

IF YOU GRAB THE HONEY, YOU BETTER HAVE THE MONEY: AN IN-DEPTH ANALYSIS OF INDIVIDUAL SUPERVISOR LIABILITY FOR WORKPLACE SEXUAL HARASSMENT

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Meet Jane Doe. Jane is employed as a controller by a small corporation. She is the only woman in an eight-member finance department. Jane works directly for the company's chief financial officer ("CFO"). The CFO has been with the company for some time and manages it with an "old boys' club" mentality. The men in the finance department frequently make lewd jokes, obscene gestures, and offensive comments toward Jane. Not only is this behavior tolerated, but the CFO himself frequently engages in the unwelcome, sexually charged conduct. As a result, Jane, the only woman in the department, feels extremely threatened. After following the appropriate procedures set forth in the company's employee handbook, Jane concludes that nothing seems to have changed. Jane still feels threatened and particularly helpless, as nothing has been done to help alleviate her problems. Jane has filed a claim with the Equal Employment Opportunity Commission and wants to bring a lawsuit against the company. She also desires to bring a suit against the company's CFO in his individual capacity, which would provide her with a fuller sense of vindication. Unfortunately for Jane, her latter cause of action will likely not be recognized in either federal or state court.¹

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1. See Randy Sutton, Annotation, *When Is Supervisor's or Coemployee's Hostile Environment Sexual Harassment Imputable to Employer Under State Law*, 94 A.L.R.5TH 1, 29 (2001); see also cases cited *infra* note 16. The author recognizes that supervisors may be held liable under state tort law. That discussion, however, is outside the scope of this Note.

INTRODUCTION

The type of sexual harassment described in the previous example is not a new phenomenon in the workplace.² It has likely existed since women entered the workplace.³ Liability for workplace sexual harassment, however, is a relatively recent development in the law.⁴ Although lower courts have recognized this cause of action since the mid-1970s,⁵ it was not until 1986 when, in the case of *Meritor Savings Bank v. Vinson*,⁶ the Supreme Court of the United States officially recognized sexual harassment as unlawful discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964 ("Title VII").⁷ The Supreme Court recognized that an employer could be held liable for sexual harassment.⁸ However, due to an incomplete factual record, it declined to issue any definitive rules for whether this statute extended liability to the supervisor in his individual capacity for his own acts of sexual harassment.⁹ This refusal initially led to a cluttered and confused body of law in the lower federal courts.¹⁰ Today,

2. See, e.g., CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 1–2 (1979).

3. Alicia M. Simmons, *State Sexual Harassment*, 6 GEO. J. GENDER & L. 597, 597 (2005) ("Sexual harassment has been prevalent in workplaces around the nation since the introduction of women into the workplace.").

4. See Paul P. Dumont, Comment, *Radtke v. Everett: An Analysis of the Michigan Supreme Court's Rejection of the Reasonable Woman/Victim Standard: Treating Perspectives That Are Different as Though They Were Exactly Alike*, 27 GOLDEN GATE U. L. REV. 255, 258–62 (1997) (providing a short summary of the development of American sexual harassment jurisprudence).

5. Sexual harassment was first recognized as discrimination on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000–2000e-17 (2000), in 1976 by the United States District Court for the District of Columbia in the case of *Williams v. Saxbe*, 413 F. Supp. 654, 658, 661 (D.D.C. 1976), *rev'd on other grounds sub nom. Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978). Since that case, there have been thousands more filed. See EEOC, *Harassment Charges FY 1997–FY 2006*, <http://www.eeoc.gov/stats/harassment.html> (last visited Feb. 8, 2007) (compiling data concerning the trends in harassment claims filed with the EEOC). See also EEOC, *Sexual Harassment Charges: EEOC & FEPAs Combined: FY 1997–FY 2006*, <http://www.eeoc.gov/stats/harass.html> (last visited Feb. 8, 2007) (compiling data concerning the trends in sexual harassment claims filed with the EEOC and the Fair Employment Practices Agency from 1997 through 2006).

6. 477 U.S. 57 (1986).

7. *Id.* at 63.

8. *Id.* at 71–72.

9. *Id.* at 72.

10. Rachel E. Lutner, Note, *Employer Liability for Sexual Harassment: The Morass of Agency Principles and Respondeat Superior*, U. ILL. L. REV. 589, 598–602 (1993).

however, there is a consensus among federal circuit courts that liability for acts of sexual harassment does *not* extend to the supervisor in his individual capacity under Title VII.¹¹

This reluctance to hold supervisors individually liable for acts of sexual harassment has also carried over to the state courts. Following Congress's enactment of the Civil Rights Act of 1964, nearly every state followed suit and enacted its own employment discrimination law.¹² Substantively, these state statutes proscribe most of what is covered under Title VII, although the actual language employed by the statutes varies greatly.¹³ Nearly every state that has adopted a

11. See, e.g., *Wathen v. Gen. Elec. Co.*, 115 F.3d 400, 405 (6th Cir. 1997) (holding that "an individual employee/supervisor, who does not otherwise qualify as an 'employer,' may not be held personally liable under Title VII"); *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1078 (3d Cir. 1996) ("[W]e are persuaded that Congress did not intend to hold individual employees liable under Title VII."); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir. 1995) (holding that "individual defendants with supervisory control over a plaintiff may not be held personally liable under Title VII"), *abrogated on other grounds by Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Williams v. Banning*, 72 F.3d 552 (7th Cir. 1995) (holding that a supervisor, in his individual capacity, does not fall within the definition of "employer" in Title VII); *Lenhardt v. Basic Inst. of Tech., Inc.*, 55 F.3d 377, 381 (8th Cir. 1995) ("Every circuit that has considered the issue ultimately has concluded that an employee, even one possessing supervisory authority, is not an employer upon whom liability can be imposed under Title VII."); *Smith v. Lomax*, 45 F.3d 402, 403 n.4 (11th Cir. 1995) (recognizing that an employee cannot be held individually liable under Title VII); *Gary v. Long*, 59 F.3d 1391, 1399 (D.C. Cir. 1995) (noting that "while a supervisory employee may be joined as a party defendant in a Title VII action, that employee must be viewed as being sued in his capacity as the agent of the employer, who is alone liable for a violation of Title VII"); *Grant v. Lone Star Co.*, 21 F.3d 649, 653 (5th Cir. 1994) (holding that "[T]itle VII does not permit the imposition of liability upon individuals unless they meet [T]itle VII's definition of employer"); *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583 (9th Cir. 1993) (holding that individuals cannot be held liable for damages under Title VII); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993) (holding that "[u]nder Title VII, suits against individuals must proceed in their official capacity; individual capacity suits are inappropriate").

12. Although this Note discusses examples of state employment discrimination statutes in the context of individual liability for sexual harassment, it does not attempt to collect and summarize the state job discrimination statutes of all the states. Other sources are available for this purpose. See generally JOHN F. BUCKLEY IV & RONALD M. GREEN, 2006 STATE BY STATE GUIDE TO HUMAN RESOURCES LAW (2006); JAMES O. CASTAGNERA ET AL., TERMINATION OF EMPLOYMENT (2006); LAWRENCE SOLOTOFF & HENRY S. KRAMER, SEX DISCRIMINATION AND SEXUAL HARASSMENT IN THE WORK PLACE (2006).

13. Compare 42 U.S.C. § 2000e(b) (2000) (defining an employer as "a person 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"), with CONN. GEN. STAT. ANN. § 46a-51 (West 2005) (defining an employer as including "the state and all political subdivisions thereof and means any person or employer with three or more persons in such person's or employer's employ"), and KAN. STAT. ANN. § 44-1002 (2000) (defining an employer as including any state resident "employing four or more persons and any

civil rights statute has held that an employer may be held liable under the statute for sexual harassment.¹⁴ However, taking the lead from the federal courts' interpretations of Title VII, most states have been reluctant to hold supervisors individually liable for their acts of sexual harassment under their respective civil rights statutes.¹⁵

Despite this majority view that supervisors cannot be held individually liable for their acts of workplace sexual harassment, several state courts have taken a divergent view.¹⁶ The most recent state court to break the trend of denying individual supervisor liability is the Michigan Supreme Court. In its June 1, 2005, decision of *Elezovic v. Ford Motor Co.*,¹⁷ the court rejected the federal courts' reliance on their own interpretations of the "object" and "policy" behind Title VII in refusing to hold supervisors liable in their individual capacity and held that under the Elliot-Larsen Civil Rights

person acting directly or indirectly for an employer, labor organizations, nonsectarian corporations, organizations engaged in social service work and the state of Kansas and all political and municipal subdivisions thereof, but shall not include a nonprofit fraternal or social association or corporation").

14. See Sutton, *supra* note 1, at 28–29.

15. See, e.g., Foster v. Shore Club Lodge, Inc., 908 P.2d 1228 (Idaho 1995) (concluding that no liability extends to the supervisor under the Idaho Human Rights Act for sexual harassment because the purpose of the Idaho Human Rights Act is to provide for the execution within the state of the policies embodied in the Federal Civil Rights Act and because agents of an employer are not subject to personal liability under the federal analogue); Devillier v. Fid. & Deposit Co. of Md., 709 So. 2d 277, 280–81 (La. Ct. App. 1998) (stating that it is appropriate to consider the federal courts' interpretations of Title VII when interpreting the Louisiana Commission on Human Rights Act and ultimately holding that no liability extends to the supervisor in his individual capacity under the Louisiana statute). See also Shannon Clark Kief, Annotation, *Individual Liability of Supervisors, Managers, Officers or Co-Employees for Discriminatory Actions Under State Civil Rights Act*, 83 A.L.R.5TH 1, 26 (2000).

16. See, e.g., Wallace v. Skadden, Arps, Slate, Meagher & Flom, 715 A.2d 873, 887–88 (D.C. Cir. 1998) (holding that individual law partners were employers under the District of Columbia Human Rights Act); Broomfield v. Lundell, 767 P.2d 697, 700–01 (Ariz. Ct. App. 1988) (holding that a doctor may be individually liable as an "agent" under the state statute's definition of "employer"), *overruled on other grounds by* Taylor v. Graham County Chamber of Commerce, 33 P.3d 518 (Ariz. Ct. App. 2001); Genaro v. Cent. Transp., Inc., 703 N.E.2d 782, 787–88 (Ohio 1999) (holding that the plain language of the Ohio unlawful discrimination statute imposed individual liability on managers and supervisors for discriminatory conduct); Brown v. Scott Paper Worldwide Co., 20 P.3d 921, 926 (Wash. 2001) (holding that "a supervisor acting in the interest of an employer who employs eight or more people can be held individually liable for his or her discriminatory acts").

17. 697 N.W.2d 851 (Mich. 2005).

Act,¹⁸ Michigan's version of Title VII, a supervisor could be held liable in his individual capacity for acts of sexual harassment.¹⁹

This minority view, most recently exemplified by Michigan, has given reason to reexamine the federal district courts' interpretations of Title VII.²⁰ This Note argues that the federal courts have erred and that Title VII should be read to impose liability upon the supervisor in his individual capacity for acts of sexual harassment. After providing a brief summary of sexual harassment under Title VII of the Civil Rights Act of 1964, Part I examines the various rationales behind the federal courts' refusal to hold supervisors individually liable under Title VII. Part II of this Note addresses the handful of state court decisions that have found individual supervisor liability under their respective sexual harassment statutes, focusing specifically on the recent *Elezovic* decision. Part III examines and critiques the various arguments set forth by the federal courts for declining to hold a supervisor liable for sexual harassment under Title VII and offers other arguments in favor of extending liability under Title VII to supervisors in their individual capacity. This Note ultimately concludes that the federal courts have erred in refusing to hold a supervisor individually liable for acts of sexual harassment under Title VII and that they ought to reexamine their interpretations and enforcement of the law.

I. FEDERAL COURT DECISIONS

Title VII of the Civil Rights Act of 1964 states that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."²¹ Initially, courts held that Title VII's proscription of sex discrimination covered only disparate treatment claims, such as

18. MICH. COMP. LAWS §§ 37.2101--2804 (West 2001).

19. *Elezovic*, 697 N.W.2d at 861. The Elliot-Larsen Civil Rights Act is nearly identical in construction to Title VII. Although there are several differences, they are beyond the scope of this Note.

20. Although the states were interpreting their own state civil rights statutes while the federal circuit courts were interpreting Title VII of the Civil Rights Act of 1964, the language of the statutes is similar enough that the state court decisions can be used as illustrations for calling into question the reasoning of the federal circuit courts. The differences between some of the state statutes and Title VII will not be explored in this Note.

21. 42 U.S.C. § 2000e-2(a) (2000).

applicants being refused employment because of their sex when the applicants are otherwise qualified for the position.²² More recently, however, courts have come to interpret sex-based discrimination in violation of Title VII to include sexual harassment.²³

Sexual harassment is generally defined as “[a] type of employment discrimination consisting in verbal or physical abuse of a sexual nature.”²⁴ This verbally or physically abusive conduct is understood to consist of unwanted sexual advances, requests to perform sexual acts, and other verbal or physical conduct of a sexual character.²⁵ The U.S. Supreme Court has recognized two forms of sexual harassment: *quid pro quo* and hostile work environment.²⁶ *Quid pro quo* sexual harassment occurs when an applicant or current employee is subject to an adverse employment decision for refusing to satisfy a sexual demand.²⁷ Hostile work environment sexual harassment occurs when a work environment is created in which an

22. See *City of Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702 (1978); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971) (holding that rejecting a female applicant because she is married, yet imposing no marital restrictions on men, is prohibited discrimination because of sex).

23. In 1976, the United States District Court for the District of Columbia was the first federal court to recognize sexual harassment as unlawful employment discrimination on the basis of sex within the meaning of Title VII. *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976) (recognizing sexual harassment as treatment “based on sex” within the meaning of Title VII), *rev’d on other grounds sub nom.* *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978). That decision opened the floodgates. In 1986, ten years later, the Supreme Court of the United States recognized sexual harassment as unlawful employment discrimination because of sex, which is actionable under Title VII. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63–65 (1986). Sexual harassment is also recognized as a form of unlawful employment discrimination because of sex by the EEOC, the enforcement agency for Title VII. EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11 (2004). More recently, the U.S. Supreme Court has heard several sexual harassment cases. See *Pa. State Police v. Suders*, 542 U.S. 129 (2004); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

24. BLACK’S LAW DICTIONARY 1407 (8th ed. 2004). Catharine A. MacKinnon has defined sexual harassment in its broadest sense as “the unwanted imposition of sexual requirements in the context of a relationship of unequal power.” MACKINNON, *supra* note 2, at 1.

25. 29 C.F.R. § 1604.11 (2005) states:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.

26. *Burlington Indus.*, 524 U.S. at 752.

27. *Id.* at 751–53.

employee is subject to unwanted verbal or physical conduct on the basis of her sex.²⁸ In order for such a hostile or abusive work environment to exist, the abusive behavior must be sufficiently severe or pervasive.²⁹

The debate over whether a supervisor who engages in sexual harassment should be individually liable stemmed primarily from the issue of whether a supervisor is considered an “employer” within the meaning of Title VII.³⁰ Title VII defines the term “employer” as “a person 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.”³¹ The debate concerning the individual liability of the supervisor surrounds the “any agent” language.³²

As previously stated, the Supreme Court has never explicitly determined whether individual liability for the supervisor exists under Title VII.³³ In declining to rule on whether the scope of “employer” liability includes individuals, the Supreme Court stated that the lower courts should be guided by agency principles.³⁴ Rather than actually providing guidance, this instruction has confused the matter all the more. The federal circuit courts that use what they believe to be agency law actually utilize the doctrine of respondeat superior to exclude supervisors from liability under Title VII.³⁵ In the case of *Miller v. Maxwell’s International, Inc.*, for example, the Ninth Circuit rejected the argument that a supervisor could be held

28. *Id.*

29. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

30. See Jan W. Henkel, *Discrimination by Supervisors: Personal Liability Under Federal Employment Discrimination Statutes*, 49 FLA. L. REV. 767, 770 (1997).

31. 42 U.S.C. § 2000e(b) (2000).

32. Kathleen Dawson, *Supervisor Liability for Employment Discrimination Under Federal Law: Substantive Remedy or Procedural Issue?*, 41 WAYNE L. REV. 1875, 1879 (1995) (discussing the problems that have arisen as a result of this language).

33. See *supra* text accompanying note 9.

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

35. See, e.g., *Wathen v. Gen. Elec. Co.*, 115 F.3d 400, 405–06 (6th Cir. 1997) (noting that Congress included “agent” in the statutory definition of “employer” to define the scope of liability of the employer through the doctrine of respondeat superior); *Grant v. Lone Star Co.*, 21 F.3d 649, 652 (5th Cir. 1994) (relying on the use of respondeat superior by the Ninth Circuit in *Miller v. Maxwell’s Int’l, Inc.* to find that “[T]itle VII does not permit the imposition of liability upon individuals”); *Miller v. Maxwell’s Int’l, Inc.*, 991 F.2d 583, 588 (9th Cir. 1993) (concluding that “there is no reason to stretch liability of individual employees beyond the respondeat superior principle intended by Congress”).

individually liable for sexual harassment.³⁶ After recognizing that it is plausible to reason that supervisors and other agents of an employer are statutory employers under the “agent” language in the definition of “employer,” the court, quoting the district court, concluded that “the obvious purpose of this [agent] provision was to incorporate respondeat superior liability into [Title VII].”³⁷ Without any further explanation of respondeat superior, the Ninth Circuit concluded that a supervisor cannot be held individually liable for sexual harassment under Title VII.³⁸ Similarly, in *Grant v. Lone Star Co.*, the Fifth Circuit concluded that no individual liability under Title VII exists for the supervisor.³⁹ Relying on the Ninth Circuit’s reasoning in *Miller*, the court determined that “[T]itle VII does not permit the imposition of liability upon individuals unless they meet [T]itle VII’s definition of ‘employer,’” which the court held did not include agents of the employer.⁴⁰

Other federal circuit courts attempt to resolve this issue by relying on what they perceive to be the real intention of Congress in enacting Title VII.⁴¹ These courts, ignoring what they acknowledge to be the plain language of the statute, interpret Title VII on the basis of what they *believe* to be the policy and purpose of the statute.⁴² In the case of *Tomka v. Seiler Corp.*, for instance, the Second Circuit determined that there was no individual liability under Title VII.⁴³ The court acknowledged that, under what it grudgingly referred to as “a narrow, literal reading of the agent clause,” Title VII “does imply that an employer’s agent is a statutory employer for purposes of [Title VII] liability.”⁴⁴ The court, ignoring the literal reading of the text of the statute, read Title VII on the basis of what it *believed* were the real “intentions of the legislators.”⁴⁵ In explaining what it believed to be the “intentions” of Congress in enacting Title VII, the court also relied

36. *Miller*, 991 F.2d at 588.

37. *Id.* at 587.

38. *Id.*

39. *Grant*, 21 F.3d at 653.

40. *Id.*

41. *See, e.g.,* *Wathen v. Gen. Elec. Co.*, 115 F.3d 400, 405 (6th Cir. 1997); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir. 1995).

42. *See, e.g., Tomka*, 66 F.3d at 1313–14.

43. *Id.* at 1314.

44. *Id.*

45. *Id.*

on the Ninth Circuit's *Miller* decision.⁴⁶ Agreeing with the Ninth Circuit's reasoning that Congress sought to protect small employers by defining "employer" as a person with fifteen or more employees, the Second Circuit held that it is reasonable to conclude that Congress would certainly not want to hold supervisors liable in their individual capacities.⁴⁷

Similarly, in the case of *Wathen v. General Electric Co.*,⁴⁸ the Sixth Circuit ruled that Title VII does not provide for the individual liability of a supervisor or manager.⁴⁹ While acknowledging that a "literal reading of the agent clause in [Title VII] *does imply* that an employer's agent is a statutory employer for purposes of liability," the Sixth Circuit stated instead that in explaining a statute, the court must look to the "object and policy" behind the law.⁵⁰ In reciting what it believed to be the "object and policy" behind Title VII, the Sixth Circuit, like the Second Circuit in *Tomka*, cited the *Miller* case from the Ninth Circuit, which stated that it was not likely that Congress intended for a supervisor to be individually liable given the statutory definition of employer, which excludes "small employers" from liability under Title VII.⁵¹ Thus, the court held that a supervisor could not be held individually liable under Title VII.⁵²

Still other federal courts look to the remedial provisions in Title VII to support their position of excluding individual liability for supervisors.⁵³ When Congress originally enacted the Civil Rights Act of 1964, the only remedies available under Title VII were injunctive relief, back pay, and reinstatement.⁵⁴ Accordingly, these courts have determined that those remedies were appropriate only against an employer, not an individual.⁵⁵

46. *Id.*

47. *Id.* at 1313.

48. 115 F.3d 400 (6th Cir. 1997).

49. *Id.* at 405.

50. *Id.* (emphasis added).

51. *Id.*

52. *Id.* at 406.

53. *See, e.g., Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995); *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1281 (7th Cir. 1995).

54. 42 U.S.C. § 2000e-5(g) (2000). *See also AIC Sec. Investigations*, 55 F.3d at 1281.

55. *E.g., Tomka*, 66 F.3d at 1314 (concluding that "[c]learly, backpay and reinstatement are equitable remedies which are most appropriately provided by employers, defined in the traditional sense of the word") (citing *Padway v. Palches*, 665 F.2d 965, 968 (9th Cir. 1982)).

In 1991, Congress enacted the Civil Rights Act of 1991, which amended the Civil Rights Act of 1964.⁵⁶ The new remedies of compensatory and punitive damages proved to be a major change to the Act.⁵⁷ Now, it is possible for plaintiffs to obtain both compensatory and punitive damages against an individual for a violation under the Act.⁵⁸ While acknowledging the plausibility of such an argument, some courts have concluded that the inclusion of such additional remedies is not strong evidence of congressional intent to hold supervisors individually liable, and have thereby denied individual liability.⁵⁹

II. STATE COURT DECISIONS

The federal courts have unanimously held that a supervisor may not be held liable in his individual capacity under Title VII for his acts of sexual harassment.⁶⁰ Most state courts have followed the federal courts' lead in denying individual liability and have relied on federal courts' interpretations of Title VII, even though the language employed in the state statutes often varies from that used in Title VII.⁶¹ The federal circuit courts' denial of individual liability under Title VII—coupled with the fact that the majority of state courts follow this federal precedent—have resulted in the predominant view in the legal community that supervisors cannot be held individually liable for their acts of sexual harassment.

Despite this overwhelming reluctance to hold supervisors individually liable for their sexual harassment, a few states recently have reached the opposite conclusion, holding that under their respective state civil rights statutes a supervisor may be found individually liable for his acts of sexual harassment.⁶² The language

56. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.).

57. *Id.* § 102(b).

58. This was exactly the argument made by the EEOC in *AIC Sec. Investigations*, 55 F.3d at 1281.

59. *See id.* (holding that it is “a long stretch to conclude that Congress silently intended to abruptly change its earlier vision through an amendment to the remedial provisions of the statute alone”). This argument rests, however, on the presumption that it was Congress's original intent to exclude supervisors from facing individual liability under Title VII.

60. *See supra* Part I.

61. *Supra* note 19.

62. *See* cases cited *supra* note 16.

employed by these states in their respective civil rights statutes is very similar to that of Title VII in that they include the “agent” language.⁶³ These states conclude that the plain language of their respective civil rights statutes defines an “agent” as a statutory “employer,” thereby imposing individual liability on the supervisor who engages in acts of workplace sexual harassment.⁶⁴

*Genaro v. Central Transport*⁶⁵ provides an example of this recent trend. In that case, the Supreme Court of Ohio answered the question certified to it by the United States District Court for the Northern District of Ohio: whether a supervisor may be held personally liable for unlawful discriminatory acts that he commits in violation of Chapter 4112 of the Ohio Revised Code.⁶⁶ This state statute, like Title VII, makes it unlawful for any employer to discriminate against any employee on the basis of sex.⁶⁷ In the Ohio statute, the term “[e]mployer” is defined as “any person employing four or more persons within the state, and *any person acting directly or indirectly in the interest of an employer.*”⁶⁸ Based on the plain language of this statute, the Ohio Supreme Court answered the certified question in the affirmative, thereby holding that supervisors may be held personally liable for their acts of sexual harassment under the Ohio statute.⁶⁹

The most recent example of this trend is found in the Supreme Court of Michigan’s decision of *Elezovic v. Ford Motor Co.*⁷⁰ Prior to *Elezovic*, the general reluctance to hold supervisors individually liable for acts of sexual harassment pervaded Michigan’s lower courts. Although the Michigan Supreme Court had addressed the issue of

63. See, e.g., ARIZ. REV. STAT. ANN. § 41-1461(4) (2004) (defining “employer” as “a person 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 that person”) (emphasis added); MICH. COMP. LAWS § 37.2201(a) (West 2001) (defining “employer” as “a person who has 1 or more employees, and includes an agent of that person”) (emphasis added); OHIO REV. CODE ANN. § 4112.01(2) (West 2001) (defining “employer” as “the state, any political subdivision of the state, any person employing four or more persons within the state, and any person acting directly or indirectly in the interest of an employer”) (emphasis added). Though these statutes are very similar, they also contain several differences, which will not be discussed in this Note.

64. See cases cited *supra* note 16.

65. 703 N.E.2d 782 (Ohio 1999).

66. *Id.* at 784.

67. OHIO REV. CODE ANN. § 4112.01 (West 2001).

68. *Id.* § 4112.01(A)(2).

69. *Genaro*, 703 N.E.2d at 790.

70. 697 N.W.2d 851 (Mich. 2005).

sexual harassment, it had not yet addressed the issue of whether supervisors or managers could be individually liable for acts of sexual harassment.⁷¹ Before *Elezovic*, the Michigan Court of Appeals dealt with individual supervisor liability in *Jager v. Nationwide Truck Brokers, Inc.*⁷² The *Jager* court, relying on the federal circuit courts' interpretations of Title VII, held that under Michigan's civil rights statute, supervisors could not be individually liable for their acts of sexual harassment.⁷³ It was amid this atmosphere of judicial reluctance to hold supervisors and managers individually liable for their discriminatory acts of sexual harassment that the Supreme Court of Michigan decided *Elezovic*.

Lula Elezovic, an employee at a Ford Motor Company assembly plant, filed her lawsuit in November, 1999, pursuant to the Elliot-Larsen Civil Rights Act ("ELCRA"), Michigan's civil rights statute.⁷⁴ She alleged that she was being sexually harassed as a result of a hostile work environment.⁷⁵ Elezovic named both Ford Motor

71. See, e.g., *Champion v. Nationwide Sec.*, 545 N.W.2d 596 (Mich. 1996).

72. 652 N.W.2d 503 (Mich. Ct. App. 2002).

73. *Id.* at 515 (concluding that "a supervisor engaging in activity prohibited by the [EL]CRA may not be held individually liable for violating a plaintiff's civil rights").

74. See *Elezovic*, 697 N.W.2d at 853-54.

75. *Id.* at 853. There are generally two recognized sets of legal grounds for claiming sexual harassment under the ELCRA—hostile work environment and quid pro quo. *Haynie v. State*, 664 N.W.2d 129, 132 n.7 (Mich. 2003). In order to establish a prima facie case of sexual harassment based on a hostile work environment, the plaintiff employee must establish five elements:

- (1) the employee belonged to a protected group;
- (2) the employee was subjected to communication or conduct on the basis of sex;
- (3) the employee was subjected to unwelcome sexual conduct or communication;
- (4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and
- (5) respondeat superior.

Chambers v. Trettco, Inc., 614 N.W.2d 910, 915 (Mich. 2000). Respondeat superior exists when an employer has received adequate notice of the harassment and fails to take suitable remedial action. *Id.* In order to establish a claim of quid pro quo sexual harassment, the plaintiff employee must establish: "(1) that she was subject to any of the types of unwelcome sexual conduct or communication described in the [ELCRA], and (2) that her employer or the employer's agent used her submission to or rejection of the proscribed conduct as a factor in a decision affecting her employment." *Champion*, 545 N.W.2d at 599. These are the same two legal bases upon which one may claim sexual harassment under Title VII. EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11 (2004). See also *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); David J. Burge, Note, *Employment Discrimination—Defining an Employer's Liability Under Title VII for On-the-Job Sexual Harassment: Adoption of a Bifurcated Standard*, 62 N.C. L. REV. 795 (1984).

Company, her employer, and Daniel Bennett, her supervisor at the assembly plant, as defendants.⁷⁶ Following a three-week jury trial, the trial court granted directed verdicts in favor of both Ford Motor Company and Bennett, holding that Elezovic failed to establish a prima facie case of sexual harassment because she failed to notify Ford Motor Company of Bennett's alleged misconduct.⁷⁷

Elezovic appealed to the Michigan Court of Appeals, arguing that she had established a prima facie case against both Bennett and Ford Motor Company.⁷⁸ The Court of Appeals, however, reluctantly relying on the *Jager* case, affirmed the trial court's ruling in favor of the defendants, Bennett and Ford Motor Company.⁷⁹ With respect to Ford Motor Company, the Court of Appeals rejected Elezovic's claim that she provided sufficient evidence of notice of Bennett's alleged sexual harassment to the company.⁸⁰

Elezovic then appealed to the Supreme Court of Michigan.⁸¹ In granting leave to appeal, the court instructed the parties to brief the issue of whether a supervisor may be held individually liable under the ELCRA for violating a plaintiff's civil rights.⁸² The ELCRA prohibits an employer from discriminating against an individual, in relation to employment, on the basis of sex.⁸³ The statute explicitly states that "[d]iscrimination because of sex includes sexual harassment."⁸⁴ The statute also expressly defines an employer as "a person who has 1 or more employees, and includes an agent of that person."⁸⁵ It is to this small portion of the statute that the Michigan Supreme Court directed most of its attention.

76. *Elezovic*, 697 N.W.2d at 853.

77. *Id.* at 854–55.

78. *Id.* at 855.

79. *Elezovic v. Ford Motor Co.*, 673 N.W.2d 776, 783 (Mich. Ct. App. 2003), *rev'd*, 697 N.W.2d 851 (Mich. 2005). The Michigan Court of Appeals, while concluding that *Jager* was wrongly decided, acknowledged nonetheless that it was obligated to follow the case's precedent and it therefore affirmed the trial court's directed verdict in favor of Bennett. *Id.* at 783–86.

80. *Elezovic*, 697 N.W.2d at 856.

81. *Id.*

82. *Id.* at 856–57.

83. MICH. COMP. LAWS ANN. § 37.2202(1)(a) (West 2001) (stating that "[a]n employer shall not . . . [f]ail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status").

84. *Id.* § 37.2103(i).

85. *Id.* § 37.2201(a) (emphasis added).

Ford Motor Company and Bennett asserted three arguments in response to the issue of whether a supervisor or manager should be individually liable for acts of sexual harassment. They first argued that inclusion of the term “agent” in the ELCRA’s definition of employer served solely to confer vicarious liability upon the employer.⁸⁶ The court acknowledged that the “agent” language served to confer vicarious liability on the employer, yet also stated that the discussion must go further. The court concluded that the plain language of the statute made clear “that the Legislature intended to make the agent tantamount to the employer so that the agent unmistakably is also subject to suit along with the employer.”⁸⁷

Ford Motor Company and Bennett next argued that the court should not find individual liability under the ELCRA because all of the federal circuit courts had held that Title VII, the federal analogue to the ELCRA, does not provide for individual liability.⁸⁸ The court, critiquing the federal courts’ reliance on the *policy* of Title VII rather than what the text of that statute actually stated, responded to this argument by stating that “[t]his Court has been clear that the policy behind a statute cannot prevail over what the text actually says.”⁸⁹ Thus, because the words of the ELCRA expressly state that an employer includes an agent of the employer, the court held that an agent could face individual liability under the ELCRA.⁹⁰

Ford and Bennett finally argued that the legislative history of the ELCRA precludes a finding of individual liability for supervisors.⁹¹ The court answered by stating that the legislature must be held to what it said in the statute because it is the court’s duty to interpret the statute as written, rather than to rework it to find some other

86. *Elezovic*, 697 N.W.2d at 857. This argument was borrowed from the federal courts.

87. *Id.* at 858.

88. *Id.* For a discussion of Title VII, *see infra* Part III.

89. *Elezovic*, 697 N.W.2d at 858.

90. *Id.* at 859.

91. *Id.* at 860. Ford and Bennett set forth their argument by calling attention to the ELCRA as it was first enacted in 1976. *Id.* Originally, the ELCRA defined employer as a person employing 4 or more employees, and included an agent of that person. *Id.* Ford and Bennett argued that because of this definition, a supervisor could not be individually liable because the ELCRA did not apply unless there were at least four employees. *Id.* Having taken this predicate of no individual liability under the original statute, Ford and Bennett then argued that even though the old theory of nonliability of agents cannot be sustained under the ELCRA as it currently reads, the court should read it into the statute anyway. *Id.*

meaning.⁹² The court thus rejected this third argument because “the actual wording of the statute as currently written unambiguously provides that an agent may be individually liable.”⁹³

The Michigan Supreme Court’s ruling that a supervisor can be held individually liable for sexual harassment was a major departure from the majority of state courts and the federal courts. The court’s ruling effectively rejected *Jager* and approximately thirty years of state law precedent. The Michigan Supreme Court and the statutory analysis it applied is an example that state and federal courts should follow in cases involving Title VII and analogous state counterparts.

III. ANALYSIS

The recent state court decisions that hold supervisors individually liable for their acts of sexual harassment under their respective state civil rights statutes cast doubt on the federal courts’ decisions that deny individual supervisor liability under Title VII. As previously noted, the federal courts have relied on several rationales for denying individual supervisor liability.⁹⁴ Upon closer inspection, however, the federal courts’ arguments against holding supervisors individually liable for acts of workplace sexual harassment are not convincing. Their analyses are incomplete, and the conclusions they have drawn from those analyses are erroneous. Furthermore, there are other, more persuasive arguments in favor of holding supervisors individually liable for their acts of sexual harassment. This Part examines and critiques the arguments set forth by the federal circuit courts. It also sets forth the other arguments favoring individual liability of supervisors under Title VII.

A. *Arguments by, and Critiques of, the Federal Circuit Courts*

1. *The Principle of Respondeat Superior*

The U.S. Supreme Court has never determined whether a supervisor may be liable in his individual capacity for acts of

92. *Id.* See also *Mayor of Lansing v. Mich. Pub. Serv. Comm’n*, 680 N.W.2d 840, 844 (Mich. 2004) (stating that the court’s “task, under the Constitution, is the important, but yet limited duty to read into and interpret what the Legislature has actually made the law”).

93. *Elezovic*, 697 N.W.2d at 860.

94. See *supra* Part I.

workplace sexual harassment. The Court did, however, give some direction to lower courts in deciding this issue in the 1986 case of *Meritor Savings Bank v. Vinson*.⁹⁵ The issue was whether a bank and its vice president ought to be held liable for sexual harassment.⁹⁶ The plaintiff, noting that Title VII's definition of "employer" included the "agent" language, argued that as long as the circumstances giving rise to the sexual harassment were work related, the supervisor was the employer and the employer was the supervisor.⁹⁷ The Court, stating that the "debate over the appropriate standard for employer liability has a rather abstract quality about it given the state of the record in this case,"⁹⁸ declined to rule on whether a supervisor ought to be considered an employer within the language of Title VII.⁹⁹ The Court did, however, direct lower courts to be guided by agency principles in interpreting the "agent" language in the definition of "employer" and establishing the boundaries of liability for sexual harassment under Title VII.¹⁰⁰ Thus, the sole guidance that the Supreme Court has given with respect to determining whether a supervisor may be held liable under Title VII is to use the principles of agency law.

This rather vague command by the Court to use agency principles for considering individual liability under sexual harassment claims has led to a considerable amount of confusion among the lower federal courts.¹⁰¹ The federal circuit courts that have ruled on this issue have determined that a supervisor may not be held liable under Title VII.¹⁰² In coming to this conclusion, many of these courts follow the Supreme Court's command to use agency principles;¹⁰³ however, their interpretations of agency principles are incomplete, and their conclusions are erroneous.

The courts that adopt agency principles have determined that the sole purpose of Congress's use of the word "agent" in its definition of "employer" is to express the doctrine of respondeat superior.¹⁰⁴

95. 477 U.S. 57 (1986).

96. *Id.* at 59–61.

97. *Id.* at 70.

98. *Id.* at 72.

99. *Id.*

100. *Id.*

101. Henkel, *supra* note 30, at 770.

102. *See* cases cited *supra* note 11.

103. *See* cases cited *supra* note 35.

104. *Id.*

Respondeat superior is a legal “doctrine holding an employer or principal liable for the employee’s or agent’s wrongful acts committed within the scope of the employment or agency.”¹⁰⁵ This concept is often labeled “vicarious liability,” whereby a principal is held liable for the wrongful acts of its servant.¹⁰⁶ This common law doctrine has been adopted by the American Law Institute in the *Restatement (Second) of Agency*, which reads: “A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.”¹⁰⁷ Courts have used this doctrine of respondeat superior to exclude a supervisor in his individual capacity from the reaches of Title VII.¹⁰⁸ However, the federal circuit courts that adopt this approach fail to state their rationales for this conclusion.¹⁰⁹ After merely stating that the inclusion of the “agent” language in Title VII’s definition of employer seems to trigger the doctrine of respondeat superior, these courts then simply conclude that this doctrine precludes the individual liability of the supervisor.¹¹⁰ Presumably, the rationale of the courts using the respondeat superior principle to exclude supervisors from liability for sexual harassment is that because employers are liable for the actions of their employees, it is not possible for the employees to be responsible for their own acts.

This understanding of agency principles, however, is incomplete. “Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.”¹¹¹ The person on whose behalf the other is acting is the principal, and the person who is acting on the principal’s behalf is the agent.¹¹² In the workplace situation, the employer is the principal, and the employee is the agent.¹¹³ Through the existence of the agency

105. BLACK’S LAW DICTIONARY, *supra* note 24, at 1338. Respondeat superior is a Latin phrase translated to mean “let the superior make answer.” *Id.*

106. *See id.* at 934 (defining vicarious liability as “[l]iability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties”).

107. RESTATEMENT (SECOND) OF AGENCY § 219 (1958). *See also id.* § 219, cmt. a (describing the rationale behind imposing liability upon the master for the acts of its servant).

108. *See cases cited supra* note 35.

109. *See supra* Part I.

110. *See cases cited supra* note 35.

111. RESTATEMENT (SECOND) OF AGENCY, *supra* note 107, § 1(1).

112. *Id.* §§ 1(2)–(3).

113. *Meyer v. Holley*, 537 U.S. 280, 285 (2003).

relationship between the employer and the employee, the employee is endowed with the power “to affect the legal relations of the principal by acts done in accordance with the principal’s manifestations of consent to him.”¹¹⁴ According to agency principles, the principal is subject to liability for the wrongful acts of his servants committed while acting in the scope of their employment.¹¹⁵ The federal courts that employ the respondeat superior principle mistakenly presume that because respondeat superior holds the employer vicariously liable for the wrongful acts of its employees, the employees may not be held liable for their own acts. This marks the point where the understanding of the federal courts is wanting. Under agency principles, the employer and the employee may both be held liable for the employee’s wrongful conduct.¹¹⁶ Furthermore, in situations in which the legal action is based solely on the wrongful conduct of the employee, agency principles demand that the employee be more liable than the employer.¹¹⁷ Thus, although it is true that the employer may be held vicariously liable for the wrongful conduct of its employee, it is also true that the employee may be held liable for his own acts.

The inclusion of the “agent” language, if read merely as holding an employer liable for the wrongful acts of its agents, would be redundant.¹¹⁸ As noted previously, the doctrines of respondeat superior and vicarious liability already hold an employer liable for the wrongful acts of its employees.¹¹⁹ For these reasons, “Congress’[s] decision to define agents as employers only makes sense if read to impose individual liability on agents as statutorily defined employers.”¹²⁰

114. RESTATEMENT (SECOND) OF AGENCY, *supra* note 107, § 7.

115. *Id.* § 219.

116. *See id.* § 359C(1) (stating that “[p]rincipal and agent can be joined in one action for a wrong resulting from the tortious conduct of an agent or that of agent and principal, and a judgment can issue against each”).

117. *See id.* § 359C(2) (stating that “[i]f the action is based solely upon the tortious conduct of the agent, a judgment on the merits for the agent and against the principal, or a smaller judgment for compensatory damages against the agent than against the principal, is erroneous”).

118. *See Ball v. Renner*, 54 F.3d 664, 667 (10th Cir. 1995).

119. *See cases cited supra* note 35 and accompanying text.

120. Henkel, *supra* note 30, at 778.

2. *Statutory Interpretation Under Title VII*

Several other federal circuit courts rely on what they perceive to be the congressional intent for enacting Title VII in order to support their position that supervisors should not be held individually liable for sexual harassment.¹²¹ While these courts willingly acknowledge that the plain language of the statute allows for individual supervisor liability, they nevertheless decide the issue based on what they perceive to be the legislative intent of the statute.¹²² These courts have two main bases for their conclusion. First, they look to the number of employees required for a person to be considered an employer.¹²³ “Employer,” as it relates to Title VII, is a title reserved for a person who has fifteen or more employees.¹²⁴ These courts maintain that Congress limited Title VII’s application to employers of fifteen or more employees because it wanted to avoid burdening small businesses with the costly expenses of litigating discrimination claims.¹²⁵ Because Congress wanted to avoid burdening small businesses, these courts believe it follows that Congress would have also wanted to avoid burdening individuals.¹²⁶

These courts also look to the legislative history of Title VII to find support for their understanding.¹²⁷ Specifically, these courts cite to the floor debate over the definition of “employer,” where a proposal to change the minimum employee threshold led to a discussion of Title VII’s litigation burden on small businesses.¹²⁸ These courts also point to the absence of any discussion over agent liability in the floor debates as support for their interpretation.¹²⁹ They conclude that the amount of floor debate regarding the minimum employee threshold

121. See cases cited *supra* note 11 and accompanying text.

122. See cases cited *supra* note 11 and accompanying text.

123. See *Wathen v. Gen. Elec. Co.*, 115 F.3d 400, 405 (6th Cir. 1997); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995).

124. 42 U.S.C. § 2000e(b) (2000).

125. See *Miller v. Maxwell’s Int’l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993) (concluding that “Title VII limits liability to employers with fifteen or more employees . . . because Congress did not want to burden small entities with the costs associated with litigating discrimination claims”). See also *Wathen*, 115 F.3d at 406 (citing *Miller*, 991 F.2d at 587); *Tomka*, 66 F.3d at 1314 (citing *Miller*, 991 F.2d at 587).

126. See, e.g., *Miller*, 991 F.2d at 587.

127. See, e.g., *Tomka*, 66 F.3d at 1314.

128. See, e.g., *id.*

129. See, e.g., *id.*

in the definition of “employer,” and the absence of any discussion of agent liability, implies that Congress did not contemplate agent liability under Title VII.¹³⁰

These arguments are not persuasive for three reasons. First, they ignore fundamental principles of statutory construction. As previously stated, Title VII defines “employer” as “a person 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.*”¹³¹ The courts using the above arguments acknowledge that the plain language of Title VII includes individual liability for the supervisor.¹³² Rather than using this literal reading, however, these courts substitute their own interpretations of what they perceive to be the congressional policy and purpose of the statute.¹³³

The U.S. Supreme Court has laid out the basic principles of statutory construction on numerous occasions.¹³⁴ The first place to start when interpreting a statute is its language.¹³⁵ “[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.”¹³⁶ Thus, rather than beginning with the historical background of the statute, the Supreme Court has admonished that the starting point of statutory interpretation is the text of the statute itself. When the words of the statute are unambiguous, as they are in Title VII’s employer definition, the “judicial inquiry is complete.”¹³⁷

Title VII states that an employer is “a person 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

130. *See, e.g., id.*

131. 42 U.S.C. § 2000e(b) (2000) (emphasis added).

132. *Tomka*, 66 F.3d at 1314 (concluding that “a narrow, literal reading of the agent clause in [Title VII] does imply that an employer’s agent is a statutory employer for purposes of liability”); *Wathen v. Gen. Elec. Co.*, 115 F.3d 400, 405 (6th Cir. 1997) (citing *Tomka*, 66 F.3d at 1314).

133. *Tomka*, 66 F.3d at 1314.

134. *Conn. Nat’l Bank v. Germain*, 503 U.S. 249 (1992); *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989).

135. *Cmty. for Creative Non-Violence*, 490 U.S. at 739 (“The starting point for our interpretation of a statute is always its language.”).

136. *Conn. Nat’l. Bank*, 503 U.S. at 253–54.

137. *Id.* at 254.

person.”¹³⁸ Because this definition includes “any agent of such a person,” agents are considered employers within the terms of the statute and are, therefore, parties to whom liability may attach under Title VII.¹³⁹ Thus, the plain, unambiguous language of the statute makes the absence of any discussion of individual liability in the legislative history of Title VII irrelevant, despite the impression left by courts that refuse to hold supervisors individually liable.¹⁴⁰ Furthermore, it is not even necessary to look at the legislative history because the text of the statute clearly allows supervisors, in their capacity as agents, to be held individually liable as statutory employers.¹⁴¹

A second flawed argument against individual liability for supervisors is that Congress could not have wanted to burden individuals because Congress did not want to burden small businesses with the costs of litigating discrimination suits.¹⁴² The courts that make this argument fail to recognize that this reasoning is inconsistent with many of the other federal antidiscrimination statutes. The definition of “employer” in the other statutes is similar to the definition of the term in Title VII. For example, according to the Family Medical Leave Act of 1993 (“FMLA”), an “employer” is defined as “any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.”¹⁴³ Similarly, under the Age Discrimination in Employment Act of 1967 (“ADEA”), an “employer” is “a person engaged in an industry affecting commerce who has twenty or more employees . . . [and] any agent of such a person.”¹⁴⁴ Although these statutes, like Title VII, limit “employer” to persons employing a fixed number of employees, they allow for the individual liability of supervisors.¹⁴⁵ This argument against individual liability,

138. 42 U.S.C. § 2000e(b) (2000).

139. *Jones v. Cont'l Corp.*, 789 F.2d 1225, 1231 (6th Cir. 1986) (stating that “the law is clear that individuals may be held liable . . . as ‘agents’ of an employer under Title VII”).

140. *See, e.g., Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995).

141. 42 U.S.C. § 2000e(b).

142. *See cases cited supra* note 125.

143. 29 U.S.C. § 2611(4)(A) (2000).

144. *Id.* § 630(b).

145. *See infra* Part III.B.1.

while perhaps persuasive in the limited context of Title VII, finds no support in the broader context of federal antidiscrimination statutes.

Finally, courts are substituting their own presumptions about the congressional intent of Title VII and ignoring the congressional mandate to construe the law broadly.¹⁴⁶ Congress, when it enacted Title VII, stated that it “intended to give the courts wide discretion in exercising their equitable powers to fashion the most complete relief possible.”¹⁴⁷ By rejecting the application of Title VII to supervisors in their individual capacities, these courts effectively deny Congress’s direction to construe the statute broadly enough to provide complete relief.

3. Remedial Provisions of Title VII

Title VII of the Civil Rights Act of 1964, as Congress originally enacted it, only permitted remedies of injunctive relief, back pay, and reinstatement.¹⁴⁸ Conventional wisdom dictates that it is not likely that these types of relief would be enforceable against an individual. Thus, because these damages would generally be enforceable solely against the employer, several federal circuit courts understandably held that liability under Title VII existed solely for the employer and did not extend to the supervisor in his individual capacity.¹⁴⁹ Congress’s enactment of the Civil Rights Act of 1991¹⁵⁰—which amended the Civil Rights Act of 1964 in large part by allowing victims of unlawful discrimination to collect compensatory as well as punitive damages—seriously undermined this argument.¹⁵¹ Despite these significant changes, the federal circuit courts maintain their position that Congress did not intend for supervisors to face liability in their individual capacity under Title VII, even though these types

146. 118 CONG. REC. 7168 (1972) (statement of Sen. Williams) (stating Congress’s intention in enacting Title VII was to give the courts wide discretion in granting the most complete relief possible).

147. *Id.*

148. *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995).

149. *See, e.g., id.* (concluding that “[c]learly, backpay and reinstatement are equitable remedies which are most appropriately provided by employers, defined in the traditional sense of the word”) (citing *Padway v. Palches*, 665 F.2d 965, 968 (9th Cir. 1982)).

150. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.).

151. *Id.*

of remedies would be enforceable against individuals.¹⁵² The Seventh Circuit, for example, embraces this argument, noting that it would be “a long stretch to conclude that Congress silently intended to abruptly change its earlier vision through an amendment to the remedial portions of the statute alone.”¹⁵³

This conclusion is not persuasive. The congressional purpose for enacting section 1981a of the Civil Rights Act of 1991—according to the law’s legislative history—was to make available to victims of sex discrimination the same kinds of remedies afforded victims of racial discrimination under section 1981a of the original Civil Rights Act.¹⁵⁴ Although Congress did not address the specific issue of whether supervisors may be held liable in their individual capacities for sexual harassment, individual liability does extend to individuals for acts of racial discrimination in cases brought pursuant to section 1981 of the Civil Rights Act.¹⁵⁵ Thus, it is plausible that Congress intended for liability to extend to individuals for their acts of sexual harassment in cases brought pursuant to Title VII. Furthermore, the legislative history of Title VII clearly indicates that Congress intended for the courts to interpret the remedies available to the victim of unlawful discrimination broadly.¹⁵⁶

Not only is the conclusion of the federal circuit courts regarding the remedies available under Title VII erroneous, it is also presumptuous. Although the federal circuit courts acknowledge the validity of the arguments in this Note, they consistently refuse to adopt these views on the basis that there is not strong enough evidence that Congress intended to hold supervisors individually liable.¹⁵⁷ This conclusion, however, is based on the audacious presumption that Congress did not intend for liability to extend to supervisors in their individual capacities in the first place. As argued throughout the body of this Note, this assumption is incorrect.

152. *See, e.g.*, *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1281 (7th Cir. 1995).

153. *Id.*

154. H.R. REP. NO. 102-40, pt. 2, at 24 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 694, 717 (“It is the Committee’s intention that damages should be awarded under Title VII in the same circumstances in which such awards are now permitted under U.S.C. § 1981 in intentional race discrimination cases.”).

155. *See, e.g.*, *Al-Khazraji v. Saint Francis Coll.*, 784 F.2d 505, 518 (3d Cir. 1986).

156. 118 CONG. REC. 7168 (1972) (section-by-section analysis of the bill) (“The provisions of these subsections are intended to give the courts wide discretion in exercising their equitable powers to fashion the most complete relief possible.”).

157. *See supra* note 152 and accompanying text.

B. *Additional Arguments*

In addition to the critiques of the rationales behind the federal circuit courts' holdings that individual liability does not exist under Title VII, there are also several other reasons why Title VII should be read to provide for the individual liability of a supervisor engaged in sexual harassment.

1. *Other Federal Discrimination Statutes*

The first of these reasons is that other federal discrimination statutes provide for individual liability of the discriminating supervisor.

a. Fair Labor Standards Act

The Fair Labor Standards Act ("FLSA")¹⁵⁸ has long been held to impose individual liability on a supervisor engaged in acts of discrimination prohibited by the FLSA.¹⁵⁹ This is due to the express provision of individual liability under the Act.¹⁶⁰ According to the FLSA, "[a]ny person who willfully violates any of the provisions of section 215 [of the FLSA] shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both."¹⁶¹ A "person" is defined as "an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons."¹⁶² Thus, the FLSA expressly provides for individual liability for a person engaged in discriminatory acts prohibited by the Act. Furthermore, the FLSA prescribes certain penalties for an employer who engages in discrimination proscribed by the FLSA.¹⁶³ An "employer" is defined as including "any person acting directly or indirectly in the interest of an employer in relation to an employee."¹⁶⁴ Courts have long

158. Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2000).

159. Brock v. Hamad, 867 F.2d 804, 808 n.6 (4th Cir. 1989); Donovan v. Agnew, 712 F.2d 1509, 1511 (1st Cir. 1983); Donovan v. Sabine Irrigation Co., 695 F.2d 190, 194–95 (5th Cir. 1983).

160. 29 U.S.C. § 216(a).

161. *Id.*

162. *Id.* § 203(a).

163. *Id.* § 216(b).

164. *Id.* § 203(d).

interpreted this definition of “employer” to include supervisors.¹⁶⁵ Thus, under the FLSA, a supervisor may be held individually liable for his acts of unlawful discrimination proscribed by the Act.

b. Age Discrimination in Employment Act

According to the Age Discrimination in Employment Act (“ADEA”),¹⁶⁶ it is unlawful for an employer “to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.”¹⁶⁷ In enacting the ADEA, Congress borrowed its definition of “employer” from Title VII with only minor differences.¹⁶⁸ Thus, the ADEA defines an “employer” as “a person engaged in an industry affecting commerce who has twenty or more employees . . . [and] any agent of such a person.”¹⁶⁹ Because of the similar definitions of “employer” in the ADEA and Title VII, many federal circuit courts address the issue of supervisor liability under the ADEA in the same way as they have under Title VII.¹⁷⁰ Others, however, argue that the ADEA does provide for individual supervisor liability by relying on the parallels between the FLSA and the ADEA.¹⁷¹

Under the FLSA, an “employer” is defined as “any person acting directly or indirectly in the interest of an employer in relation to an employee.”¹⁷² The courts interpreting this definition of employer have long held that it imposes individual liability on discriminatory supervisors.¹⁷³ In 1978, the U.S. Supreme Court ruled that Congress—by selectively incorporating the FLSA’s remedial and procedural provisions into the ADEA—intended to adopt the existing

165. See, e.g., *Donovan v. Hamm’s Drive Inn*, 661 F.2d 316, 318 (5th Cir. 1981).

166. Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (2000).

167. *Id.* § 623(a)(1). The protection under this statute is limited to individuals who are at least 40 years of age. *Id.* § 631(a).

168. Compare *id.* § 630(b), with 42 U.S.C. § 2000e(b) (2000).

169. 29 U.S.C. § 630(b).

170. See, e.g., *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1279–80 (7th Cir. 1995); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510–12 (4th Cir. 1994); *Miller v. Maxwell’s Int’l, Inc.*, 991 F.2d 583, 587–88 (9th Cir. 1993); *Matthews v. Rollins Hudig Hall Co.*, 874 F. Supp. 192, 194 n.1 (N.D. Ill. 1995).

171. See, e.g., *Miller*, 991 F.2d at 589–90 (Fletcher, J., dissenting); *House v. Cannon Mills Co.*, 713 F. Supp. 159, 160–62 (M.D.N.C. 1988).

172. Fair Labor Standards Act, 29 U.S.C. § 203(d) (2000).

173. See, e.g., *Donovan v. Sabine Irrigation Co.*, 695 F.2d 190, 194–95 (5th Cir. 1983).

interpretation of those provisions into the ADEA.¹⁷⁴ Because of this admonition, some courts conclude that the FLSA's provision for individual liability of supervisors ought to extend to supervisors under the ADEA.¹⁷⁵

Most federal courts, however, reject the comparisons between the FLSA and the ADEA and focus instead on the similarities between the ADEA and Title VII.¹⁷⁶ These courts focus on the similarities between the definitions of "employer" adopted by the ADEA and Title VII.¹⁷⁷ Because the ADEA borrowed its definition of "employer" from Title VII, these courts argue that the issue of supervisor liability should be decided under the ADEA in the same manner as the courts have decided it under Title VII.¹⁷⁸ As this Note has argued, however, the federal circuit courts are erroneous in their interpretations of Title VII, and Title VII ought to be read to impose liability upon a supervisor in his individual capacity. Thus, under either the minority or the majority view, the ADEA could be read as imposing individual liability on the supervisor for acts of discrimination.

c. Family Medical Leave Act

The Family Medical Leave Act ("FMLA")¹⁷⁹ makes it unlawful for a qualified "employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the Act]."¹⁸⁰ Furthermore, it prohibits an "employer" from discriminating "against any individual for opposing any practice made unlawful by [the Act]."¹⁸¹ Because the FMLA holds the "employer" liable for his violations of the Act, liability depends on the scope of "employer." Under the Act, an "employer" is defined as "any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of

174. *Lorillard v. Pons*, 434 U.S. 575, 582 (1978) (concluding that the "selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA [into the ADEA]").

175. *Id.*

176. *See, e.g., Miller*, 991 F.2d at 588 n.3.

177. *Id.* at 587–88.

178. *Id.*

179. Family Medical Leave Act, 29 U.S.C. §§ 2601–2654 (2000).

180. *Id.* § 2615(a)(1).

181. *Id.* § 2615(a)(2).

20 or more calendar workweeks in the current or preceding calendar year.”¹⁸² “Employer” also includes “any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer.”¹⁸³ Because the definition of “employer” under the FMLA is modeled after the language contained in the FLSA, most courts follow the FLSA case law and have held supervisors individually liable under the FMLA.¹⁸⁴ Thus, a supervisor may be held individually liable for his discriminatory acts that are proscribed under the FMLA.

2. *Deterrence*

Imposing individual liability on a supervisor for his acts of unlawful sexual harassment also furthers the two congressional aims of Title VII: eliminating employment discrimination and compensating victims of such unlawful discrimination.¹⁸⁵

First, the prospect of individual liability for acts of sexual harassment is likely to be an effective deterrent against supervisors engaging in sexual harassment. Although the effectiveness of Title VII in eliminating sexual harassment from the workplace ultimately depends on the effectiveness of the employer in monitoring its employment practices, the threat of individual liability provides a necessary and effective check against insufficient or insincere monitoring by the employer. Furthermore, because individuals would be forced to pay for their unlawful acts of sexual harassment out of their own funds, they would be more likely to alter their behavior.

Second, imposing individual liability on a supervisor will effectuate more fully Congress’s other goal of compensating the victim of unlawful sex discrimination. Most obviously, imposing liability on a supervisor affords the victim of sexual harassment an

182. *Id.* § 2611(4)(A)(i).

183. *Id.* § 2611(4)(A)(ii)(I).

184. *See, e.g.,* *Waters v. Baldwin County*, 936 F. Supp. 860, 863 (S.D. Ala. 1996); *Knussman v. Maryland*, 935 F. Supp. 659, 664 (D. Md. 1996); *Johnson v. A.P. Prods., Ltd.*, 934 F. Supp. 625, 629 (S.D.N.Y. 1996); *Freemon v. Foley*, 911 F. Supp. 326, 330–31 (N.D. Ill. 1995). *See also* 29 C.F.R. § 825.104(d) (2000) (declaring that “as under the FLSA, individuals . . . ‘acting in the interest of an employer’ are individually liable for any violations of the requirements of FMLA”).

185. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) (proclaiming that “the central statutory purposes” of Title VII are “eradicating discrimination” and “making persons whole for injuries suffered through past discrimination”).

additional party against whom she may seek recovery. Furthermore, in some situations, a supervisor may be the sole party against whom the alleged victim seeks recovery. While it would seem more likely for the victim to recover fully from the employer, in some instances, such as bankruptcy or dissolution, relief may be foreclosed unless the victim could recover from the individual supervisor.

3. *Vindication*

Imposing liability upon a supervisor who engages in workplace sexual harassment provides the victim with a fuller sense of personal vindication. Sexual harassment is an intimately personal offense:¹⁸⁶ “Like women who are raped, sexually harassed women feel humiliated, degraded, ashamed, embarrassed, and cheap, as well as angry.”¹⁸⁷ In her seminal work entitled *Sexual Harassment of Working Women*, Catharine A. MacKinnon recounts several answers given by women in response to a survey question asking whether they experienced any physical or emotional effects of being sexually harassed:

As I remember all the sexual abuse and negative work experiences I am left feeling sick and helpless and upset instead of angry. . . . Reinforced feelings of no control—sense of doom . . . I have difficulty dropping the emotional barrier I work behind when I come home from work. My husband turns into just another man. . . . Kept me in a constant state of emotional agitation and frustration; I drank a lot. . . . Soured the essential delight in the work. . . . Stomachache, migraines, cried every night, no appetite.¹⁸⁸

Today, unlike the women in the above survey, victims of sexual harassment have several forms of relief available from which to choose.¹⁸⁹ However, because sexual harassment most often occurs in a supervisor-subordinate relationship in the workplace context, the victim is most likely unable to seek any damages from the individual supervisor subjecting her to the sexual harassment.¹⁹⁰ This likely

186. MACKINNON, *supra* note 2, at 47–55.

187. *Id.* at 47.

188. *Id.* (quoting Dierdre Silverman, *Sexual Harassment: Working Women's Dilemma*, in *BUILDING FEMINIST THEORY* 84, 87 (1981)).

189. *See supra* Parts I & II.

190. *See cases cited supra* note 11 and accompanying text.

leaves the victim of sexual harassment feeling as though nothing has been done to rectify the wrong that she has suffered. Imposing liability on a supervisor who engages in sexual harassment in violation of Title VII allows the victim of sexual harassment the ability to feel truly vindicated.

CONCLUSION

Sexual harassment is a problem that has plagued the workplace for years.¹⁹¹ Although laudable strides have been made to remedy the problem, serious shortcomings remain. Despite the recent growth in lawsuits concerning this issue, most supervisors and managers do not feel compelled to change their behavior because they are not likely to be threatened with a personal lawsuit. Every federal circuit court that has considered this issue has denied individual liability for such egregious behavior under Title VII,¹⁹² and most state courts have followed the federal courts' lead in rejecting individual liability claims under their respective state statutes.¹⁹³ With Michigan leading the emerging trend among a minority of state courts that hold supervisors liable in their individual capacities for acts of sexual harassment under their respective civil rights statutes,¹⁹⁴ the federal circuit courts' opinions concerning this issue under Title VII must be called into question. A close examination of the reasoning behind the federal circuit courts' determinations that supervisors may not be held liable in their individual capacities under Title VII reveals that their arguments are not persuasive. In enacting Title VII of the Civil Rights Act of 1964, Congress clearly determined that supervisors, in their capacities as agents, are statutory employers. Thus, like the larger entities for which they work, supervisors must be held liable for acts of sexual harassment if the workplace is to ever see an end to this problem. Perhaps one day, Jane Doe's supervisor will be held individually liable for his egregious behavior in the workplace.

191. See MACKINNON, *supra* note 2.

192. See cases cited *supra* note 11.

193. See Kief, *supra* note 15, at 26.

194. See cases cited *supra* note 16.