guidelines on Sexual Harassment appeared to impose strict liability for all sexual harassment by a supervisor. 29 C.F.R. § 1604.11(c) (1995). In an amicus brief to the Court in *Meritor*, however, the EEOC changed course, claiming employers should be liable only if they knew or should have known of the harassment. *Meritor*, 477 U.S. at 77 (citing EEOC's amicus brief). Finally, in its 1990 Policy Guidance, the EEOC explained its Guidelines, contending that an employer will always be liable for a hostile work environment when a supervisor was acting in an agency capacity and that such capacity will exist "in the absence of a strong, widely disseminated and consistently enforced policy against sexual harassment, and an effective complaint-procedure." *Policy Guidance on Sexual Harassment*, *supra* note 45, at 6697.

To the extent that any conflict now exists between the Guidelines and the Policy Guidance, the Guidelines, promulgated after notice and comment, would control. *See* Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 102-07 (explaining binding nature of EEOC interpretations). However, as the Policy Guidance merely explains more fully what the agency meant in its guidelines, no conflict likely exists.

The EEOC's interpretive guidelines, however, do not necessarily resolve the vicarious liability question. While courts should defer to the EEOC's statutory construction of ambiguous statutory language, *id.*, whether courts should defer to the EEOC's interpretations of the common law of agency is much less clear. *See* Jonathan D. Hacker, Note, *Are Trojan Horse Union Organizers "Employees"? A New Look at Deference to the NLRB's Interpretation of NLRA Section 2(3)*, 93 MICH L. REV. 772, 776 (1995) (questioning court's duty to defer to NLRB's interpretation when the Board is applying common-law agency principles).

the issue ultimately should be resolved. Accordingly, any attempt to use agency-law rationales developed in hostile work environment caselaw to broadly eviscerate vicarious employer liability fails.

B. A STATUTORY APPROACH TO VICARIOUS LIABILITY

As discussed, common-law agency principles support vicarious employer liability for discrimination, and in *Meritor* the Court read the statutory definition of employer, with its "and any agent" language, as an incorporation of this common-law approach.[140] Title VII, ADEA, and ADA claims, however, are not common-law claims but statutory ones.[141] Therefore, it is appropriate to question whether vicarious employer liability is supported by the statutes' structures, purposes, and history.

Unfortunately, no legislative history exists regarding vicarious liability under any of these statutes.[142] However, their predecessor, the National Labor Relations Act (NLRA), does include such legislative history.[143] The NLRA, on which Title VII was modeled,[144] defines "employer" to include "any person acting as an agent of an employer."[145] The Taft-Hartley Amendments to the NLRA substituted this definition for that found in the Wagner Act, which defined employer to include any person "acting in the interest of an employer."[146]

Under the Wagner Act, employers had been held liable for the actions of persons who were not acting within the scope of their

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[140] *Meritor*, 477 U.S. at 72.

[141] This perhaps explains why, prior to *Meritor*, the lower courts rarely invoked agency law analysis when holding employers strictly liable, pointing instead to the relevant statutory goals and purposes. *See* Horn v. Duke Homes, 755 F.2d 599, 605 (7th Cir. 1985) (finding, as one of few pre-*Meritor* decisions to discuss agency principles, that Title VII demands employer liability "whatever the result under the common law of agency").

[142] *See supra* note 58 and accompanying text (commenting that courts have been unable to find applicable legislative history).

[143] 29 U.S.C. §§ 141-87 (1988 & Supp. V 1993).

[144] *Meritor*, 477 U.S. at 75 n.1 (1986) (Marshall, J., concurring); Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975); Low v. Hasbro, Inc., 817 F. Supp. 249, 250 (D.R.I. 1993); White, *supra* note 139, at 56 n.27; *see also* Franke, *supra* note 27, at 41 (noting NLRA served as model for original versions of Title VII).

[145] 29 U.S.C. § 152 (1988).

[146] National Labor Relations Act, ch. 372, 49 Stat. 449, 450 (1935); *Low*, 817 F. Supp. at 250.

authority,[147] and those cases prompted employers to demand that the statutory language be amended.[148] At the same time, Congress was reluctant to allow employers to evade vicarious liability by claiming that their employees' acts were neither authorized nor ratified.[149] Thus, in amending the NLRA to include "agents" within the statutory definition, Congress made clear its intent not only to absolve employers from liability for actions of persons who were *not* their agents but also to hold employers liable, using the common law of agency, for the acts of those who were.[150]

The NLRA makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights under the statute or to discriminate in order to encourage or

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[147] H.R. REP. NO. 245, 80th Cong., 1st Sess. 11 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 292, 302. The House Report provides:

> [T]he Board frequently "imputed" to employers anything that anyone connected with an employer, no matter how remotely, said or did, notwithstanding that the employer had not authorized what was said or done, and in many cases even had prohibited it. By such rulings, the Board often was able to punish employers for things they did not do, did not authorize and had tried to prevent.

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

[148] *See, e.g.*, International Ass'n of Machinists v. NLRB, 311 U.S. 72, 80 (1940) (concluding actions were attributable to employer "even though the acts of the so-called agents were not expressly authorized or might not be attributable to him on strict application of the rules of *respondeat superior*") (italics in original).

[149] 93 CONG. REC. 6858-59 (June 12, 1947) (statement of Sen. Taft).

[150] The bill, by defining as an "employer" "any person acting *as an agent* of an employer" makes employers responsible for what people say or do only when it is within the *actual* or *apparent* scope of their authority, and thereby makes the ordinary rules of the law of agency equally applicable to employers and to unions.

H.R. REP. NO. 245, *supra* note 147, at 302; *see also* 93 CONG. REC. 6641 (June 5, 1947) (providing definition of "employer" under NLRA). To ensure that employers would not be able to avoid liability for the acts of their agents, Congress defined "agent" to provide that "the question of whether the specific acts were actually authorized or subsequently ratified shall not be controlling." National Labor Relations Act, § 2(13), 29 U.S.C. § 152(13) (1988). As described by Senator Taft, "This restores the law of agency as it has been developed at common law." 93 CONG. REC. 6859 (June 12, 1947); *see also* Friend v. Union Dime Sav. Bank, 24 Fair Empl. Prac. Cas. (BNA) 1307, 1310 (S.D.N.Y. 1980) (applying to ADEA reasoning from legislative history of NLRA to find defendants were not agents), *cited in* Greer, *supra* note 27, at 1843-44.

discourage union membership.[151] Employers routinely have been held liable for supervisory actions that violate the statute, whether or not those acts were authorized and even when they were prohibited.[152] When a supervisor fires an employee because of his views on unionization or threatens more onerous working conditions if the workplace becomes unionized, the employer is vicariously liable.[153] Such has been the uniform interpretation of the NLRA.

It was against this backdrop that Congress passed Title VII, borrowing from the NLRA its definition of employer.[154] The longstanding acceptance of vicarious liability under the NLRA may explain the paucity of discussion by Congress or the courts on whether vicarious liability was intended under Title VII, the ADEA, and the ADA. Its incorporation, through use of the term "agents," was simply understood.

Additionally, the remedial scheme originally devised for Title VII was interpreted to allow recovery of only equitable remedies for a statutory violation.[155] Section 706(g) provides that a court may enjoin unlawful practices and order "such affirmative action as may be appropriate, which may include, but is not limited to, reinstate-

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[151] National Labor Relations Act §§ 8(a)(1)-(3), 29 U.S.C. §§ 158(a)(1)-(3) (1988).

[152] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 75 (1986) (Marshall, J., concurring); Graves Trucking v. NLRB, 692 F.2d 470, 472 (7th Cir. 1982); Gary W. Florkowski, *Personal Liability Under Federal Labor and Employment Laws: Implications for Human Resources Managers*, 14 EMP. REL. L.J. 593, 594 (1989) ("[M]anagerial misconduct generally will be assigned to the employer.").

[153] *Graves Trucking*, 692 F.2d at 472-74; Florkowski, *supra* note 152, at 594.

Interestingly, some courts under the NLRA have drawn a liability distinction similar to the one drawn by the EEOC's Policy Guidance on Sexual Harassment. Supervisory harassment or intimidation of union adherents is attributable to the employer *unless* the employer strongly and promptly repudiates the conduct. *See* NLRB v. Miami Coca-Cola Bottling Co., 222 F.2d 341, 346 (5th Cir. 1955) (refusing to hold employer liable for supervisor's misconduct in light of immediate disciplinary action). *Miami Coca-Cola Bottling* supports the distinctive approach to hostile environment cases endorsed by the EEOC, whose policy guidance relieves an employer of liability if it takes "immediate and appropriate action to correct the harassment." *Policy Guidance on Sexual Harassment*, *supra* note 45, at 6696.

[154] *See supra* notes 142-145 and accompanying text (providing NLRA's definition of "employer").

[155] Although the Supreme Court never directly addressed this issue, the lower courts were in agreement that compensatory and punitive damages were unavailable under Title VII prior to its amendment by the 1991 Civil Rights Act. Congress's amendment to add these damages appears to confirm this interpretation. 42 U.S.C. § 1981a (Supp. V 1993).

ment or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice)."[156] That reinstatement and hiring are remedies only an employer, not an individual, can provide strongly supports a vicarious liability approach to the statute.[157] Were there no vicarious liability, victims of discrimination would often be denied meaningful relief.

But, Title VII's backpay provision could be read to impose only direct liability.[158] In other words, if one views agents as statutory employers,[159] then one could read the statute (and some have) as placing backpay liability only on the statutory employer who actually committed the discriminatory act, thereby absolving the employing entity of backpay liability.

Such a reading of section 706(g) is incorrect. This statutory language, like the definition of employer, also was borrowed directly from the NLRA.[160] Under the NLRA, agents have not been held personally liable for backpay.[161] Thus, Congress most likely did *not* have a direct liability scheme in mind when it borrowed the NLRA's language. Rather, the language is better read simply to make clear that unions and employment agencies may be held liable for backpay under Title VII, just as unions may be held liable for backpay under the NLRA.

The 1991 Civil Rights Act's addition of punitive damages, however, raises questions on vicarious liability that have no NLRA

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[156] Civil Rights Act of 1964 § 706(g), 42 U.S.C. § 2000e-5 (1988 & Supp. V 1993).

[157] Grant v. Lone Star Co., 21 F.3d 649, 652-53 (5th Cir.), *cert. denied*, 115 S. Ct. 574 (1994).

[158] Verkerke, *supra* note 28, at 287-88, 289 n.45.

[159] *See infra* notes 188-199 and accompanying text (discussing whether agents should be considered statutory employers and therefore personally liable under these statutes).

[160] National Labor Relations Act § 10, 29 U.S.C. §§ 141-87 (1988 & Supp V. 1993); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 75 n.1 (1986) (Marshall, J., concurring); Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975).

[161] *See* Florkowski, *supra* note 152, at 594 (recognizing NLRA's language would support individual liability, but NLRB and courts "have reflected little willingness to adopt this perspective"); *see also* Friend v. Union Dime Sav. Bank, 24 Fair Empl. Prac. Cas. (BNA) 1307, 1310 (S.D.N.Y. 1980) (drawing from NLRA's legislative history to reject individual liability under Title VII and ADEA).

counterpart.[162] As amended, Title VII and the ADA permit recovery of punitive damages for intentional discrimination engaged in with malice or reckless indifference.[163]

At common law, a principal sometimes may be absolved from punitive damages arising from his agent's torts.[164] Taking note of *Meritor*'s suggestion that agency law should be consulted in determining employer liability questions,[165] employers may argue that they are shielded from punitive damages claims resulting from their agents' misconduct.[166]

Under the Restatement (Second) of Agency, however, a principal is liable when "the agent was employed in a managerial capacity and was acting in the scope of employment."[167] As previously discussed, much supervisory discrimination will fall within the scope of employment, and employers therefore often would be vicariously liable at common law.[168]

More important, nothing in the legislative history of the 1991 Civil Rights Act suggests Congress intended an exception for vicarious employer liability when it comes to punitive damages.[169] In fact, the statutory structure is quite to the contrary. By enacting damages caps geared toward the size of the *employing entity*, Congress demonstrated its understanding that the employing entity would be responsible for paying these damages.[170]

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[162] Compensatory and punitive damages are not available under the NLRA. 29 U.S.C. § 160 (1988 & Supp. V 1993).

[163] 42 U.S.C. § 1981a (Supp. V 1993).

[164] KEETON ET AL., *supra* note 5, at 499 n.3.

[165] *Meritor*, 477 U.S. at 72.

[166] *See* Preston v. Income Producing Mgt., 871 F. Supp. 411, 415 (D. Kan. 1994) (rejecting employer's argument); *see also* Franke, *supra* note 27, at 51 (contending punitive damages would not be recoverable from vicariously liable employer).

[167] RESTATEMENT (SECOND) OF AGENCY § 217C(c) (1958).

[168] *See supra* notes 113-117 and accompanying text (noting supervisors may simultaneously discriminate *and* believe they are serving employer's interest). When a supervisor is *not* a manager, however, employers may try to invoke this exception.

[169] The legislative history simply makes repeated reference to employers, without discussing questions of vicarious or personal liability. *See* Goldberg, *supra* note 27, at 580 (discussing absence of legislative history); Lamberson, *supra* note 27, at 426 (same).

[170] The statute places limits on the amount of compensatory and punitive damages that may be awarded, ranging from $50,000 for employers with less than 100 employees to $300,000 for employers with 500 or more employees. 42 U.S.C. § 1981a(6)(3) (Supp. V 1993). Assessing damages based on employer size makes sense only if the employer is responsible for paying the damages.

Vicarious liability, moreover, is a necessary means of accomplishing the statutes' goals.[171] It is the employer who is best positioned to remedy discrimination when it occurs.[172] An award of backpay and compensatory and punitive damages against a supervisor often may be uncollectible, as most individuals do not have the assets to satisfy such awards. Thus, vicarious liability ensures that victims of discrimination will be fully compensated,[173] a primary purpose of the employment discrimination statutes.[174]

Second, it is the employer's delegation of authority to its agent *within the employment relationship* that has "caused" the wrong.[175] Absent an employment relationship, there is no statutory violation.[176] An individual who chooses, in his relationships outside the workplace, not to associate with minorities or women does not violate Title VII. It is the delegation of power from the employer to the individual supervisor that enables one individual to inflict a statutory harm on another.[177] Thus, vicarious liability is even more obviously appropriate in statutory claims that depend on the employment relationship for their existence than in garden-variety tort cases.

Although the damages provision could be interpreted to impose such damages on employers only when they are directly, not vicariously, liable, that interpretation would render damages unavailable in the vast majority of intentional discrimination cases, a result at odds with the legislative history.

However, when an employer is vicariously liable for punitive damages, insurance coverage for these amounts should be enforceable. Sean W. Gallagher, Note, *The Public Policy Exclusion and Insurance for Intentional Employment Discrimination*, 92 MICH. L. REV. 1256, 1325-26 (1994).

[171] Horn v. Duke Homes, 755 F.2d 599, 605 (7th Cir. 1985); Phillips, *supra* note 27, at 1262.

[172] Sometimes, meaningful remedies may only be supplied by the employer. *See supra* note 157 and accompanying text (discussing employers' control over reinstatement and hiring).

[173] Sykes, *supra* note 5, at 567-69.

[174] Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

[175] Sykes, *supra* note 5, at 605-07. Professor Sykes has forcefully argued for vicarious liability whenever a tort is *caused* by the employment enterprise because in these cases vicarious liability is economically efficient. This theory clearly supports vicarious liability in employment discrimination cases, for without the employment relationship there could be no wrong at all. *Id.*

[176] *Id.*

[177] *See* Weddle, *supra* note 27, at 745 (recognizing employer has "nondelegable duty" to not discriminate).

In addition, vicarious liability makes employment discrimination litigation more efficient.[178] Holding an employer vicariously liable for the discriminatory acts of its agents eliminates the need to determine whether the employer either (1) knew or should have known of the discrimination and failed to take steps to remedy it, or (2) negligently hired or retained the discriminating supervisor. Were employers only directly liable for discrimination, such determinations would be a necessary component of liability. Layering such inquiries onto the existing analysis for disparate treatment claims, with its search for discriminatory motive and causation, is to render the litigation more lengthy and more expensive. While efficiency is an insufficient basis for imposing liability on employers as a matter of policy, a statutory interpretation that streamlines cases is more consistent with the statutory goals of expediting employment discrimination litigation.[179]

Finally, without vicarious liability, the deterrent purposes of the statute would be undermined.[180] An employer on the line for damages occasioned by its agents' discrimination not only has a powerful incentive to ensure those agents comply with the law but also has the means to do so. An employer can provide training programs to acquaint its agents with discrimination law. Disciplinary actions, up to and including discharge, can make clear to agents the price for noncompliance.[181]

Thus, it is not surprising that courts have long understood Title VII and its younger companions to encompass vicarious liability.

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[178] I thank my colleague, Tom Eaton, for this observation.

[179] "It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited." Civil Rights Act of 1964 § 706(f)(5), 42 U.S.C. § 2000e-5(f)(5) (1988); Americans With Disabilities Act § 107, 42 U.S.C. § 12117(a) (Supp. V 1993).

[180] Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975). The Court noted in *Albemarle Paper*:

> It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."

Id. at 417-18 (citations omitted); *see also* Horn v. Duke Homes, 755 F.2d 599, 605 (7th Cir. 1985) (discussing policies behind imposing vicarious liability).

[181] *See* Sykes, *supra* note 5, at 607 (arguing vicarious liability creates incentives for employers to prevent harassment).

Although little analysis on the issue has occurred outside the hostile work environment context, the courts' approach to vicarious liability, once analyzed, makes perfect sense. Vicarious liability logically flows from a statute that makes liability contingent on an employment relationship and is a necessary component of the federal statutory scheme outlawing on-the-job discrimination.

IV. PERSONAL LIABILITY

Determining that employers are vicariously liable for their agents' employment discrimination only partially solves the liability puzzle. Still to be resolved is the issue of an agent's personal liability for that discrimination. This issue has provoked disagreement among the lower courts and has never been considered by the Supreme Court.[182]

As before, confusion of the issue arises from the statutory definition of employer. As previously set forth, the lower courts unanimously have found that Congress's inclusion of "agents" within the definition of employer was meant to incorporate vicarious liability principles into the statutes. Accepting this reading of the statute, however, does not necessarily answer the question of personal liability.[183]

At common law, agents are individually responsible for their own torts, whether or not their employers are also vicariously liable for the wrongdoing.[184] Thus, if common-law principles were to apply to discrimination law, individuals would be personally liable for their acts under Title VII, the ADEA, and the ADA. Because these are not common-law claims,[185] however, the question is whether

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[182] *See supra* notes 23-24 and accompanying text (citing courts with opposing views on personal liability issue).

[183] The employee and employer, for example, could be held jointly and severally liable for discrimination when the employer's liability is vicarious.

[184] Griffith v. Keystone Steel & Wire, 858 F. Supp. 802, 805 (C.D. Ill. 1994); RESTATEMENT (SECOND) OF AGENCY § 343 (1958); Goldberg, *supra* note 27, at 589.

[185] "[C]ommon law [agency] principles may not be transferable in all their particulars to Title VII." Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986); *see also* Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1, 73 (1990-91) (recognizing Court in early cases "demarked the Title VII claim as special, as something other than a garden-variety tort" and criticizing Reagan Court's tort like approach to Title VII).

Congress intended to impose personal liability or, through its definition of employer, intended only a vicarious liability scheme.

In answering this question, recall that an individual must be an "agent" before personal liability even arguably could be imposed. Only "employers" are prohibited from discriminating, and unless the statutory definition of employer is satisfied, there can be no statutory violation.[186] Accordingly, if the individual is not acting in an agency capacity when he discriminates, the question of personal liability does not arise.[187]

Although the Court in *Meritor* invoked the common law of agency in resolving employer vicarious liability questions, it was not addressing, and has never addressed, the issue of personal liability.

[186] In addition, for an individual defendant to be held liable, the plaintiff must timely file an EEOC charge implicating that individual. Bishop v. Okidata, Inc., 864 F. Supp. 416, 424-25 (D.N.J. 1994); *cf.* Dirschel v. Speck, 66 Empl. Prac. Dec. (CCH) ¶ 43,490 (S.D.N.Y. 1994) (holding omission of CEO's name in original EEOC charge did not require dismissal of suit against CEO because "identity" existed between CEO and company); Poulsen v. City of North Tonawanda, 811 F. Supp. 884, 891 (W.D.N.Y. 1993) (finding exceptions to general rule that inclusion of individual names in EEOC charge is prerequisite to suit).

[187] While this conceivably may leave some victims with no remedy, "a court may not expand liability onto another class of persons merely to meet that purpose [of eradicating discrimination] in the absence of a congressional directive." Lowry v. Clark, 843 F. Supp. 228, 231 (E.D. Ky. 1994); *see also* Sanborn, *supra* note 27, at 175 ("[S]upervisors cannot be considered agents when acting outside the scope of employment."). Moreover, if vicarious liability principles are properly applied, such cases should occur only infrequently. *But see* Gary v. Long, 59 F.3d 1391, 1396 (D.C. Cir. 1995) (concluding incorrectly that no liability existed, despite supervisor's threatening of victim with adverse job actions).

This point has been misunderstood by some courts. In hostile work environment harassment cases, for example, when the employer has been found not vicariously liable, courts have reasoned that individual liability is necessary in order to provide a remedy under Title VII for the plaintiff. *E.g.*, Johnson v. University Surgical Group Assocs., 871 F. Supp. 979, 986 (S.D. Ohio 1994); *see also* Goldberg, *supra* note 27, at 582 ("Agent liability, therefore, furthers the congressional goal of compensating the victims of discrimination by providing a defendant against whom a plaintiff realistically can prevail in cases in which doctrinal gaps foreclose recovery against employers."). If the supervisor is acting as an agent, however, vicarious employer liability will exist; if he is not acting as an agent, then he is not acting as an "employer" and therefore cannot be liable under the statutes.

Regardless of an individual's personal liability under federal employment discrimination statutes, he still may be liable for common-law torts under state law. Moberly & Miles, *supra* note 20, at 496-97; *see also* Saville v. Houston County Healthcare Auth., 852 F. Supp. 1512, 1540-42 (M.D. Ala. 1994) (finding defendant's harassment presented jury question on invasion-of-privacy and assault-and-battery claims). Questions of such liability are beyond the scope of this Article.

A. THE CONFLICT IN THE LOWER COURTS

Courts imposing personal liability on agents frequently have invoked a "plain meaning" approach to the statute.[188] These courts assert that because agents are included within the statutory definition of employer, they are persons on whom liability may be imposed under Title VII, the ADEA, and the ADA.[189] To date, these courts have not used this plain meaning approach to disavow vicarious liability theories, but only to impose personal liability on the discriminating agent.[190]

Personal liability, these courts reason, also serves an important deterrence function.[191] If individuals know they will be held accountable for their discriminatory acts, they will be less inclined to discriminate. While an employer's discipline often does serve as

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[188] A "plain meaning" approach to statutory construction can mean either that the statute is clear and unambiguous *or* that the ordinary meaning of a statute's language should receive greater weight than legislative history or policy arguments. Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561, 1563-66 (1994) (*reviewing* LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES (1993)). Those courts applying a "plain meaning" approach to Title VII liability issues appear to use the term in the former sense. *E.g.*, Jendusa v. Cancer Treatment Ctrs. of Am., 868 F. Supp. 1006, 1010 (N.D. Ill. 1994); *see also* Goldberg, *supra* note 27, at 575 ("Thus, simply substituting the statutory definition of employer into the provisions defining unlawful employment practices plainly establishes a basis for agent liability.").

[189] *E.g.*, Jones v. Continental Corp., 789 F.2d 1225, 1231 (6th Cir. 1986) ("[T]he law is clear that individuals may be held liable for violations of § 1981, and as 'agents' of an employer under Title VII." (citations omitted)); Matthews v. Rollins Hudig Hall, 874 F. Supp. 192, 194-95 (N.D. Ill. 1995) (interpreting ADEA); Jendusa v. Cancer Treatment Ctrs. of Am., 868 F. Supp. 1006, 1010 (N.D. Ill. 1994) (interpreting ADA); Bishop v. Okidata, Inc., 864 F. Supp 416, 422 (D.N.J. 1994) (same); Griffith v. Keystone Steel & Wire Co., 858 F. Supp. 802, 805-06 (C.D. Ill. 1994) (interpreting Title VII); Lamirande v. Resolution Trust Corp., 834 F. Supp. 526, 528-29 (D.N.H. 1993) (same); *see also* Sanborn, *supra* note 27, at 171 ("[B]ecause the definition of 'employer' includes agents, the damages provisions of Title VII and the ADEA extend to hold agents liable."); Note, *Sexual Harassment and Title VII*, *supra* note 7, at 1030 ("[A]n agent of an employer . . . is directly liable under Title VII . . . since Title VII's definition of 'employer' includes 'any agent of such person.' "). For an overview of the arguments in favor of individual liability, see Franke, *supra* note 27, at 53-62.

[190] *But see* Phillips, *supra* note 27, at 1258-59 (reading § 701(b) of Title VII as individual liability provision, not vicarious liability provision). Moreover, the arguments of some commentators in favor of personal liability are at odds with vicarious employer liability. *See infra* notes 250-256 and accompanying text (explaining inconsistency in imposing individual *and* vicarious liability).

[191] *E.g.*, *Jendusa*, 868 F. Supp. at 1011; *see also* Goldberg, *supra* note 27, at 585-86 (arguing individual liability is necessary for full deterrence effect).

a deterrent to its agents' discrimination,[192] discipline will not always be effective, particularly if the responsible individuals are nearing retirement or have left or are leaving the employer for other positions.[193]

In addition to deterrence, these courts claim another important goal of employment discrimination statutes—victim compensation—is better served by personal liability.[194] In some situations, the employing entity is bankrupt or no longer in existence, and thus an award against the employer will not compensate the victim.[195] In those cases, personal liability can help ensure that full compensation to the victims of discrimination occurs.

The 1991 Civil Rights Act's addition of compensatory and punitive damages to the Title VII and ADA remedial schemes has persuaded some courts to impose personal liability.[196] Looking to common-law principles that hold agents jointly and severally liable for their torts, these courts find the current availability of tort-type damages now supports application of the tort-law liability scheme.[197]

Finally, as a matter of policy, the individual who acts on the basis of an unlawful motive, such as firing an individual because

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[192] *But see Jendusa*, 868 F. Supp. at 1012 (contending employers "more often than not" fail to discipline supervisor after jury finds supervisor discriminated).

[193] *Id.*; Goldberg, *supra* note 27, at 585.

[194] *E.g.*, Johnson v. University Surgical Group Assocs., 871 F. Supp. 979, 986 (S.D. Ohio 1994); Vakharia v. Swedish Covenant Hosp., 824 F. Supp. 769, 784-86 (N.D. Ill. 1993).

[195] *Vakharia*, 824 F. Supp. at 785-86.

[196] *E.g.*, *Jendusa*, 868 F. Supp. at 1015-16 (N.D. Ill. 1994); Bridges v. Eastman Kodak Co., 800 F. Supp. 1172, 1180 (S.D.N.Y. 1992); Hangebrauck v. Deloitte & Touche, No. 92-G3328, 1992 WL 348743, at *3 (N.D. Ill. Nov. 9, 1992). As one commentator asserts, the issue of individual liability "has taken on a new dimension" with the 1991 Civil Rights Act's addition of compensatory and punitive damages. Franke, *supra* note 27, at 39; *see also* Moberly & Miles, *supra* note 20, at 483 (noting 1991 Amendment has significantly impacted individual liability question). Certainly, the Act has resulted in a new level of attention to the issue.

[197] *See supra* note 196 (listing relevant cases).

Many commentators, moreover, rely on this argument, as well as Congress's purpose of enhancing remedies for discrimination, to support individual liability. *E.g.*, Goldberg, *supra* note 27, at 586; Greer, *supra* note 27, at 1845; Sanborn, *supra* note 27, at 172; *see also* United States v. Burke, 504 U.S. 229, 235 (1992) ("[O]ne of the hallmarks of traditional tort liability is the availability of a broad range of damages to compensate the plaintiff 'fairly for injuries caused by the violation of his legal rights.' " (citation omitted)). *But see* Commissioner v. Schleier, 115 S. Ct. 2159, 2167 (1995) (holding ADEA, which does not permit recovery of compensatory and punitive damages, is not "tort type" right).

of his race, should be held legally responsible for the wrongdoing, reason these courts.[198] Placing blame on the party who is at fault, conclude these courts and various commentators, serves the interests of justice better than a liability scheme that holds only the employer responsible for remedying discrimination.[199]

Numerous courts disagree, however, including a majority of the circuits that have addressed the issue of personal liability.[200] First, a "plain meaning" approach to statutory construction is inapplicable, they argue, because the language is plainly capable of more than one meaning.[201] These courts interpret "agents" in the statutory definition merely to incorporate respondeat superior into the statute, not to impose personal liability on agents.[202] This interpretation routinely has been applied under the NLRA, on

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

[199] As articulated by commentator Goldberg:

> In the context of employment discrimination, agents who discriminate are usually deemed more blameworthy than their employers, who are merely vicariously exposed to liability for the violations of their agents. As such, recognizing employer liability without recognizing agent liability would be anomalous as a legal doctrine. Regardless of how the relative blame is distributed between the agent and the employer, however, the agent is still more blameworthy than the victim for the injury inflicted. As such, the blameworthiness theory of tort liability also requires that victims be allowed to sue agents who discriminate.

Goldberg, *supra* note 27, at 589.

[200] Circuits rejecting individual liability include the Second (Tomka v. Seiler Corp., 66 F.3d 1295 (2d Cir. 1995)); the Fourth (Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 510-11 (4th Cir.), *cert. denied*, 115 S. Ct. 666 (1994)); the Fifth (Grant v. Lone Star Co., 21 F.3d 649, 653 (5th Cir.), *cert. denied*, 115 S. Ct. 574 (1994)); Seventh (EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1278 (7th Cir. 1995)); the Ninth (Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587-88 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1049 (1994)); and the Eleventh (Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991)).

[201] *AIC*, 55 F.3d at 1281; *see also* Hernandez v. Miranda Velez, No. 92-2701, 1994 WL 394855, at *6 (D.P.R. July 20, 1994) (agreeing purpose of "agents" language was to embrace respondeat superior).

[202] *E.g.*, *AIC*, 55 F.3d at 1281; *Miller*, 991 F.2d at 587.

Moreover, at least one court also has seized upon the use of the word "and" in the statutory definition to deny individual liability: "The use of the conjunctive word 'and' as opposed to the disjunctive word 'or' supports the argument that Congress merely intended to incorporate respondeat superior into the statute." Johnson v. Northern Indiana Pub. Serv. Co., 844 F. Supp. 466, 469 (N.D. Ind. 1994).

which Title VII was modeled,[203] and therefore several of these courts have looked to the NLRA in interpreting the similar language found in Title VII and the ADEA.[204]

In addition, say these courts, the statutory liability scheme is incompatible with personal liability. Only employers with fifteen or more employees are covered by Title VII and the ADA, and only employers with twenty or more employees are covered by the ADEA. Congress's exemption of small businesses from the statutes' prohibitions is viewed as inconsistent with imposing personal liability.[205]

Nor is personal liability necessary for deterrence, the courts reason. Vicarious liability gives employers strong incentive to deter discrimination by their agents.[206] The threat of discipline or discharge is enough to ensure that agents comply with the law.[207] While some individuals may not care whether they continue to work for a particular employer, discharge or discipline for unlawful discrimination usually carries enough potential career harm to

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[203] *See supra* note 141 and accompanying text (questioning whether common-law doctrine of vicarious liability is supported by statutes). Although the NLRB has not imposed individual liability on supervisors, it has been willing to pierce the corporate veil in appropriate circumstances. *See, e.g.*, White Oak Coal Co., 318 N.L.R.B. 89 (1995) (stating that "[c]orporate veil may be pierced when (a) the shareholder and corporation have failed to maintain separate identities, and (2) adherence to the corporate structure would sanction a fraud, promote injustice, or lead to an evasion of legal obligations").

[204] *E.g.*, Low v. Hasbro, Inc., 817 F. Supp. 249, 250 (D.R.I. 1993); Friend v. Union Dime Sav. Bank, 24 Fair Empl. Prac. Cas. (BNA) 1307, 1310 (S.D.N.Y. 1980). *But see* Goldberg, *supra* note 27, at 587 n.82 (criticizing reliance on NLRA precedent).

[205] *Miller*, 991 F.2d at 587 ("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."). *Miller*'s reasoning has been widely followed. *E.g.*, Caplan v. Fellheimer Eichen Braverman & Kaskey, 882 F. Supp. 1529, 1532 (E.D. Pa. 1995); Clark v. Pennsylvania, 885 F. Supp. 694, 713 (E.D. Pa. 1995); Crawford v. West Jersey Health Sys., 847 F. Supp. 1232, 1237 (D.N.J. 1994).

[206] *E.g.*, *AIC*, 55 F.3d at 1282; *Johnson*, 844 F. Supp. at 469 (N.D. Ind. 1994).

[207] *Miller*, 991 F.2d at 588 ("An employer that has incurred civil damages because one of its employees believes he can violate Title VII with impunity will quickly correct that employee's erroneous belief."); *see also* Sykes, *supra* note 5, at 570 ("The employer's influence over advancement and compensation decisions often provides another important incentive device."). Moreover, an employer held liable for discrimination could perhaps seek indemnity from its discriminatory supervisor, KEETON ET AL., *supra* note 5, § 51, at 341, a tactic that would deter discrimination.

make it a viable threat.[208]

Although some courts had relied on the absence of compensatory and punitive damages under Title VII in finding no personal liability available under the statute,[209] the addition of these damages apparently has not caused them to change their stance. Congress did not discuss personal liability when it enacted the new damages provision, and courts therefore have been reluctant to view the addition of these damages as working a change in the unamended definition of "employer."[210] Moreover, the statutes contain caps on the amount of compensatory and punitive damages that may be awarded, with those caps tied to the number of workers employed.[211] Congress's intent to limit damages based on employer size is viewed as inconsistent with holding individuals, who have no employees, responsible for paying compensatory and punitive damages.[212]

B. ASSESSING THE ARGUMENTS

At first glance, there is something unsettling about a system in which the person who directly engages in wrongdoing is not the person statutorily assigned the blame. Nevertheless, careful study of Title VII, the ADEA, and the ADA reveal that this is the system Congress selected, at least when it comes to questions of agents' personal liability. Moreover, this system makes particular sense in

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[208] Because an employer may be liable for the tort of negligent hiring if it hires an employee who has discriminated, harassed, or otherwise harmed employees in the past, supervisory employees found to have discriminated may find it difficult to locate employment elsewhere. *See* Perkins v. Spivey, 911 F.2d 22, 30-32 (8th Cir. 1990) (discussing employer liability for negligent hiring), *cert. denied*, 499 U.S. 920 (1991).

[209] *See* Hernandez v. Miranda Velez, No. 92-2701, 1994 WL 394855, at *6 (D.P.R. July 20, 1994) ("Because [equitable] relief is not the type which would be obtained from individual defendants, some circuits had concluded that no individual liability existed under Title VII.").

[210] *See AIC*, 55 F.3d at 1281 ("It is a long stretch to conclude that Congress silently intended to abruptly change its earlier vision [on individual liability] through an amendment to the remedial portions of the statute alone."); Smith v. Capital City Club, 850 F. Supp. 976, 979 (M.D. Ala. 1994) (rejecting as insufficient addition of compensatory and punitive damages as basis for imposing individual liability).

[211] 42 U.S.C. § 1981a(3) (Supp. V 1993).

[212] Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1049 (1994); Smith v. Capital City Club, 850 F. Supp. 976, 979 (M.D. Ala. 1994); Verde v. City of Philadelphia, 862 F. Supp. 1329, 1333-34 (E.D. Pa. 1994).

the federal employment discrimination setting.

In studying the question of personal liability, a "plain meaning" approach should be rejected at the outset. Congress's use of the term "agent" in defining employer, while consistent with personal liability, is also consistent with a congressional intent only to hold employers responsible for the wrongdoing of their agents.[213] Given that the language is reasonably susceptible to more than one interpretation, as reflected by the division of opinion that exists within the lower courts,[214] relying on "plain meaning" to impose personal liability oversimplifies the problem.[215]

Moreover, Congress's addition of compensatory and punitive damages ultimately is of little assistance in resolving personal liability questions.[216] It is *not* the case that until the 1991 Civil Rights Act there was no remedy available that individuals could provide. Backpay, after all, is money, and individuals could be viewed as jointly and severally responsible for any back wages due a discriminatee.[217] Thus, it is technically incorrect to say, as

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[213] *Compare* Barb v. Miles, Inc., 861 F. Supp. 356, 359 (W.D. Pa. 1994) ("When Congress included within the definition of employer the 'agent of any such person,' it intended only to ensure that, unlike the Civil Rights Act of 1866 . . . and the Civil Rights Act of 1871, employers sued pursuant to the Civil Rights Act of 1964 were subject to the doctrine of *respondeat superior*." (emphasis in original)) *with* Matthews v. Rollins Hudig Hall Co., 874 F. Supp. 192, 195 (N.D. Ill. 1995) (stating that by including agents in definition of employer, "Congress appears to have intended to subject individuals to liability for engaging in . . . discrimination").

[214] *See supra* notes 188-212 and accompanying text (discussing conflict among lower courts).

[215] *See* EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1281 (7th Cir. 1995) (disagreeing with other courts' "plain language" interpretation). When courts are unable to agree on the meaning of statutory language, it is disingenuous to regard that language as clear and unambiguous.

[216] The 1991 Civil Rights Act did not amend the definition of employer, nor does the legislative history suggest an intent by Congress to revise liability rules. *AIC*, 55 F.3d at 1281; Lowry v. Clark, 843 F. Supp. 228, 231 (E.D. Ky. 1994).

[217] At common law, for example, an employer and employee may be jointly and severally liable to a third party for damages, which may include lost wages. In the context of employment discrimination, the "third party" is the employee himself, which is different from the usual common-law scenario. This distinction, while it may help explain why vicarious employer liability is more obviously appropriate in the employment discrimination setting, does not explain why an individual may not also be liable to the plaintiff for lost wages under Title VII, the ADEA, and the ADA. *See* Tomka v. Seiler Corp., 66 F.3d 1295, 1321-22 (2d Cir. 1995) (Parker, J., dissenting).

some courts do,[218] that personal liability only became a possibility with the addition of these new damages.

The absence of legislative history on personal liability complicates matters further.[219] The legislative history of the NLRA, from which the "and any agent" language in Title VII was borrowed, suggests that the language was added to the NLRA only to incorporate common-law, vicarious employer liability principles.[220] There was no discussion at all regarding any individual liability for the agent. Such silence, however, is hardly conclusive. In the face of congressional silence on the question of personal liability, one must determine which alternative—personal liability or no personal liability—better comports with the statutory scheme and the policies behind it.

The statutory structure appears incongruent with the notion of personal liability. Small employers are exempt from the responsibility and expense of complying with federal employment discrimination laws.[221] It seems anomalous to exempt employers who employ fourteen persons from the statutes' commands, while holding individuals, who employ no one, personally responsible for discrimination.[222] Furthermore, the caps on compensatory and

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[218] *E.g.*, Grant v. Lone Star Co., 21 F.3d 649, 652 (5th Cir.), *cert. denied*, 115 S. Ct. 574 (1994); Hernandez v. Miranda Velez, No. 92-2701, 1994 WL 394855, at *6 (D.P.R. July 20, 1994).

[219] *See* Franke, *supra* note 27, at 39-42 (tracing legislative history of Title VII); Goldberg, *supra* note 27, at 580 (finding no legislative history on agent liability); Lamberson, *supra* note 27, at 426 (explaining lack of direct history on personal liability due to swift passage out of committee); Sanborn, *supra* note 27, at 172 (stating Congress did not address question of individual liability); *see also supra* note 58 and accompanying text (noting lack of legislative history). *But see* Moberly & Miles, *supra* note 20, at 499-501 (citing legislative history of amendments to Title VII extending liability to Senate members, in which Senators appear to assume no individual liability exists).

[220] *See supra* notes 149-150 and accompanying text (discussing congressional intent to hold employers liable for acts of their agents).

[221] *See supra* notes 32-33 and accompanying text (noting definitions of "employer" under relevant statutes).

[222] This anomaly has influenced a number of courts to reject individual liability. *E.g.*, Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1049 (1994); Caplan v. Fellheimer Eichen Braverman & Kaskey, 882 F. Supp. 1529, 1532 (E.D. Pa. 1995); Barb v. Miles, Inc., 861 F. Supp. 356, 359 (W.D. Pa. 1994); Verde v. City of Philadelphia, 862 F. Supp. 1329, 1333-34 (E.D. Pa. 1994); Saville v. Houston County Healthcare Auth., 852 F. Supp. 1512, 1524 (M.D. Ala. 1994).

Some of the courts that do impose individual liability reason the purpose for the small-employer exemptions was to protect small, family-run businesses from governmental

punitive damages, based on employer size,[223] also seem inconsistent with a congressional intent to impose personal liability on individuals.[224]

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regulation of their employment relationships, or to avoid burdening small businesses with administrative, litigation, and compliance costs. These concerns, they reason, are not present when individuals are sued. *E.g.*, Jendusa v. Cancer Treatment Ctrs. of Am., 868 F. Supp. 1006, 1013-14 (N.D. Ill. 1994); Bishop v. Okidata, Inc., 864 F. Supp. 416, 423-24 (D.N.J. 1994); Lamirande v. Resolution Trust Corp., 834 F. Supp. 526, 528 (D.N.H. 1993); *see also* Goldberg, *supra* note 27, at 577-78 ("Congress excluded small employers from Title VII's coverage to reserve the autonomy of family-run businesses that prefer to hire friends and family members."); Lamberson, *supra* note 27, at 427 (citing legislative history indicating size requirement based on personal nature of small businesses rather than concern over economic hardship of liability).

Congress, however, did not exempt family-run businesses; it exempted businesses that employ less than 15 persons. *Saville*, 852 F. Supp. at 1524 n.12. Moreover, Congress's concern with relieving smaller entities from the expense of litigation would seem to apply equally to individuals, who frequently lack the resources to defend themselves against discrimination claims and whose employers usually are under no duty to subsidize their defense. *See Miller*, 991 F.2d at 587 ("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 employers."); Douglas L. Williams, *Representing the Corporate Employer and Supervisory Employee*, C953 A.L.I.-A.B.A. 355, 357 (1994) (noting while many employers do shoulder expense of defending supervisory employees, "[a]bsent any contractual or statutory duty, an employer is under no obligation to provide legal representation or indemnification of legal expenses when a supervisor or manager is sued unless the employee is acting under the direct instruction of the employer").

[223] Read literally, § 1981a caps damages only for employers with more than 15 employees. If individuals are deemed statutory employers, are they then subject to unlimited liability, while General Motors's compensatory and punitive damages are capped? Such an absurd reading of the statute was urged on the court by the EEOC in EEOC v. AIC Sec. Investigations, Ltd., 823 F. Supp. 571, 576 (N.D. Ill. 1993), *rev'd*, 55 F.3d 1276 (7th Cir. 1995). This reading, adopted as a litigating position in the case, is at odds with the agency's own policy guidance. *EEOC: Policy Guidance on Compensatory and Punitive Damages Under 1991 Civil Rights Act*, 405 Fair Empl. Prac. Man. (BNA) 7091, 7093 (July 7, 1992). The EEOC's argument in *AIC* was rejected by the court. *AIC*, 823 F. Supp. at 577; *see also* Donald R. Livingston, *The Civil Rights Act of 1991 and EEOC Enforcement*, 23 STETSON L. REV. 53, 61 (1993) (discussing *AIC*); Moberly & Miles, *supra* note 20, at 486-89 (same).

[224] Basing a damage award on employer size "makes sense if the employer is the party to be held liable" but not if it is an individual. *Saville*, 852 F. Supp. at 1525. It is illogical to find that a supervisor who makes $50,000 a year and who engages in race or sex discrimination should be liable for up to $300,000 in punitive damages if he works for a large employer, but only $50,000 if he works for a small one. *Id.*; *see also* Verde v. City of Philadelphia, 862 F. Supp. 1329, 1334 (E.D. Pa. 1994) ("A corporation's ability to pay can be estimated by its size and the number of its employees; an individual's ability to pay cannot be estimated by the size of his employer."). Also, as several courts have noted, if Congress had envisioned joint and several liability for these damages, it may be expected to have provided some guidance as to how such damages should be apportioned. *E.g.*, Smith v. Capitol City Club, 850 F. Supp. 976, 980 (M.D. Ala. 1994).

At the same time, it is difficult to disagree with some of the arguments in favor of personal liability. Certainly, personal liability will result in greater deterrence in at least some cases.[225] And, in the rare instance in which an employer is bankrupt, personal liability also may help ensure full compensation to victims of discrimination.[226] Given that deterrence and compensation are the two primary goals of the statutes,[227] an interpretation that furthers these goals, even marginally, would seem the better one.[228]

In the long run, however, it is uncertain whether personal liability actually will advance these goals, and indeed, it may hinder them. It is worth noting, for instance, that joint liability *possibly* could result in apportionment of damages, a result at odds with the statutes' compensatory goals.[229] Additionally, an em-

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[225] *See* Goldberg, *supra* note 27, at 585 (suggesting personal liability may be only way, in some cases, to deter discrimination). Conversely, a supervisory employee nearing retirement or one whose job is unquestionably secure may not view the threat of employer discipline as much of a deterrent. Jendusa v. Cancer Treatment Ctrs. of Am., 868 F. Supp. 1006, 1012 n.8 (N.D. Ill. 1994). Additionally, not all employers discipline employees found guilty of discrimination. *Id.* at 1012.

[226] Vakharia v. Swedish Convenant Hosp., 824 F. Supp. 769, 785-86 (N.D. Ill. 1993). This is not mere speculation. In *Miller*, the employer had gone bankrupt by the time the case was before the trial court for decision. Some courts rejecting individual liability, moreover, have left open the possibility of liability in cases in which the employer is bankrupt or in which it is necessary to pierce the corporate veil. *E.g.*, *Saville*, 852 F. Supp. at 1525.

[227] Albemarle Paper Co. v. Moody, 422 U.S. 405, 417, 422 (1975).

[228] A number of courts and commentators have relied heavily on this reasoning when finding that individual liability exists. *E.g.*, Johnson v. University Surgical Group Assocs., 871 F. Supp. 979, 986 (S.D. Ohio 1994); Vakharia v. Swedish Convenant Hosp., 824 F. Supp. 769, 785 (N.D. Ill. 1993); Franke, *supra* note 27, at 61; Goldberg, *supra* note 27, at 580; Greer, *supra* note 27, at 1847.

[229] Although it is unclear whether a court can apportion damages among persons found jointly and severally liable under Title VII, the ADEA, or the ADA, Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 93 n.28 (1981), it is interesting that apportionment has been assumed to be appropriate in cases where individual liability has been recognized. *See* EEOC v. AIC Sec. Investigations, Ltd., 823 F. Supp. 571, 579 (N.D. Ill. 1993) (holding employer and employee jointly and severally liable for Title VII damage award), *rev'd*, 55 F.3d 1276 (7th Cir. 1995).

At common law, joint tortfeasors whose wrongdoing combined to cause a plaintiff's indivisible harm were jointly and severally liable for the full extent of the plaintiff's damages. Modern tort reform, however, has rejected or modified this rule in a majority of states. *E.g.*, CAL. CIV. CODE § 1431.2 (West Supp. 1995); HAW. REV. STAT. § 663-10.9 (1995). In many states, a tortfeasor now is legally responsible *only* for his own share of culpability. On the tort front, however, this reform generally has not been extended to cases of *vicarious* liability. Instead, it has been applied only when both tortfeasors have been found *directly*

ployer held vicariously liable for its agent's discrimination can sue the agent at common law for breach of his duties of loyalty and care, whether or not the agent is personally liable under the statute.[230] Thus, personal liability is unnecessary as a deterrent.

Additionally, Title VII, the ADEA, and the ADA now provide for jury trials in cases of intentional discrimination. If an individual supervisor may be sued in his personal capacity, how willing will a jury be to impose damages on him personally? Believing that a sizeable damage award could come out of an individual's pocket may lead at least some juries to refrain not only from assessing damages, but perhaps from finding liability altogether.[231] While this is unlikely to occur in most cases, neither is employer bankruptcy, the scenario put forward to justify a need for personal liability. Which might occur more frequently is obviously open to debate, but that debate demonstrates it is not clear that personal liability necessarily furthers the goals of victim compensation and employer deterrence, as its supporters so earnestly contend.

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liable for wrongdoing. Thus, it is curious that apportionment of damages between vicariously liable employers and discriminating employees has been assumed by some courts to be appropriate under Title VII or the ADA.

If apportionment *is* permitted, employers' vicarious liability for employee wrongdoing could be reduced significantly, a result at odds with the statutes' compensatory goals. *See infra* notes 252-254 and accompanying text (explaining how individual liability will reduce employer liability); *see also* Goldberg, *supra* note 27, at 585 (conceding recognition of agent liability will result in less vicarious liability for employers, who may then "choose to deter their agents with less vigor," but noting no empirical data supports this possibility).

[230] RESTATEMENT (SECOND) OF AGENCY § 399 (1958).

[231] This phenomenon has been recognized in cases under § 1983, in which personal, but not vicarious, liability exists. As U.S. District Judge Jon Newnan has observed, in cases involving police misconduct, "[a] jury understandably succumbs easily to the argument, stated or implied, that recovery should be denied because the damages must come from the paycheck of a hardworking, underpaid police officer." Jon O. Newnan, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 456 (1977). Judge Newnan finds that when juries believe individuals will foot the liability bill, "they tend to find for defendants, and when damages are awarded, to keep the amount at a modest level." *Id.* at 456-57.

The parallel to § 1983 is not exact, of course, because vicarious liability *does* exist under Title VII, the ADEA, and the ADA. Thus, it would be an unusual case in which the deep pocket employer was not also a party defendant.

C. THE INTERPLAY BETWEEN VICARIOUS AND PERSONAL LIABILITY

The question of personal liability ultimately must be considered, although this has not yet happened, in the context of the vicarious employer liability that presently exists. In the final analysis, those reasons that so strongly support vicarious employer liability are the ones that suggest no personal liability was intended under Title VII, the ADEA, or the ADA.

When an agent commits a common-law tort, imposing personal liability is unremarkable. Were he not acting in an agency capacity, he still would have committed a wrong, be it running a stoplight, speeding, or assaulting someone. At common law, an individual is responsible for his own torts.[232] Agency law is primarily directed toward determining when it is fair for his employer, often guilty of no direct wrongdoing of its own, nonetheless to share responsibility for the agent's actions.[233]

However, in the context of personal liability for federal employment discrimination, this common-law analogy breaks down. It is the agent's status as agent that makes his actions a federal wrong. Not only must the agent be given authority to make employment decisions, he also must have been given this authority by an employer having fifteen or more employees. Acting on his own, he has no ability to violate the statutes.[234]

This same argument, of course, explains why vicarious employer

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[232] RESTATEMENT (SECOND) OF AGENCY § 343 (1958).

[233] *See supra* note 5 and accompanying text (defining vicarious liability doctrine).

[234] As one commentator notes, "[t]he average person on the street may decide that certain people are less qualified because of their race or sex, but only with the power of the employer to employ or not and the duty to do so without discriminating does this decision become a legally recognizable harm." Weddle, *supra* note 27, at 745; *see also* Clark v. Pennsylvania, 885 F. Supp. 694, 713-14 (E.D. Pa. 1995) (noting Title VII directed toward employers, not individuals).

This serves to distinguish Title VII claims from claims under 42 U.S.C. § 1981 (1988), which prohibits race discrimination in the making and enforcement of contracts. Courts frequently have held individuals liable under § 1981. *E.g.*, Al-Khazraji v. Saint Francis College, 784 F.2d 505 (3d Cir. 1986), *aff'd*, 481 U.S. 604 (1987). However, one need not be an employer or an agent of an employer to violate the statute. One simply must intentionally discriminate, on the basis of race, in the making and enforcement of contracts. *Id.* at 518. However, whether *agents* may be personally liable for discrimination under § 1981 is beyond the scope of this Article.

liability makes sense.[235] The employment relationship has caused the wrong to occur, and it is therefore appropriate to hold the employer liable for the harm.[236] But once one accepts the employer's vicarious liability, the need for or wisdom of holding agents personally liable for statutory violations that only their status as agents enables them to commit becomes questionable.[237]

The same also could be said about liability under 42 U.S.C. § 1983. That statute provides a cause of action against any person who, acting under color of state law, subjects another or causes him to be subjected to a deprivation of the rights, privileges or immunities secured by the Constitution and laws of the United States.[238] Much discrimination prohibited by Title VII also gives rise to a § 1983 claim when the discrimination is engaged in by a public actor.[239] One must be acting under color of state law, however, for a § 1983 claim to arise, and in the employment context, that means it is the individual's status as a government employee that

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[235] Commentator Weddle, for example, is not discussing individual liability but rather is explaining why vicarious employer liability for a hostile work environment should exist.

[236] *See* Sykes, *supra* note 5, at 572-88 (contending vicarious liability is best explained by "enterprise causation" theory, which holds that when tort is caused at least in part by employment relationship, vicarious liability is economically efficient rule); *see also supra* notes 175-177 and accompanying text (commenting that employment relationship and delegation of authority make discrimination possible). Professor Sykes's analysis, however, is directed toward determining when joint and several liability, as opposed to purely personal liability, is more efficient.

[237] One may ask, what about a bank employee whose position with the bank enables him to tortiously convert funds to his own use? In such a case, personal liability is imposed, even though the employee's status as agent has enabled him to commit the wrong. Conversion is tortious, however, whether or not one is a bank employee. Agency status may make it easier to commit the tort, but one need not be an agent to convert.

Moreover, vicarious employer liability satisfies the statutory goals of compensation and deterrence in all but the unusual case. *See supra* notes 206-208 and accompanying text (discussing policy of deterrence).

[238] 42 U.S.C. § 1983 (1988). Section 1983 is a remedial statute; it does not create substantive rights.

[239] For example, firing a public employee because of her race or sex not only violates Title VII but also violates her constitutional right to equal protection.

Although one could argue that Title VII, with its detailed administrative scheme, supplants § 1983 for employment discrimination cases, *see* Great Am. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 378 (1979) ("Unimpaired effectiveness can be given to . . . Title VII only by holding that deprivation of a right created by Title VII cannot be the basis for a cause of action under § 1985(3)."), that argument routinely has been rejected. Day v. Wayne County Bd. of Auditors, 749 F.2d 1199, 1205 (6th Cir. 1984) (holding plaintiff may bring claim under both Title VII and § 1983).

makes him a proper defendant in a § 1983 action.[240]

In many ways, however, the liability scheme for § 1983, as interpreted by the Supreme Court, is a mirror image of that advocated here for modern employment discrimination statutes. Under § 1983, individuals may be sued in their personal capacities for their unconstitutional acts.[241] At the same time, respondeat superior has been rejected under § 1983.[242] What justifies distinguishing these statutory liability schemes?

First, only "persons" may be sued under § 1983, and this language obviously encompasses natural persons, as the Supreme Court has held.[243] Moreover, the Court has determined that states, which are employers, are not persons for § 1983 purposes.[244] Second, while the Court now holds that municipalities and other local governmental units are "persons" under § 1983,[245] the statutory language and legislative history of the statute led the Court to reject imposing respondeat superior liability on these governmental units. The language "subjects or causes to be subjected," said the Court, was more consistent with a direct liability scheme, a reading the Court found buttressed by § 1983's legislative history.[246]

Title VII, the ADEA, and the ADA, in contrast, impose liability not on persons but on employers.[247] Thus, the statutory language is an obvious basis on which to distinguish liability rules. Moreover, as some courts have reasoned, Congress may have included "agents" within the statutory definition of employer to ensure that

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[240] *See* West v. Atkins, 487 U.S. 42, 50 (1988) ("[A] public employee acts under color of state law while acting in his official capacity. . . .").

[241] Monroe v. Pape, 365 U.S. 167 (1961). Also, even if an employee was misusing or abusing his authority, his actions may yet be "under color of state law." *Id.* at 172. Section 1983, said the Court, "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Id.* at 187.

[242] Monell v. Department of Social Servs., 436 U.S. 658, 691 (1978).

[243] *Id.* at 691.

[244] Will v. Michigan Dep't of State Police, 491 U.S. 58, 64 (1989). This includes individuals sued in their official, as opposed to personal, capacities. *Id.* at 70-71.

[245] *Monell*, 436 U.S. at 691 (overruling Monroe v. Pape, 365 U.S. 167 (1961)).

[246] *Id.*

[247] 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. V 1993); Grant v. Lone Star Co., 21 F.3d 649, 651 (5th Cir.), *cert. denied*, 115 S. Ct. 574 (1994). The Court in the past has noted the differences in statutory language in distinguishing § 1983 claims from those under Title VII. *E.g.*, University of Tenn. v. Elliot, 478 U.S. 788 (1986).

§ 1983's rejection of respondeat superior would not be carried over into Title VII.[248] Furthermore, because the modern statutes *do* embrace respondeat superior liability, the need for individual liability that exists under § 1983, if that statute is to have significant force, is missing. If individuals could not be held personally liable under § 1983, no remedy would be available for many constitutional violations.[249] Thus, § 1983's imposition of individual liability is of little persuasive value in interpreting the statutes at issue here.

One final point to consider when deciding whether personal liability should be imposed for these statutory claims, is the impact, if any, personal liability would have on vicarious employer liability. Up to this point, the question of personal liability has been considered by courts and commentators assuming the existence of vicarious employer liability.[250] If, however, agents are statutory employers directly liable for their own discrimination, the statutory policies served by vicarious employer liability become vulnerable.

Those calling for individual liability frequently stress the personal fault or "blameworthiness" of the agent, suggesting that as between the vicariously liable employer and the directly liable employee, it is the agent who is the true wrongdoer.[251] If

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[248] This distinction has been relied upon by some courts as a basis for denying individual liability. *E.g.*, *Grant*, 21 F.3d at 651-52; Barb v. Miles, Inc., 861 F. Supp. 356, 359 (W.D. Pa. 1994).

[249] A municipality may be directly liable under § 1983 for work it has officially approved or ordered, or based on its official policy, custom or usage. *Monell*, 436 U.S. at 691-92. Although a single decision by a policymaker may be sufficient to trigger liability if the individual is responsible for setting final government policy, employment decisions by supervisors who lack policymaking authority will not impose liability on the municipal employer. City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988); Pembaur v. City of Cincinnati, 475 U.S. 469, 480-81 (1986). In such circumstances, the individual decisionmaker, sued in his personal capacity, is the only appropriate defendant.

[250] *See* Goldberg, *supra* note 27, at 572 (noting employers generally are held liable for their agents' acts); Greer, *supra* note 27, at 1835 (same); Note, *Sexual Harassment and Title VII*, *supra* note 7, at 1031 (same).

[251] *See* Bishop v. Okidata, Inc., 864 F. Supp. 416, 424 (D.N.J. 1994) ("Indeed, the traditional theory was that only the employee, and not the employer, was liable for intentional torts such as those contemplated by Section 1981a."); Franke, *supra* note 27, at 51, 61-62 (arguing under tort law, primary liability remains on wrongdoer); Goldberg, *supra* note 27, at 589 (arguing common-law tort liability theories support agent liability); Greer, *supra* note 27, at 1850 ("A reasonable and faithful interpretation of the statutory language would, therefore, impose liability where it belongs: on those who actually discriminate.").

individual liability is available under these statutes, this fault-based approach to liability may aid vicariously liable employers arguing for apportionment of damages[252] or for escape altogether from punitive damage awards.[253]

Additionally, if individual liability were established, employers may mount a full-scale assault on vicarious liability. Employing entities may argue they are not "the employer" responsible for the unlawful employment practice and thus may not be held liable for backpay or compensatory and punitive damages.[254] A certain tension exists between reading the statute to impose direct liability on agents and holding employers vicariously liable for their agents' wrongdoing. Both cannot be *the* responsible employer. To accept the "plain language" approach that agents are employers is to invite re-examination of vicarious employer liability.

Yet vicarious liability is essential to accomplishing statutory goals. It is the employer, and only the employer, that can provide meaningful relief in most cases.[255] The employer, moreover, is in the best position to ensure that statutory commands are obeyed, and vicarious liability gives it the incentive to do so.[256]

In the end, the importance of vicarious liability may be the most powerful argument against individual liability. If recognizing individual liability means compromising vicarious liability principles, then individual liability is inconsistent with statutory goals.

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[252] Whether apportionment should ever be available in a vicarious liability context is questionable, but courts and commentators assume its applicability. *E.g.*, Jendusa v. Cancer Treatment Ctrs. of Am., 868 F. Supp. 1006, 1016 (N.D. Ill. 1994); EEOC v. AIC Sec. Investigations, Ltd., 823 F. Supp. 571 (N.D. Ill. 1993), *rev'd*, 55 F.3d 1276 (7th Cir. 1995); Sykes, *supra* note 5, at 604 n.108. In cases where an employer is directly liable for discrimination, however, the recent history of tort reform suggests that apportionment of damages would likely occur. *See supra* note 229 (discussing generally apportionment of damages in tort law).

[253] *See supra* notes 51, 158-159 and accompanying text (discussing and rejecting argument that statutory language imposes only direct liability).

[254] *See supra* notes 162-166 and accompanying text (discussing vicarious liability after 1991 Civil Rights Act); *see also* 42 U.S.C. § 1981a(a)(1) (Supp. V 1993) (stating when claim is brought "against a respondent *who engaged in unlawful intentional discrimination* . . . the complaining party may recover compensatory and punitive damages . . . from *the* respondent." (emphasis added)).

[255] *See supra* notes 157, 172-173 and accompanying text (discussing importance of employer-provided relief in compensating victim).

[256] *See supra* notes 180-181 and accompanying text (arguing employer liability provides strong deterrent to discrimination).

V. CONCLUSION

How curious that over 30 years after Title VII's enactment, the question of who may be held liable for discrimination is only recently gaining attention. Congress's addition of compensatory and punitive damages to the statutory scheme, together with judicial efforts to assess employer liability for hostile working environments, focus attention on who should foot the bill when a supervisory employee discriminates against subordinates.

With the possible exception of certain hostile work environment claims, the answer, as courts long have assumed, is the employer. Vicarious employer liability is supported by the common law of agency, the legislative history of the NLRB, on which Title VII was modeled, and the structure and goals of the statutes. Its continued acceptance is essential if these statutes are to serve as an effective force in eradicating discrimination in the workplace.

Individual liability, in contrast, is at odds with the structure of the statutes and unnecessary for the accomplishment of statutory goals. Moreover, imposing individual liability ultimately could undermine the enforcement of the statutes by making vicarious employer liability suspect. That alone is reason enough to find no congressional intent to hold individuals personally liable for discrimination.