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# Statutory Construction and Judicial Policy-Making Impact Whether Title VII's Definition of "Employer" Imposes Individual Liability Upon an Agent

*Williams v. Banning*<sup>1</sup>

## I. INTRODUCTION

Title VII of the Civil Rights Act of 1964<sup>2</sup> ("Title VII") prohibits employment discrimination.<sup>3</sup> Although no question exists that "employers" are liable for their discriminatory acts as well as for their agents' acts that occur within the scope of employment,<sup>4</sup> a conflict exists among the federal circuits regarding whether Title VII's definition of "employer" also imposes individual liability upon the employer's agent.<sup>5</sup> The Seventh Circuit answered this question for its circuit in *Williams v. Banning*.<sup>6</sup>

## II. FACTS AND HOLDING

Karen Williams ("Williams") was employed as a secretary for Calument Construction Corporation ("CCC").<sup>7</sup> From November 1993 through March 1994, Bruce Banning ("Banning") worked as her supervisor.<sup>8</sup> Throughout this time, Banning allegedly sexually harassed<sup>9</sup> Williams at the job site.<sup>10</sup> When

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1. 72 F.3d 552 (7th Cir. 1995).

2. 42 U.S.C. §§ 2000e-2000e-17 (1994).

3. See *infra* note 21 and accompanying text.

4. See *infra* notes 25-26 and accompanying text.

5. See *infra* notes 74-83 and accompanying text.

6. 72 F.3d 552 (7th Cir. 1995).

7. *Id.* at 553.

8. *Id.*

9. Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e-2000e-17 (1994), prohibits sex discrimination which includes sexual harassment. See, e.g., *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 370 (1993) and *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).

Sexual harassment occurs either (1) where an employer's actions create a hostile work environment, see *Harris*, 114 S. Ct. at 370 and *Meritor*, 477 U.S. at 66, or (2) where the employer conditions employment benefits upon sexual demands (otherwise termed the "quid pro quo theory,"), see *Meritor*, 477 U.S. at 66.

Williams rejected Banning's advances, he apparently retaliated against her by criticizing her work performance.<sup>11</sup>

Initially, Williams reported these events to CCC's Human Resources department but asked that her complaint be kept confidential.<sup>12</sup> Then, in March 1994, Williams informed Human Resources that she could no longer work with Banning.<sup>13</sup> As a result, CCC investigated her complaint and suspended Banning on March 29, 1994.<sup>14</sup> Although Williams continues to work for CCC, Banning has left their employment.<sup>15</sup>

Williams brought a Title VII action against Banning in the United States District Court for the Northern District of Indiana alleging sexual harassment in the workplace.<sup>16</sup> Banning filed a motion to dismiss,<sup>17</sup> arguing that Title VII did not apply to him in his individual capacity. In granting Banning's motion to dismiss, the district court ruled that Title VII could not impose individual liability on Banning because he did not independently meet Title VII's definition of employer.<sup>18</sup>

Williams appealed this ruling to the United States Court of Appeals for the Seventh Circuit.<sup>19</sup> In affirming the lower court, the Seventh Circuit interpreted Title VII and its 1991 amendments' silence on the issue of individual liability. The Seventh Circuit held that Title VII does not impose individual liability on an employer's agent for acts violative of the statute.<sup>20</sup>

### III. LEGAL BACKGROUND

#### *A. Interpreting Title VII and the 1991 Amendments*

Title VII of the Civil Rights Act of 1964<sup>21</sup> ("Title VII") prohibits discrimination concerning "compensation, terms, conditions, or privileges of

10. *Banning*, 72 F.3d at 553. This harassment included unwanted physical contact such as "touching Williams's breasts and legs, kissing her, and other sexual advances and comments." In addition, Banning made a trip to Williams's home uninvited. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. FED. R. CIV. P. 12(b)(6).

18. *Banning*, 72 F.3d at 553.

19. *Id.*

20. *Id.* at 555.

21. 42 U.S.C. §§ 2000e-2000e-17 (1994).

employment" on the basis of "race, color, religion, sex, or national origin."<sup>22</sup> Title VII provides potential relief to discrimination victims in the form of compensatory and punitive damages<sup>23</sup> as well as the equitable remedies of back pay, reinstatement, and injunction.<sup>24</sup>

In general, no question exists that "employers" violating Title VII are liable for their discriminatory acts<sup>25</sup> as well as for their "agents'" violations occurring within the scope of employment.<sup>26</sup> However, significant confusion abounds amongst the federal judiciary regarding the meaning of "employer" and "agent" and these definitions' corresponding impact on liability under Title VII.<sup>27</sup>

Neither Title VII nor its 1991 amendments explicitly address individual liability.<sup>28</sup> The lower federal courts have adopted various approaches to answer this statutory question. These approaches primarily include examining the statute's plain language, the legislative purpose, as well as the resulting policy consequences from either accepting or rejecting individual liability.<sup>29</sup>

In considering the plain language of the statute, Title VII defines an "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and *any agent* of such person."<sup>30</sup> Based on

22. 42 U.S.C. § 2000e-2(a)(1) (1994).

23. 42 U.S.C. § 1981a(a)(1) (1994).

24. 42 U.S.C. § 2000e5(g) (1994).

25. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 523-24 (1993) (holding that employers that engage in discriminatory employment actions are liable for damages under Title VII).

26. *See* Pommier v. James L. Edelstein Enters., 816 F. Supp. 476, 481 (N.D. Ill. 1993) (holding the employer liable under Title VII for agent's discriminatory acts); Barger v. Kansas, 630 F. Supp. 88, 92 (D. Kan. 1985) (stating that employers are subject to suit for discriminatory acts of their agents).

27. *See infra* notes 32-33 and accompanying text.

28. 42 U.S.C. §§ 2000e-1-2000e-17 (1994). Individual liability signifies, in this context, the liability of individuals "who do not otherwise meet the statutory definition of employer." EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1282 (7th Cir. 1995).

29. WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS §§ 8.03, 9.02 (1993). Professor Popkin establishes a framework for statutory interpretation: (1) the writer approach which focuses on the writer's intent; (2) the textualist approach which emphasizes the plain meaning; and (3) the reader approach which embodies creative construction to reach the best policy result. *Id.* *See also* James E. Westbrook, *A Comparison of the Interpretation of Statutes and Collective Bargaining Agreements: Grasping the Pivot of Tao*, 60 MO. L. REV. 283, 285-305 (1995) (providing a comprehensive analysis of recent scholarship on statutory interpretation).

30. 42 U.S.C. § 2000e(b) (1994) (emphasis added). *See also* Americans With

this language, some federal courts have concluded that Title VII's plain language<sup>31</sup> mandates imposing individual liability on an employer's agents because the statute incorporates "agent" within its definition of "employer."<sup>32</sup>

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Disabilities Act ("ADA"), 42 U.S.C. § 12111(5)(A) (1994); Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 630(b) (1994) (both the ADA and the ADEA apply the same definition of "employer" as Title VII).

Courts commonly refer to these statutes as the "anti-discrimination statutes" and interchangeably apply their accompanying case law in interpreting these statutory provisions unless the context mandates to the contrary. *See, e.g.,* Newman v. GHS Osteopathic, Inc., 60 F.3d 153, 157 (3d Cir. 1995); EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1279 (7th Cir. 1995); DeLuca v. Winer Indus., Inc., 53 F.3d 793, 797 (7th Cir. 1995); Miller v. Maxwell's Int'l Corp., 991 F.2d 583, 587 (9th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994).

31. Courts predominantly consider the "Plain Language" approach as the initial starting point to statutory interpretation. *See, e.g.,* Nixon v. United States, 506 U.S. 224, 231 (1993); United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989); Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985); *In re Sanderfoot*, 899 F.2d 598, 600 (7th Cir. 1990), *rev'd on other grounds*, 500 U.S. 291 (1991); and Jendusa v. Cancer Treatment Ctrs. of America, Inc., 868 F. Supp. 1006, 1010 (N.D. Ill. 1994). *See also* POPKIN, *supra* note 29, §§ 8.03, 9.02 (discussing the "plain meaning" approach to statutory interpretation as, when language has a core plain meaning, "it is usually because the facts in a case satisfy all plausible conditions. Plain meaning is really the plain application of a text to the facts at hand."); NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.01 (5th ed. 1992) (discussing the importance of the text in statutory construction).

32. *See, e.g.,* Ball v. Renner, 54 F.3d 664, 667 (10th Cir. 1995) (noting that the agent must be the equivalent of an employer by exercising "supervisory/managerial authority" over the employees); Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 802 (6th Cir. 1994) (same); Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993) (concluding that to qualify as an employer, the individual agent must serve in a supervisory position and exercise significant control over the plaintiff's hiring, firing, or other employment conditions); Shager v. Upjohn Co., 913 F.2d 398, 404 (7th Cir. 1990) (noting in dicta, based on the ADEA's text, that the plaintiff might have a cause of action solely against the agent); Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989), *rev'd in part, aff'd in relevant part*, 900 F.2d 27 (4th Cir. 1990) (en banc); York v. Tennessee Crushed Stone Ass'n, 684 F.2d 360, 362 (6th Cir. 1982) (noting in dicta that "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"); Goodstein v. Bombardier Capital, Inc., 889 F. Supp. 760, 764-65 (D. Vt. 1995); Jendusa v. Cancer Treatment Ctrs. of America, Inc., 868 F. Supp. 1006, 1010 (N.D. Ill. 1994) (finding that Title VII's plain language supports that agents are included within the definition of employer and, thus, subjecting the agent to individual liability); House v. Cannon Mills Co., 713 F. Supp. 159, 161-62 (M.D.N.C. 1988) (applying a plain language approach under the ADEA); Goodman v. Board of Trustees of Community College

On the other hand, a minority of courts have found that this same language prohibited a finding of agent liability.<sup>33</sup>

In addition, the federal courts have considered the legislature's purpose (the goals Congress seeks to promote) in enacting Title VII and its 1991 amendments as a guide for interpreting whether the statute imposes individual liability. These courts focus on Title VII's language, making it a violation for an "employer" to discriminate.<sup>34</sup> The Supreme Court has characterized Congress's purpose in enacting this legislation as serving two primary goals: fully compensating victims of discrimination and deterring discriminatory employment practices.<sup>35</sup> Moreover, courts have found that Title VII, as remedial legislation, must be construed liberally.<sup>36</sup>

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Dist. 524, 498 F. Supp. 1329, 1332 (N.D. Ill. 1980) (imposing agent liability based on the Title VII's plain language).

33. *See, e.g.*, *Busby v. City of Orlando*, 931 F.2d 764, 771-72 (11th Cir. 1991) (citing 42 U.S.C. § 2000e(b) (1994) (definition of "employer"); 42 U.S.C. § 2000e-2 (1994) (violation for "employer" to discriminate); 42 U.S.C. § 2000e-5(g) (1994) (relief for violation of § 2000e-2); *Padway v. Palches*, 665 F.2d 965, 968 (9th Cir. 1982) (stating that Title VII's language addresses *employer* conduct as opposed to an *agent's* conduct); *Clanton v. Orleans Parish Sch. Bd.*, 649 F.2d 1084, 1099, 1099 n.19 (5th Cir. 1981).

However, courts have rejected these cases' reasoning. *See, e.g.*, *Barger v. Kansas*, 630 F. Supp. 88, 91 (D. Kan. 1985) (noting that the *Padway* court's reasoning was "clearly erroneous"); *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994) (although the court ultimately rejects agent liability, the court indicates that concluding that Title VII's plain language permits agent liability is not "without merit").

34. *See, e.g.*, *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir. 1995) ("[I]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."). *See also* *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (A statute's plain meaning normally controls "except in the rare cases [where] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.").

35. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975). *See also* *Jendusa v. Cancer Treatment Ctrs. of America, Inc.*, 868 F. Supp. 1006, 1010 (N.D. Ill. 1994) (citing this same proposition).

36. *Jendusa*, 868 F. Supp. at 1010 (citing *Philbin v. General Elec. Capital Auto Lease, Inc.*, 929 F.2d 321, 323 (7th Cir. 1991)); *Taylor v. Western & Southern Life Ins. Co.*, 966 F.2d 1188, 1195 (7th Cir. 1992); *EEOC v. Liberty Trucking Co.*, 695 F.2d 1038, 1040 (7th Cir. 1982), *cert. denied*, 467 U.S. 1204 (1984) ("Federal courts have consistently interpreted Title VII in a manner which places great weight on the important remedial purposes of the legislation."); *Armbruster v. Quinn*, 711 F.2d 1332, 1336 (6th Cir. 1983) ("To effectuate its purpose of eradicating the evils of employment discrimination, Title VII should be given a liberal construction. The impact of this

To accomplish Title VII's full deterrent effect, some courts have concluded that Congress intended to impose individual liability because otherwise an employer's agents might believe that they could violate Title VII with impunity.<sup>37</sup> However, other courts have found that individual liability is unnecessary to accomplish Title VII's deterrent function. These courts observe that the marketplace would adequately ensure that employers, as rational economic actors, would avoid the risk of a civil penalty by educating or disciplining their employees.<sup>38</sup>

However, in response to the argument that the marketplace will indirectly accomplish Title VII's deterrent goal, other courts have noted that discriminatory employment practices—such as failure to promote the most qualified candidate on account of race, age, gender or other prohibited factor—do not represent rational economic conduct. Therefore, "it is inconceivable . . . that Congress intended to delegate the deterrence function of these statutes to the rational economic actors in the marketplace."<sup>39</sup> Another attack on the marketplace as a deterrent questions the empirical assumption that employers discipline agents that have violated an anti-discrimination statute.<sup>40</sup>

Some courts have concluded that Congress inserted the "agent" language into the "employer" definition with the purpose of incorporating *respondeat superior* liability<sup>41</sup> into the statute.<sup>42</sup> On the other hand, courts that reject this

construction is the broad interpretation given to the employer and employee provisions.").

37. *Jendusa*, 868 F. Supp. at 1109 (citing *Strzelecki v. Schwarz Paper Co.*, 824 F. Supp. 821, 829 (N.D. Ill. 1993) (not allowing individual liability undermines the ADEA's deterrent goal); *Vakharia v. Swedish Covenant Hosp.*, 824 F. Supp. 769, 785 (N.D. Ill. 1993)). See also *Hamilton v. Rodgers*, 791 F.2d 439, 443 (5th Cir. 1986).

38. *Jendusa*, 868 F. Supp. at 1010 (citing *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 588 (9th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994) ("No employer will allow supervisory or other personnel to violate Title VII when the employer is liable for the Title VII violation. 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 *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1282 (7th Cir. 1995) (the employer has proper incentives for disciplining offending employees to deter future illegal acts); *Lenhardt v. Basic Inst. of Tech., Inc.*, 55 F.3d 377, 380 (8th Cir. 1995) (decided under the Missouri Human Rights Act ("MHRA") based on the analogous federal civil rights laws and cases).

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

40. For example, one court reasons that employers may feel that their employment decisions were motivated by legitimate nondiscriminatory reasons, despite the jury's contrary verdict, and, thus, choose not to discipline the responsible employee. *Jendusa*, 868 F. Supp. at 1012.

41. *Respondeat superior* liability is a form of vicarious liability that allows

argument state that no legislative history, either in committee reports or floor debates, regarding Title VII's definition of "employer" supports this view.<sup>43</sup> These courts maintain that, if Congress had intended to impose *respondeat superior* liability, Congress could have included a direct statement to this effect in the statute as opposed to merely including "agents" within the definition of "employer."<sup>44</sup>

The Supreme Court in *Meritor Savings Bank v. Vinson*<sup>45</sup> instructed that "Congress wanted courts to look to agency principles for guidance" when determining employer liability for its agents under Title VII.<sup>46</sup> As such, some courts have applied agency law<sup>47</sup> to find personal liability for agents under Title VII.<sup>48</sup>

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employers to be strictly liable for their agent's torts under certain circumstances. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69 (5th ed. 1984); and RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

42. *AIC Sec. Investigations, Ltd.*, 55 F.3d at 1281 (decided in ADEA context); *Lenhardt*, 55 F.3d at 380 (decided under the MHRA); *Smith v. Lomax*, 45 F.3d 402, 403 n.4 (11th Cir. 1995) (decided under the ADEA); *Miller*, 991 F.2d at 587; *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 511 n.1 (4th Cir. 1994) (noting, however, that the court was only denying individual liability for personnel decisions of a "plainly delegable character" and, therefore, did not consider the context of sexual harassment); *Grant v. Lone Star Co.*, 21 F.3d 649, 652 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 574, (1994); *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991).

43. *Jendusa*, 868 F. Supp. at 1012. See also 110 CONG. REC. 130 (1964).

44. *Id.* (citing *Cassano v. DeSoto, Inc.*, 860 F. Supp. 537, 539 (N.D. Ill. 1994)).

45. 477 U.S. 57 (1986).

46. *Meritor*, 477 U.S. at 72. However, the Supreme Court does not cite to any legislative history to support this proposition.

47. The Restatement(Second) of Agency stipulates that "[p]rincipal and agent can be joined in one action for a wrong resulting from the tortious conduct of an agent . . . and a judgment can issue against each." RESTATEMENT (SECOND) OF AGENCY § 359c(1) (1957).

48. See, e.g., *Garcia v. Elf Atochem North America*, 28 F.3d 446, 450-51 and n.2 (5th Cir. 1994) (construing plaintiff's complaint to state a cause of action against his supervisors in their official capacities because "Title VII liability does not attach to individuals acting in their individual capacity"); *Harvey v. Blake*, 913 F.2d 226, 227-28 (5th Cir. 1990) (holding that individuals acting as an employer's agents are liable in their official capacities only); *Padway v. Palches*, 665 F.2d 965, 968 (9th Cir. 1982) (same); *Jendusa*, 868 F. Supp. at 1013-14; *Griffith v. Keystone Steel & Wire Co.*, 858 F. Supp. 802, 806 (C.D. Ill. 1994).

However, other courts conclude that Congress included the agent clause within the definition of employer in order for agency principles to determine the *scope* of an employer's liability as opposed to imposing joint and several Title VII liability upon an agent. As a result, the agent clause still would not be mere surplusage. See, e.g., *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1315 (2d Cir. 1995).



Moreover, in *Meritor*, the Supreme Court found congressional intent to limit an employer's responsibility for an agent's acts when the employer would not be liable under agency principles.<sup>49</sup> Consequently, if a court found an employer not liable for his agent's Title VII violation and the court did not recognize individual liability under the Act, then the victim of discrimination would not have a remedy under Title VII.<sup>50</sup> As such, Title VII would provide no deterrent effect on the agent in this situation.<sup>51</sup>

One court indicates that such a result "is wholly incompatible with the remedial and deterrence objectives of Title VII and the other anti-discrimination statutes . . . [and concludes] that the statutes must be interpreted to authorize individual liability."<sup>52</sup> Courts have also made a similar argument when the employer, although liable for her agent's discriminatory acts, is judgment proof, precluding the victim from obtaining any significant remedy from her. As a result, permitting individual liability against the agent might provide the victim with the only avenue for real recovery under Title VII.<sup>53</sup> However, some plaintiffs have also sought redress by bringing a tort cause of action for Intentional Infliction of Emotional Distress<sup>54</sup> ("IIED").<sup>55</sup>

49. *Meritor*, 477 U.S. at 72 ("Congress' decision to define 'employer' to include any 'agent' of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible."). Nonetheless, the Supreme Court does not cite any legislative history to support this proposition but, instead, bases this conclusion upon the statutory definition of employer as "surely" evidencing such intent. See *infra* notes 113-116 and accompanying text for further discussion of *Meritor*'s applicability to the present case.

50. *Jendusa*, 868 F. Supp. at 1013.

51. *Id.*

52. *Id.* at 1013 n.9.

53. *Id.* at 1011 n.7 (citing *Vakharia*, 824 F. Supp. at 785-86; *Zakutansky v. Bionetics Corp.*, 806 F. Supp. 1362, 1365 n.7 (N.D. Ill. 1992)).

54. RESTATEMENT (SECOND) OF TORTS § 46 (1965) defines "Outrageous Conduct Causing Severe Emotional Distress" as follows:

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

RESTATEMENT (SECOND) OF TORTS § 46 cmt. d defines "extreme and outrageous conduct" as:

It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. *Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly*

Courts that have denied individual liability under Title VII have pointed to the Act's definition of "employer" that extends liability only to employer's with fifteen or more employees.<sup>56</sup> These courts reason that Congress so limited employer liability in order to avoid burdening small entities with litigation costs associated with discrimination claims; therefore, Congress could not have intended to impose such a burden against an individual employee.<sup>57</sup>

However, other courts that have imposed individual liability have rejected this argument for several reasons.<sup>58</sup> First, some courts noted that Congress limited the definition of "employer" not only out of a concern for litigation costs but also to limit the federal government's reach into small employers' associational rights.<sup>59</sup> Second, these courts indicated that Congress limited the

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*intolerable in a civilized community.* Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!" *The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppression, or other trivialities.* . . . (emphasis added).

55. *See, e.g.,* Ball v. Renner, 54 F.3d 664, 664 (10th Cir. 1995); Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 799 (6th Cir. 1994); Brooms v. Regal Tube Co., 881 F.2d 412, 416 (7th Cir. 1989); Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989), *rev'd in part, aff'd in relevant part*, 900 F.2d 27 (4th Cir. 1990) (en banc).

However, in order to recover under an IIED theory, the plaintiff must show that the discriminatory act was significantly more severe than what otherwise would qualify as sexual harassment under Title VII. *See, e.g., supra* note 9 and accompanying text referring to the Supreme Court's test for a sexual harassment cause of action.

56. Tomka v. Seiler Corp., 66 F.3d 1295, 1313-14 (2d Cir. 1995); EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1281 (7th Cir. 1995); Birbeck v. Marvel Lighting Corp., 30 F.3d 507, 510 (4th Cir. 1994); Grant v. Lone Star Co., 21 F.3d 649, 652 (5th Cir. 1994); Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993); Pelech v. Klaff-Joss, LP, 828 F. Supp. 525, 529 (N.D. Ill. 1993); Finley v. Rodman & Renshaw, Inc., 63 Fair Empl. Prac. Cas. (BNA) 916, 917 (N.D. Ill. 1993).

57. *Id.* *See* Remarks of Senator Cotton, 110 CONG. REC. 13092 (1964) (reflecting a concern for small business' ability to absorb the litigation costs of a discrimination claim; Remarks of Senator Morse, 110 CONG. REC. 13092-93 (1964) (same); Remarks of Senator Humphrey, 110 CONG. REC. 13088 (1964); *See also* Remarks of Senator Stennis, 118 CONG. REC. 2388-89 (1972) (noting similar concerns when Congress was considering expanding the definition of employer).

58. Jendusa v. Cancer Treatment Ctrs. of America, Inc., 868 F. Supp. 1006, 1014 (N.D. Ill. 1994). *See also* Lamirande v. RTC, 834 F. Supp. 526, 528-29 (D.N.H. 1993).

59. Jendusa, 868 F. Supp. at 1013. *See* Remarks of Senator Cotton, 110 CONG. REC. 13085-86 (1964) ("[T]he principal reason why title VII is so repugnant . . . lies in the fact that in a small business . . . the personal relationship is predominant . . . .

definition of "employer" to eliminate the administrative burden on small businesses of complying with the federal government's bureaucratic regulations and accompanying paperwork.<sup>60</sup> As such, these courts conclude that Congress' desire to protect small employers from Title VII liability does not necessarily require an inference that Congress similarly desired to protect an individual agent that otherwise qualifies as an "employer" under the Act.<sup>61</sup>

Before the 1991 amendments to Title VII,<sup>62</sup> some courts believed that Congress did not seek to impose individual liability because Title VII's remedial scheme consisted of equitable remedies<sup>63</sup> that an employer, as opposed to an agent, would most likely provide.<sup>64</sup> However, since the 1991 amendments<sup>65</sup> have added compensatory as well as punitive damages to the potential remedies, other courts have noted that this argument loses all its force.<sup>66</sup>

Nonetheless, some courts maintain that the 1991 amendments further evidence legislative intent to not impose individual liability on an employer's

When a small businessman . . . selects an employee, he comes very close to selecting a partner; and when a businessman selects a partner, he comes dangerously close to the situation he faces when he selects a wife."). *See also* Remarks of Senator Ervin, 118 CONG. REC. 3171 (1972); Remarks of Senator Fannin, 118 CONG. REC. 2411 (1972) (reflecting the same concern). *See also* Janice R. Franke, *Does Title VII Contemplate Personal Liability for Employee/Agent Defendants?*, 12 HOFSTRA LAB. L.J. 39 (1994).

60. *Id.* *See* Remarks of Senator Fannin, 118 CONG. REC. 2410 (1972) ("Men and women who are very able and eager to run small businesses find that they are overwhelmed by paperwork and regulations and redtape.").

61. *Jendusa*, 868 F. Supp. at 1014. *See also Lamirande*, 834 F. Supp. at 528-29.

62. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072-73 (1991).

63. These remedies included back pay, reinstatement, and an injunction against future discriminatory practices. *See* 42 U.S.C. § 2000e-5(g) (1994).

64. *Tomka*, 66 F.3d at 1314; *AIC Sec. Investigations, Ltd.*, 55 F.3d at 1281; *Grant*, 21 F.3d at 653; *Padway*, 665 F.2d at 968; *Pommier v. James L. Edelstein Enters.*, 816 F. Supp. 476, 481 (N.D. Ill. 1993) (indicating that individual liability is not needed because the employer can generally provide the victim of discrimination with the full available remedy); *Weiss v. Coca-Cola Bottling Co.*, 772 F. Supp. 407, 411 (N.D. Ill. 1991) (same).

65. *See supra* note 62.

66. *Jendusa*, 868 F. Supp. at 1015 (citing *Vakharia v. Swedish Covenant Hosp.*, 824 F. Supp. 769, 785 n.2 (N.D. Ill. 1993) and *Hangebrauck v. Deloitte & Touche*, No. 92-C-3328, 1992 WL 348743, at \*3 (N.D. Ill. Nov. 9, 1992)).

However, an amendment to the remedial scheme cannot change the legislative intent that arguably existed when the original Act was adopted. *See, e.g.*, POPKIN, *supra* note 29, § 15.01 (discussing impact of later legislation).

agents for the following reason.<sup>67</sup> In the 1991 amendments, Congress specifically limited the potential damages based upon an employer's size but did not list a corresponding limit for agents.<sup>68</sup> Some courts find that this omission reveals that Congress did not contemplate individual liability under Title VII.<sup>69</sup>

One court has responded to this argument by contending that the 1991 damage scheme merely sets a cap on the compensatory and punitive damages that a discrimination victim can recover and makes this cap a function of the employer's number of employees.<sup>70</sup> In addition, some courts have found that the 1991 amendments' legislative history supports the view that Congress did not intend to omit individual liability under Title VII.<sup>71</sup> Such courts cite congressional findings that the pre-1991 remedies were inadequate and that the 1991 amendments' express purpose was "to strengthen existing remedies to provide more effective deterrence and ensure compensation commensurate with the harms suffered by victims of intentional discrimination."<sup>72</sup> Therefore, these courts conclude that Congress' silence on agent liability under the 1991 damage scheme is irrelevant because no express provision was needed to

67. *Tomka*, 66 F.3d at 1314; *AIC Sec. Investigations, Ltd.*, 55 F.3d at 1281; *Miller*, 991 F.2d at 587-88 n.2. See also *Grant*, 21 F.3d at 651-53; *Finley v. Rodman & Renshaw*, 63 Fair Empl. Prac. Cas. (BNA) 916, 917 (N.D. Ill. 1993).

68. *Id.* See also 42 U.S.C. § 1981a(a)(1) (Supp. 1993). This damage limitation provision authorizes compensatory and punitive damage awards only in the disparate treatment cases as opposed to disparate impact cases. These provisions state:

The sum of the amount of compensatory damages awarded under this section . . . and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees . . . , \$50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees . . . , \$100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees . . . , \$200,000; and

(D) in the case of a respondent who has more than 500 employees . . . , \$300,000.

42 U.S.C. § 1981a(b)(3) (Supp. 1993).

69. *Id.*

70. *Jendusa*, 868 F. Supp. at 1016.

71. *Id.* See H.R. REP. NO. 102-40(I), at 18, 113 (1991). See also *Sheehan v. Purolator Courier Corp.*, 676 F.2d 877, 885, 887 (2d Cir. 1982); *Guardians Ass'n of New York City Police Dept., Inc. v. Civil Service Comm'n of City of New York*, 633 F.2d 232, 254 (2d Cir. 1980).

72. *Id.* (citing H.R. REP. NO. 102-40(I), at 18, 113 (1991)).

effectuate the broad compensatory and deterrent purposes envisioned under the Act.<sup>73</sup>

### *B. The Current Conflict Among the Circuits Regarding Individual Liability Under Title VII*

The courts of appeals in the various circuits, analyzing the preceding arguments, have reached divergent results. Thus, there is a conflict among the circuits regarding individual liability under Title VII.<sup>74</sup>

The four circuits explicitly rejecting individual liability under Title VII include the Second,<sup>75</sup> Fourth,<sup>76</sup> Ninth,<sup>77</sup> and Eleventh<sup>78</sup> Circuits. The two

73. *Id.*

74. See *infra* notes 95-102 and accompanying text for the Seventh Circuit's summary of this conflict's current status.

75. The Second Circuit recently rejected individual liability under Title VII. *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2nd Cir. 1995).

This case decided the Second Circuit's split on the issue as reflected in the following district court cases: *Bakal v. Ambassador Constr.*, 94 Civ. 584, 1995 U.S. Dist. LEXIS 10542, at \*8-12 (S.D.N.Y. July 28, 1995) (finding no agent liability); *Coraggio v. Time, Inc.*, 67 Fair Empl. Prac. Cas. (BNA) 1880, 1886 (S.D.N.Y. April 26, 1995) (same); *Goodstein v. Bombardier Capital, Inc.*, 889 F. Supp. 760, 763-65 (D.Vt. 1995) (imposing agent liability); *Dirschel v. Speck*, 94 Civ. 0502, 1994 U.S. Dist. LEXIS 9257, at \*20-24 (S.D.N.Y. July 6, 1994) (same); *Bridges v. Eastman Kodak Co.*, 800 F. Supp. 1172, 1179-80 (S.D.N.Y. 1992) (same).

Nonetheless, the Second Circuit did allow the agent to be sued in his personal capacity for sexual harassment under New York's Human Rights Law. *Id.* (citing N.Y. EXEC. LAW § 292(5) (McKinney 1993)).

The New York Human Rights Law ("HRL") defines "employer" as a function of the number of employees and is also silent on the issue of individual liability. N.Y. EXEC. LAW § 292(5) (McKinney 1993). See also *Patrowich v. Chemical Bank*, 473 N.E.2d 11, 12 (1984) (stating this proposition).

Section 296(6) of the HRL makes it an unlawful discriminatory practice "for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or attempt to do so." N.Y. EXEC. LAW § 292(6) (McKinney 1993). As such, some courts have found that a defendant that actually participates in the discriminatory conduct can be subject to personal liability under the HRL. See, e.g., *Poulsen v. City of North Tonawanda*, 811 F. Supp. 884, 900 (W.D.N.Y. 1993); *Bridges*, 800 F. Supp. at 1180-81; *Wanamaker v. Columbian Rope Co.*, 740 F. Supp. 127, 135-36 (N.D.N.Y. 1990). Cf. *Patrowich*, 473 N.E.2d at 12.

76. The Fourth Circuit rejected individual liability under the ADEA. *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 666 (1994). However, the Fourth Circuit noted in dictum that an employee might be liable if not performing plainly delegable tasks. *Id.* at 511 n.1.

77. The Ninth Circuit recently rejected individual liability in *Greenlaw v. Garrett*,

circuits that have sent conflicting messages on this issue are the Fifth<sup>79</sup> and Tenth<sup>80</sup> Circuits. On the other hand, the Sixth Circuit, in dicta, has recognized individual liability under Title VII.<sup>81</sup>

As such, two circuits, the Seventh and the Eighth,<sup>82</sup> had not formally ruled on individual liability under Title VII. The Seventh Circuit was finally presented this opportunity in *Williams v. Banning*.<sup>83</sup>

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59 F.3d 994, 1001 (9th Cir. 1995), *cert. denied*, 117 S. Ct. 110 (1996).

78. The Eleventh Circuit rejected individual liability in *Cross v. Alabama State Dep't of Mental Health and Mental Retardation*, 49 F.3d 1490, 1504 (11th Cir. 1995).

79. Although the Fifth Circuit rejected individual liability in *Grant v. Lone Star Co.*, 21 F.3d 649, 649 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 574 (1994), the court has most recently held "supervisors who exercise employer's traditional rights . . . liable under Title VII." *Garcia v. Elf Atochem North America*, 28 F.3d 446, 451 (5th Cir. 1994).

80. The Tenth Circuit has most recently approved individual liability in theory while still formally considering the issue an open question. *Ball v. Renner*, 54 F.3d 664, 668 (10th Cir. 1995). However, the court had previously rejected individual liability. *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993).

81. *York v. Tennessee Crushed Stone Ass'n.*, 684 F.2d 360, 362 (6th Cir. 1982).

82. However, the Eighth Circuit did reject individual liability under a similarly worded state statute by analogy to Title VII. *Lenhardt v. Basic Inst. of Tech. Inc.*, 55 F.3d 377, 380-81 (8th Cir. 1995) (construing the Missouri Human Rights Act ("MHRA")). *See also Smith v. St. Bernard's Regional Medical Center*, 19 F.3d 1254, 1255 (8th Cir. 1994) (holding that claims against individual defendants fail under Title VII in context of co-employee as opposed to supervisor); *Herrero v. St. Louis Univ. Hosp.*, 929 F. Supp. 1260, 1266 (E.D. Mo. 1996) (supervisors are not individually liable under Title VII, the ADEA, or the MHRA as they are not the employer to whom those statutes are directed); *Griswold v. Madrid County Group Practice*, 920 F. Supp. 1046, 1046-1048 (E.D. Mo. 1996) (same); *Schallehn v. Central Trust and Sav. Bank*, 877 F. Supp. 1315, 1328-1338 (N.D. Iowa 1995) (holding individual liability can be imposed on supervisory personnel under ADEA); *Seals v. State of Missouri, Div. of Youth Servs.*, 865 F. Supp. 595, 595-596 (E.D. Mo. 1994) (rejecting individual liability under Title VII and MHRA); *Williams v. Rothman Furniture Stores, Inc.*, 862 F. Supp. 239, 240-41 (E.D. Mo. 1994) (rejecting individual liability under Title VII); *Engle v. Barton County Memorial Hosp.*, 864 F. Supp. 118, 118-120 (W.D. Mo. 1994) (holding hospital administration is not subject to individual liability under Title VII); *Henry v. E.G.&G. Missouri Metals Shipping Co.*, 837 F. Supp. 312, 314 (E.D. Mo. 1993) (no individual liability for supervisory employees per Title VII); *Stafford v. State of Missouri*, 835 F. Supp. 1136, 1148-49 (W.D. Mo. 1993) (rejecting Title VII and MHRA claims against supervisor in individual capacity); *Burrell v. Truman Med. Ctr., Inc.*, 721 F. Supp. 230, 231-32 (W.D. Mo. 1989) (holding that employees may be liable under federal Civil Rights Act if they qualify as statutory agents of employer).

83. *Williams v. Banning*, 72 F.3d 552 (7th Cir. 1995).

## IV. INSTANT DECISION

In considering Williams's appeal, the Seventh Circuit accepted as true the facts alleged in Williams's complaint.<sup>84</sup>

The court first noted that both sides agreed that Title VII and its 1991 amendments do not *specifically* address the issue of individual liability.<sup>85</sup> The court then examined the Congressional purpose behind Title VII and, particularly, its 1991 amendments. The court stated that one of the major reasons Congress adopted the 1991 amendments was to allow punitive and compensatory damages for the victims of unlawful intentional discrimination, provided that they could not otherwise recover under section 1981 of the Act.<sup>86</sup> Nonetheless, the Seventh Circuit found that the 1991 amendments to Title VII limited damages based on the employer's size<sup>87</sup> and that this limit reflected a congressional intent not to impose individual liability on an employer's agents.<sup>88</sup>

Next, the court stated that it had recently denied individual liability under the Americans With Disabilities Act ("ADA").<sup>89</sup> Because Title VII, the ADA, and the Age Discrimination in Employment Act ("ADEA") contain essentially the same definition of "employer,"<sup>90</sup> the appellate court drew an analogy

84. *Id.* at 553 (citing *Whirlpool Fin. Corp. v. GN Holdings, Inc.*, 67 F.3d 605, 608 (7th Cir. 1995)).

85. *Id.*

86. *Id.* (citing 42 U.S.C. § 1981a(a)(1) (1994)). The Seventh Circuit indicated that the stated purpose of the 1991 amendments was "to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace" and "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." *Id.* (quoting Pub. L. No. 102-166, § 3(1), (4), 105 Stat. 1071 (1991)).

87. Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072-73 (1991).

88. *Banning*, 72 F.3d at 553 (citing *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1279-82 (7th Cir. 1995); *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994) ("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.")).

89. *Id.* (citing *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1279-82 (7th Cir. 1995)).

90. Title VII defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such person[.]" 42 U.S.C. § 2000e(b) (1994). The ADA's and the ADEA's corresponding provisions are located at 42 U.S.C. § 12111(5)(A) (1994), and 29 U.S.C. § 630(b) (1994), respectively.

"Courts routinely apply arguments regarding individual liability to all three statutes interchangeably." *AIC Sec. Investigations, Ltd.*, 55 F.3d at 1279-80. *See also*

from a recent Seventh Circuit case, *EEOC v. AIC Security Investigations, Limited*,<sup>91</sup> involving individual liability under the ADA.<sup>92</sup> In that case, the appellate court held that the ADA's definition of "employer," which (like Title VII) includes an employer's agents, merely represents traditional *respondeat superior* liability as opposed to creating individual liability for the employer's agents.<sup>93</sup> In fact, the court indicated that its holding—rejecting individual liability under the ADA—was based on cases that had rejected individual liability under Title VII.<sup>94</sup> Next, the Seventh Circuit summarized the other Circuits' positions on an agent's individual liability under the Act as follows.

The court noted that the Second,<sup>95</sup> Fourth,<sup>96</sup> Ninth,<sup>97</sup> and Eleventh<sup>98</sup> Circuits have all recently rejected individual liability under Title VII.<sup>99</sup> Although the Eighth Circuit has not formally considered individual liability under Title VII, the court found that the Eighth Circuit did reject individual liability under a similarly worded state statute.<sup>100</sup> The court found that the Fifth and Tenth Circuits presented conflicting signals on individual liability

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Newman v. GHS Osteopathic, Inc., Parkview Hosp. Div., 60 F.3d 153, 156-57 (3d Cir. 1995).

91. 55 F.3d 1276, 1279-82 (7th Cir. 1995).

92. *Banning*, 72 F.3d at 554.

93. *Id.* For a discussion of *respondeat superior* liability, see *supra* notes 41-44.

94. *Id.* (citing *AIC Sec. Investigations, Ltd.*, 55 F.3d at 1280 (citing *Smith v. Lomax*, 45 F.3d 402 (11th Cir. 1995); *Grant v. Lone Star Co.*, 21 F.3d 649 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 574 (1994); *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993))).

95. *Id.* at 554 n.2 (citing *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313-17 (2d Cir. 1995)). See *supra* note 75 discussing the Second Circuit case law on the issue.

96. *Id.* (citing *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510 n.1 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 666 (1994)) (rejecting individual liability under the ADEA, while noting in dictum that an employee "may not be shielded as an employer's agent" unless performing plainly delegable tasks).

97. *Id.* (citing *Greenlaw v. Garrett*, 59 F.3d 994, 1001 (9th Cir. 1995), *cert. denied*, 117 S. Ct. 110 (1996)).

98. *Id.* (citing *Cross v. Alabama*, 49 F.3d 1490, 1504 (11th Cir. 1995)).

99. *Id.*

100. *Id.* (citing *Lenhardt v. Basic Inst. of Tech., Inc.*, 55 F.3d 377, 380-81 (8th Cir. 1995)) (construing the Missouri Human Rights Act by analogy to Title VII).



under the Act.<sup>101</sup> However, the Seventh Circuit stated that the Sixth Circuit had recognized, in dictum, individual liability under Title VII.<sup>102</sup>

In reaching its decision, the Seventh Circuit indicated that the rationale underlying *AIC Security* mandated the instant case's disposition unless Title VII's definition of "employer" is meaningfully distinguishable from the ADA's.<sup>103</sup> In concluding that the two definitions of "employer" were not meaningfully distinguishable, and, therefore, both statutory definitions of "employer" were ambiguous, the court rejected Williams's textual argument.<sup>104</sup> The court refused to accept that Title VII's plain language includes an employer's agents within the definition of "employer" and, therefore, imposes individual liability on the agent.<sup>105</sup> The appellate court noted that it had similarly rejected this "plain language" argument in *AIC Security*.<sup>106</sup> In addition, the court found that the majority of appellate courts directly considering the issue had similarly rejected the "plain language" argument.<sup>107</sup> The court further indicated that it had previously characterized the definition of "employer" as ambiguous regarding the issue of individual agent liability and, thus, susceptible of several potential interpretations.<sup>108</sup>

Next, the appellate court addressed Williams's argument based on Title VII's broad remedial purpose. Williams contended that the 1991 Amendments to the Civil Rights Act that added both punitive and compensatory damages reflected a broad remedial purpose to provide redress for victims of

101. *Id.* (comparing *Grant v. Lone Star*, 21 F.3d 649, 649 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 574 (1994); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1124-25 (10th Cir. 1993) (both rejecting individual liability) with *Ball v. Renner*, 54 F.3d 664, 668 (10th Cir. 1995) ("individual liability approved in theory, but considered an 'open question'"); *Garcia v. Elf Atochem North America*, 28 F.3d 446, 451 (5th Cir. 1994) ("supervisors who exercise employer's traditional rights are liable under Title VII)).

102. *Id.* (citing *York v. Tennessee Crushed Stone Ass'n*, 684 F.2d 360, 362 (6th Cir. 1982)).

103. *Id.*

104. Williams cited *Estate of Cowart v. Nicklos Drilling Company*, 505 U.S. 469, 475 (1992) for the proposition that "[w]hen a statute speaks with clarity to an issue judicial inquiry into the statute's meaning . . . is finished." *Id.*

105. *Id.*

106. *Id.* at 3 (citing *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1281 (7th Cir. 1995)).

107. *Id.* (citing *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995); *Grant v. Lone Star Co.*, 21 F.3d 649, 653 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 574 (1994); *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993) but comparing *Ball v. Renner*, 54 F.3d 664, 667 (10th Cir. 1995)).

108. *Id.* (citing *Shager v. Upjohn Co.*, 913 F.2d 398, 404 (7th Cir. 1990) (decided in the context of the ADEA)).

discrimination and harassment.<sup>109</sup> Williams argued that Congress intended to impose individual liability on an employer's agents because, otherwise, victims like Williams (whose employer is not liable for the agent's discriminatory acts or harassment) would have no remedy.<sup>110</sup>

In response, the court acknowledged that most cases that had rejected individual liability assumed, under the doctrine of *respondeat superior*, that the victim could sue her employer as another avenue for redress.<sup>111</sup> The court noted that Williams did not have this option in the present case because her employer ("CCC") was not liable for her supervisor's acts of harassment.<sup>112</sup>

The appellate court explained that employers are not strictly liable for their agents discriminatory acts under Title VII based on the Supreme Court's holding in *Meritor Savings Bank v. Vinson*.<sup>113</sup> Instead, under *Meritor*, the court stated that an employer is only liable for a supervisory employee's sexual harassment if "the supervisor's acts fell within the scope of his authority or were foreseeable, and the employer failed to take appropriate remedial action."<sup>114</sup>

In the instant case, the court concluded that Williams's employer had already provided the required remedial action.<sup>115</sup> As such, the court held that

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109. *Id.*

110. *Id.*

111. *Id.* (citing *AIC Sec. Investigations, Ltd.*, 55 F.3d at 1282 (holding the employing entity liable) and *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991) (finding that the plaintiff's appropriate avenue for recovery under Title VII is through a suit against the employer)).

The Seventh Circuit also noted that *Paroline v. Unisys Corporation*, 879 F.2d 100, *vacated in part*, 900 F.2d 27 (4th Cir. 1990) (en banc), did not hold differently. *Id.* at 554 n.3. In *Paroline*, the Fourth Circuit held that: "[a]n 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." *Id.* (quoting *Paroline*, 879 F.2d at 104). The Seventh Circuit explained that the court in that case determined whether the individual harasser met the definition of "employer" in order to decide whether the employer would be liable for the harassment under a *respondeat superior* theory. *Id.*

112. *Id.*

113. *Id.* (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986)).

114. *Id.* The court cited *Shager v. Upjohn Co.*, 913 F.2d 398, 404 (7th Cir. 1990), *Garcia v. Elf Atochem North America*, 28 F.3d 446, 451 (5th Cir. 1994), and *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 803 (6th Cir. 1994) as examples of appellate courts applying this *Meritor* standard. To contrast, the court cited *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir. 1994), *cert. denied*, 114 S. Ct. 2693 (1994), as holding that an employer is "absolutely liable if supervisor uses actual or apparent authority to further harassment." *Id.*

115. *Id.* The court found that CCC maintained a system where harassment victims

Title VII need not provide any remedy other than this *respondeat superior* liability to a victim like Williams.<sup>116</sup> The court found that Williams had already received a significant non-monetary remedy because her employer showed sensitivity to her complaint by taking prompt action against her harasser.<sup>117</sup> For example, the court noted that Williams remains employed with her company while her supervisor Banning does not.<sup>118</sup> Therefore, the court stated that such a prompt remedy would also likely deter other potential harassers from violating Title VII.<sup>119</sup>

However, the appellate court commented that, if an employer's prompt remedial action does not fully compensate a victim of severe harassment,<sup>120</sup> then Congress instead intended for the victim to rely on traditional tort remedies for redress.<sup>121</sup> The court explained that such a conclusion follows their analysis in *AIC Security*.<sup>122</sup> In that case, the plaintiff argued that since the employer was judgment-proof because of bankruptcy, the plaintiff could only recover if the court imposed individual liability.<sup>123</sup> In rejecting the plaintiff's argument, the Seventh Circuit stated that Congress and not the courts had the power to amend this statutory structure.<sup>124</sup> Applying this rationale to the instant case, the court found that this distinction (merely because the employer in this case was not liable as opposed to judgment proof) did not raise sufficient grounds for imposing individual liability.<sup>125</sup>

In conclusion, the Seventh Circuit affirmed the district court's dismissal of Williams's Title VII claim against her supervisor in his individual capacity

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could relate their complaints to the company. After Williams used the company's complaint system, CCC promptly investigated her complaint and then took quick, decisive action against her supervisor Banning. *Id.*

116. *Id.* The Seventh Circuit clarified that *Meritor* and its progeny "do not hold that an agent's acts of harassment are not attributable to a principal who takes prompt remedial action, just that the principal/employer is not liable for such acts." *Id.* (citing *Meritor*, 477 U.S. at 72; *Brooms v. Regal Tube Co.*, 881 F.2d 412, 421 (7th Cir. 1989)). As such, Banning's acts of harassment are attributable to his employer; however, his employer is not liable for its agent's harassment. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. The court listed examples of "severe" harassment to include severe mental and emotional distress, embarrassment, and humiliation. *Id.* at 555.

121. *Id.* See *supra* notes 54-55 and accompanying text for a discussion regarding the traditional tort recovery of Intentional Infliction of Emotional Distress.

122. *Id.* (citing *AIC Sec. Investigations, Ltd.*, 55 F.3d at 1282 n.9).

123. *Id.*

124. *Id.*

125. *Id.*

under Rule 12(b)(6).<sup>126</sup> The court held that Williams failed to state a claim on which relief could be granted because "a supervisor does not, in his individual capacity, fall within Title VII's definition of employer."<sup>127</sup>

#### IV. COMMENT

In rejecting individual liability under Title VII, the Seventh Circuit becomes the next to the last circuit to address the issue.<sup>128</sup> Only the Eighth Circuit awaits formal consideration of this question.<sup>129</sup> The Seventh Circuit followed the majority of the circuits that have refused to impose personal liability on an employer's agent;<sup>130</sup> however, a conflict still persists among the circuits.<sup>131</sup>

The various circuits' analysis of this statutory interpretation question reveals debates regarding the meaning of the statute as well as the proper approach to statutory interpretation.<sup>132</sup> Significantly, these various approaches result in divergent policy implications for potential Title VII plaintiffs and defendants.

The courts following a strict "plain meaning" approach to statutory interpretation conclude that Title VII does impose individual liability upon an employer's agents because "agent" is expressly included within the statutory definition of an "employer."<sup>133</sup> Therefore, an agent meets Title VII's statutory definition of employer and is consequently subject to Title VII liability.

Such a result furthers the legislative purpose behind Title VII of providing compensation to victims of unlawful discrimination and deterring

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126. *Id.*

127. *Id.*

128. *Id.* at 552.

129. *See* Lenhardt v. Basic Inst. of Tech., Inc., 55 F.3d 377 (8th Cir. 1995) (rejecting individual liability under the Missouri Human Rights Act).

130. For a discussion of the circuits that have refused to impose individual liability under Title VII, see *supra* notes 75-78 and accompanying text.

131. For a discussion of the circuits that have imposed individual liability under Title VII, see *supra* notes 79-81 and accompanying text.

132. For a discussion regarding the circuits' various approaches to interpreting Title VII, see *supra* notes 29-73 and accompanying text.

133. *See supra* notes 30-33 and accompanying text that discusses the "plain meaning" approach to statutory interpretation and the courts that have adhered to this method. *See also* Scott B. Goldberg, Comment, *Discrimination by Managers and Supervisors: Recognizing Agent Liability Under Title VII*, 143 U. PA. L. REV. 571, 575 (1994) (arguing that Title VII's literal text supports a finding of agent liability).

Title VII violations.<sup>134</sup> For instance, one scholar argues that imposing individual liability upon an agent provides a direct deterrent to the agent through the threat of personal bankruptcy as well as serving as a better approach to allocating the blame on the party responsible for the unlawful act.<sup>135</sup>

In addition, the canon of statutory construction stating that remedial legislation, such as Title VII, should be liberally construed further supports imposing individual liability upon an agent.<sup>136</sup> Nonetheless, despite strong arguments for imposing individual liability upon an agent under Title VII, the majority of the circuits have reached the opposite conclusion.<sup>137</sup>

These courts, like the Seventh Circuit in *Williams v. Banning*, reach this result by reading the insertion of "agent" into the definition of employer as providing for *respondeat superior* liability as opposed to agent liability.<sup>138</sup> However, a plain language argument against this interpretation contends that such a reading reduces the agent clause to surplusage because "[a]bsent this clause, Title VII would nevertheless permit *respondeat superior* liability against employers for the acts of their agents under common law liability principles."<sup>139</sup> The argument follows that, unless Congress clearly indicates to the contrary, the courts should not construe a statute in a way that renders part of the statute mere surplusage.<sup>140</sup>

Nonetheless, the Seventh Circuit, like the majority of the circuits, also relied on Title VII's remedial scheme as evidence that Congress did not intend to impose individual liability under the Act.<sup>141</sup> This argument contends that, because Congress chose not to impose Title VII liability upon an employer with less than fifteen employees, Congress similarly did not intend to impose individual liability upon a single agent.

134. For a discussion regarding the legislative intent and purpose behind Title VII and its 1991 amendments, see *supra* notes 34-73 and accompanying text.

135. See Goldberg, *supra* note 133, at 583-89.

136. See *supra* note 36 and accompanying text citing this canon of statutory construction. See also Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 401 (1950) (citing this canon of statutory construction).

137. See *supra* notes 75-78 and accompanying text (identifying the circuits that have rejected individual liability under Title VII).

138. For a discussion of the *respondeat superior* argument, see *supra* notes 41-44 and accompanying text.

139. *Tomka*, 66 F.3d at 1319 (Parker, J., dissenting).

140. *Id.* See also *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985) (stating this same surplusage argument).

141. See *supra* notes 62-73 and accompanying text (discussing Title VII's remedial scheme).

While such an argument carries intuitive appeal, the plain language of Title VII's definition of employer could override this logic. The principle of separation of powers supports judicial deference to the language of the statute.<sup>142</sup> Moreover, a court should only reject the clear language of a statute when that meaning would lead to absurd results.<sup>143</sup> Imposing liability on a single agent (of an employer with fifteen or more employees) while denying Title VII liability to an employer with fourteen employees may seem unfair but clearly does not rise to the level of absurdity. In any case, the legislature always retains the power to amend the statute if the legislature finds the results of applying the plain language unsatisfactory.

Significantly, the Seventh Circuit decided this case in the context of a sexual harassment suit where the employer was found not liable for the agent's violative acts. By refusing to impose individual liability upon the agent, the plaintiff was left with no Title VII remedy. To secure a recovery directly against her alleged harasser, the plaintiff must now turn to the tort cause of action, Intentional Infliction of Emotional Distress ("IIED"). IIED presents the plaintiff with a significantly more onerous burden of proof<sup>144</sup> and would most likely provide relief for only the most egregious acts. Therefore, the Seventh Circuit takes a more restrictive view of the "employer" definition than, for instance, the Fourth Circuit, which only denied individual liability for an agent's decisions that were characterized as "plainly delegable" and did not consider the act of sexual harassment, a task outside the agent's scope of authority.<sup>145</sup>

While the Eight Circuit has not formally addressed the issue under Title VII, its decision in *Lenhardt v. Basic Institute of Technology, Inc.*<sup>146</sup> denied individual liability under the Missouri Human Rights Act ("MHRA")<sup>147</sup> in a disability discrimination case. The Eighth Circuit substantially relied upon

142. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992); *Tomka*, 66 F.3d at 1319 (Parker, J., dissenting).

143. *Tomka*, 66 F.3d at 1319 (Parker, J., dissenting).

144. For a discussion of Intentional Infliction of Emotional Distress, see *supra* notes 54-55 and accompanying text.

145. For a cite to the Fourth Circuit position, see *supra* note 76.

146. 55 F.3d 377 (8th Cir. 1995).

147. MO. REV. STAT. § 213.010 (1994). Section 213.010(6) defines "employer" as:

"Employer" includes the state, or any political subdivision thereof, or any person employing six or more persons within the state, *and any person directly acting in the interest of an employer*, but does not include corporations and associations owned and operated by religious or sectarian groups.  
 (emphasis added).

the same arguments advanced in *Williams v. Banning*.<sup>148</sup> Consequently, *Williams v. Banning* and *Lenherdt v. Basic Institute of Technology, Inc.*'s denial of individual liability under Title VII and the MHRA, respectively, may be predictive of how the Eighth Circuit might rule on agent liability under Title VII.

## VI. CONCLUSION

In conclusion, *Williams v. Banning* reflects the majority position of the appellate courts that refuse to impose individual liability upon an employer's agents under Title VII. In reaching this decision, the appellate courts depart from the clear meaning of the statutory text and, instead, rely upon their view of legislative intent and purpose as gleaned from the logic behind the Act's remedial scheme.

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148. *Lenherdt*, 55 F.3d at 379-81.