Does Title VII Contemplate Personal Liability for Employee/Agent Defendants?

Janice R. Franke
DOES TITLE VII CONTEMPLATE PERSONAL LIABILITY FOR EMPLOYEE/AGENT DEFENDANTS?

Janice R. Franke*

INTRODUCTION

There has always been disagreement among the federal courts as to whether Title VII of the Civil Rights Act of 1964 ("Title VII")\(^1\) contemplates personal liability for individual defendants who participate in discriminatory job actions while acting as agents of the employing entity.\(^2\) Much of the disagreement stems from a lack of clear guidance regarding legislative intent. The confusion stems from the use of vague and general language in the statute’s remedy section\(^3\) as well as the lack of legislative history regarding the remedial scheme adopted, particularly in light of the “on floor” amendments shifting the enforcement focus of the statute.\(^4\) Since Congress enacted the 1991 amendments directly authorizing the award of tort-like compensatory and punitive damages in cases of intentional discrimination,\(^5\) this issue has taken on a new dimension. This article reviews the legislative development of Title VII and the courts’ treatment of the issue of personal liability under the statute, noting relevant comparisons to other labor and anti-discrimination laws. In doing so, it urges that individual liability is appropriate given considerations of both law and policy.

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I. THE LEGISLATIVE DEVELOPMENT OF TITLE VII

The passage of Title VII, as part of the broad-based Civil Rights Act of 1964, was the culmination of a long series of efforts in Congress to pass some sort of fair employment legislation. While a major impetus for this legislation was the goal of improving the social and economic position of Blacks by ensuring to all full opportunity to participate in the workforce, strong concerns about the impact of government intrusion into business operations profoundly shaped the legislative process. As a result, Congress accepted significant revisions to Title VII in order to facilitate the passage of other provisions of the civil rights legislation. These changes, particularly those relating to the Act's enforcement mechanism, resulted from last-minute compromises made on the floor of the chamber. They altered the focus of Title VII from a "public right," to be enforced largely through the efforts of an administrative agency with strong powers, to a "private right," to be vindicated mainly through individual lawsuits. One pitfall of the compromise frenzy was that the remedial section of the statute, originally written to provide for judicial relief incidental to central agency enforcement, was adopted without further conference or

6. Pub. L. No. 88-352, 78 Stat. 241 (1964) (current version at 42 U.S.C. §§ 2000a et seq. (1988 & Supp. V 1993)). The purpose of the original act was: To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes. Id.

7. See Kotkin, supra note 4, at 1315.

8. See Note, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 HARV. L. REV. 1109, 1113 (1971) [hereinafter Employment Discrimination]. It was noted that President Kennedy thought that legislation was needed because the plight of black Americans was so severe that threats of civil unrest mandated a reversal of the status quo. Id. at n.2.


10. See Fair Employment, supra note 4, at 432.

11. See Kotkin, supra note 4, at 1315.

12. See Kotkin, supra note 4, at 1315-16.
significant debate.\textsuperscript{13}

The National Labor Relations Act ("NLRA")\textsuperscript{14} provided a model for the initial versions of Title VII.\textsuperscript{15} Like the NLRA, congressional authority for the enactment of Title VII was derived from the Commerce Clause.\textsuperscript{16} Thus, the scope of Title VII’s provisions is constitutionally limited to the regulation of those activities of private employers that have an impact on interstate commerce.\textsuperscript{17} For example, the original definition of covered employers under Title VII included an exemption for entities employing fewer than twenty-five employees.\textsuperscript{18} Legislative history indicates that a policy defining employers by the number of employees working over a period of time was intended to limit coverage to those employing entities which have a significant impact on interstate commerce.\textsuperscript{19} This policy was also intended to further limit coverage to those workplaces where close and intimate personnel relationships are of less consequence.\textsuperscript{20}

Parallel to the role of the National Labor Relations Board ("NLRB") in enforcing the NLRA,\textsuperscript{21} the Fair Employment Practice Commission ("FEPC") — under later versions, the Equal Employment Opportunity Commission ("EEOC") — was to be empowered with the authority to enforce the provisions of the fair employment law.\textsuperscript{22} Enforcement was contemplated through the issuance of "cease and desist" orders, subject to only limited judicial review.\textsuperscript{23} The agency would have authority to investigate and charge an employer with discrimination, and to hold hearings and issue enforce-

\textsuperscript{13} See Fair Employment, supra note 4, at 431-32, 466; Kotkin, supra note 4, at 1317.
\textsuperscript{15} See Employment Discrimination, supra note 8, at 1196 n.7.
\textsuperscript{16} U.S. CONST. art. I, § 8, cl. 3.
\textsuperscript{20} See id. at 474. However, the additional requirement mandating that the employer have the requisite number of workers for at least twenty calendar weeks of the current or preceding year was added specifically to exempt small seasonal employers. Francis J. Vaas, Title VII: Legislative History, 7 B.C. INDUS. & COM. L. REV. 431, 447 (1966).
\textsuperscript{22} See Kotkin, supra note 4, at 1315.
\textsuperscript{23} See Kotkin, supra note 4, at 1315; Vaas, supra note 20, at 435.
able orders upon a finding of discrimination. In conjunction with this broad enforcement authority, these agencies were also given incidental authority "to take such affirmative action including reinstatement of employees with or without backpay, as would effectuate the policies of the Act."

By the time the equal employment opportunity provision emerged from the full committee in the House, however, the EEOC was left with little enforcement power, other than the authority to institute civil actions in federal court, provided that voluntary efforts at conciliation were unsuccessful. The proffered explanation for this change was that the majority of the Judiciary Committee preferred that the federal judiciary, because of its perceived ability to provide a swifter and fairer resolution of allegations of discrimination, make the ultimate determination of discrimination. Inherent in this explanation was also a fear that the EEOC would adopt requirements for the racial balancing of businesses' workforces. The Senate further curtailed the EEOC's enforcement authority by leaving it with only the power to effect voluntary compliance with the statute. As a result, in cases where the EEOC determined discrimination existed and where voluntary compliance efforts were unsuccessful, the aggrieved party was given authority to file suit in federal court.

Despite this major shift in the basic enforcement mechanism of Title VII, little consideration was given to redrafting the Act's

24. Vaas, supra note 20, at 435; see also Employment Discrimination, supra note 8, at 1196 n.7.
26. See Vaas, supra note 20, at 436; Kotkin, supra note 4, at 1315. H.R. REP. No. 405, 88th Cong., 1st Sess. (1963), which is considered the predecessor to Title VII, provided for administrative agency enforcement akin to that of the NLRA as originally introduced. However, opposition to an independent commission led the full Judiciary Committee to significantly alter the agency's enforcement powers. See Vaas, supra note 20, at 433, 435-36. The text of House Report 405 was amended by H.R. REP. No. 570, 88th Cong., 1st Sess. (1963), submitted by the House Committee on Education and Labor, which substituted the text of House Report 570 for that of House Report 405. See H.R. REP. No. 570, 88th Cong., 1st Sess. 1 (1963) [hereinafter H.R. REP. No. 570].
27. See Vaas, supra note 20, at 436.
29. See 110 Cong. Rec. S12,811 (1964); Vaas, supra note 20, at 452. The Senate amendments also limited enforcement suits in federal court to cases involving intentional discrimination. Vaas, supra note 20, at 453.
30. 110 Cong. Rec. S12,814. See Kotkin, supra note 4, at 1316.
remedial scheme to coincide with the new private enforcement policy. The EEOC's originally proposed authority to issue "cease and desist" orders, with incidental power to order other appropriate affirmative action, was merely converted to a provision authorizing a court that finds intentional discrimination to issue injunctions and order appropriate action. Thus, although the responsibility of enforcement was shifted to the shoulders of private individuals, the remedy conceived in conjunction with public agency enforcement was all that was granted. Given the immense costs of enforcement for private individuals, the remedies of injunction, reinstatement, and backpay were in many cases wholly inadequate. It was unrealistic for many victims of discrimination to shoulder the psychological and economic burdens of challenging discrimination where relief was limited to actual salary loss and orders for the employer to hire or promote and cease the discriminatory practices. This scheme ignores the psychological harm caused by discrimination and the risk to reputation, psyche, and the out of pocket costs of challenging an adverse employment action.

This shortcoming in Title VII's remedial provisions was immediately reviewed by commentators, many of whom advocated that the courts grant more expansive relief. It was argued that
tort-like compensatory and punitive damages would be necessary to adequately encourage enforcement of Title VII by redressing the full effects of discrimination.\textsuperscript{36} In fact, as the interpretation of Section 1981 of the Civil Rights Acts of 1866 ("Section 1981")\textsuperscript{37} broadened to provide correlative relief from employment discrimination based on race,\textsuperscript{38} the availability of recourse through Section 1981 shielded victims of racial discrimination\textsuperscript{39} from the acknowledged restrictions in the remedial scheme of Title VII. This is because Section 1981 has generally been interpreted to provide for the award of compensatory and punitive damages in cases of intentional discrimination.\textsuperscript{40}

Increasing recognition of the inadequacy of the remedial scheme under Title VII led to amendment of the Act in 1972.\textsuperscript{41} Once again, the forces of political compromise prevented full realignment of the relationship between remedy and enforcement. The original amendment proposal, which would have given the EEOC authority to issue cease and desist orders was, in the end, eliminated in favor of the less controversial provision granting the agency

\textsuperscript{36} Tort Remedies, supra note 33, at 498-99.


\textsuperscript{39} Subsequent interpretations of Section 1981 extended its coverage to some victims of discrimination on the basis of national origin. See, e.g., Gonzalez v. Stanford Applied Eng'g, Inc., 597 F.2d 1298 (9th Cir. 1979).

\textsuperscript{40} Kotkin, supra note 4, at 1348.

\textsuperscript{41} The Senate Report on the 1972 amendments noted:

The most striking deficiency of the 1964 Act is that the EEOC does not have the authority to issue judicially enforceable orders to back up its findings of discrimination . . . . As a consequence, unless the Department of Justice concludes that a pattern or practice of resistance to Title VII is involved, the burden of obtaining enforceable relief rests upon each individual victim of discrimination, who must go into court as a private party, with the delay and expense that entails, in order to secure the rights promised him under the law.

S. REP. NO. 415, 92d Cong., 1st Sess. 4 (1971). See General Tel. Co., Inc. v. EEOC, 446 U.S. 318, 325 n.7 (1980); see also Kotkin, supra note 4, at 1321 (citing H.R. REP. NO. 238, 92d Cong., 1st Sess. 64 (1971)).

The House Committee also observed that less than half of the charges filed with the EEOC were satisfactorily resolved, leaving more than half of all complainants the choice of going to court or foregoing any remedy for discrimination. See Kotkin, supra note 4, at 1321 (citing H.R. REP. NO. 238, 92d Cong., 1st Sess. 3-4 (1971)).
authority to bring suit for violations of the law.\textsuperscript{42} While the EEOC's authority to institute federal suits relieved some aggrieved parties of this burden,\textsuperscript{43} it failed to address the other deficiencies attributable to the limited relief available to private litigants. Again, individuals suffering from discrimination on the basis of sex or religion were largely left with the responsibility of vindicating the public's interest in non-discrimination without the ability to also obtain full compensation for their own personal injuries.\textsuperscript{44} Other relevant changes wrought by the amendments included provisions for the appointment of an attorney, the waiver of fees for individuals pursuing litigation and authority for an enforcing court to grant "any other equitable relief as the court deems appropriate."\textsuperscript{45} Significantly, the scope of this additional authority was never debated, other than to note that it would allow the courts "wide discretion" to fashion "the most complete relief possible."\textsuperscript{46}

More recent commentary addressed the persisting need for expanded remedies under Title VII, but again also advocated a flexible approach by the federal judiciary in fashioning more comprehensive remedies under the existing statutory scheme.\textsuperscript{47} Indeed, in 1991 Congress finally adopted tort-like damages for individual victims in cases of intentional discrimination.\textsuperscript{48} Through amend-
ments in 1991, in order to "legislatively overrule" a number of limiting interpretations of Title VII and Section 1981 by the Supreme Court, Congress significantly expanded the remedies available under Title VII to more adequately compensate victims and deter unlawful discrimination. The 1990 legislation, passed by Congress but vetoed by then-President George Bush, provided for the award of compensatory and punitive damages to victims of intentional discrimination with the amount of punitive damages limited to the greater of the amount of (1) compensatory damages plus backpay or (2) $150,000. The 1991 proposed amendments, which were eventually passed and signed into law, imposed a series of incremental caps on the amount of compensatory and punitive damages that may be awarded to a complaining party depending upon the number of respondent's employees. This imposition of caps was again the result of political compromise. Largely in response to intense lobbying efforts by representatives of business entities, some members of Congress expressed grave concern that the potential damage liability would particularly threaten small businesses, thereby potentially jeopardizing a significant source of tax revenue and jobs across the nation. Other members of Congress opposed the caps because they wanted to equalize the recovery available to victims of sex or religious discrimination under Title VII with the recovery available to victims of race or national origin discrimination under Section 1981. The debate over the issue of capping damage awards thus centered on the


50. H.R. REP. No. 856, 101st Cong., 2d Sess. 7 (1990). Compensatory damages — not including backpay and interest thereon — could be awarded to any victim of intentional discrimination, and punitive damages could be awarded where a non-governmental respondent acted with malice or reckless indifference to the plaintiff's federally protected rights. Id. This section also provided that any party in a case where compensatory or punitive damages were sought could demand a jury trial. Id.


existence of caps rather than the incremental link between the size of the employer and the amount of damages recoverable.\textsuperscript{54}

II. JUDICIAL TREATMENT OF THE ISSUE OF PERSONAL LIABILITY UNDER TITLE VII

Early litigation under Title VII raised issues about the scope of relief available to victims of discrimination, including questions about the types of remedies available as well as the individuals or entities from whom relief could be obtained. Courts disagreed as to whether Title VII authorized the award of compensatory damages for the "psychic" injuries suffered as a result of discrimination and whether Title VII authorized punitive damages to further the remedial purposes of the statute.\textsuperscript{55} While the authority to award compensatory and punitive damages was derived from an interpretation of the statutory authority to award "other appropriate relief," those courts allowing recovery of such damages based their decisions largely on policy considerations.\textsuperscript{56} The policy rationale articulated focused on the encouragement of full compensation. Because the responsibility for "prosecution" of illegal employment discrimination claims was placed on the shoulders of private plaintiffs cast into the role of "private attorneys general," it was argued that more vigorous enforcement would be encouraged if full compensation for

\textsuperscript{54} The tiered cap system was introduced in conjunction with one of several unsuccessful amendments offered during the amendment process, and it was incorporated into the final version of the law without direct comment. See, e.g., H.R. REP. NO. 102-40, 102d Cong., 1st Sess., pt. 1, at 74, 112-13, 142-44, pt. 2, at 24-29, 68-74 (1991), \textit{reprinted in} 1991 \textsc{U.S.C.C.A.N.} 549, 612, 650-51, 671-73, 717-23, 754-60; see also 137 \textsc{Cong. Rec.} S7024 (daily ed. June 4, 1991). This proposal provided for the recovery of compensatory damages where the plaintiff demonstrated clear and convincing evidence of an injury requiring compensation. It also authorized the court to assess an equitable civil penalty against the defendant to be used for public anti-discrimination activities. The idea actually had its genesis in President Bush's 1991 amendment proposal wherein he proposed additional equitable relief in cases of sexual harassment, with a provision for the court to determine whether to award such relief after considering, \textit{inter alia}, the employer's size and the effect of the award on the economic viability of the employer. 137 \textsc{Cong. Rec.} S3022-23 (daily ed. March 12, 1991); see also 42 \textsc{U.S.C.} § 1981a(b)(3) (Supp. V 1993).


\textsuperscript{56} See, e.g., \textsc{Claiborne}, 401 F. Supp. at 1024; \textsc{Humphrey}, 369 F. Supp. at 835.
an individual’s injury was available.\(^{57}\) It was noted that the greatest injury resulting from discrimination — namely, the loss of self-respect or sense of achievement from performing one’s job — may far outweigh the actual salary loss.\(^{58}\) Thus, allowing punitive damages or other recovery for psychic injuries, to provide additional relief for the uncompensated losses suffered by victims of discrimination, was deemed necessary to further the broad remedial aims of the statute.\(^{59}\) Courts authorizing these types of damages, however, were in the minority and, prior to the 1991 amendments, the statute’s remedies have been interpreted as limited to compensation for backpay and other equitable relief.\(^{60}\)

III. TITLE VII PROVISIONS PRIOR TO THE 1991 AMENDMENTS

The question of potential Title VII liability for defendants in their individual capacities involves both legal and policy considerations. In contemplating these considerations, the major focus is on the plain language of the statute. The anti-discrimination provisions of Title VII pertain to “employers,” defined as persons and their agents engaged in an industry affecting commerce.\(^{61}\) Several courts have interpreted this language as directly placing those individuals engaged in discriminatory job actions, while acting for a covered employer, within the ambit of the statute’s remedial provisions.\(^{62}\) These courts have further interpreted the size requirement of fifteen or more employees as applicable only in defining statutory coverage of the employing entity.\(^{63}\) Where both the employing

\(^{57}\) Humphrey, 369 F. Supp. at 835.
\(^{58}\) Id. at 834.
\(^{61}\) 42 U.S.C. § 2000e(b) (1988). The definition also requires that the employer have at least fifteen employees working each work day in each of twenty or more calendar weeks in the current or preceding year. Id.
\(^{63}\) See Hanshaw, 405 F. Supp. at 295. In a later case, a court responded to the argument that Congress’ exemption for small businesses implies that a similar exemption was intended for individuals. See Lamirande v. Resolution Trust Corp., 834 F. Supp. 526, 528 (D.N.H. 1993). The court opined that there is no support for the proposition that Congress
entity and an individual employee agent are found liable under the Title VII, courts generally have imposed joint and several liability. In most of these cases, the inquiry focuses on whether the individual employee exercised sufficient control over decisions affecting the terms and conditions of plaintiff's employment to be deemed the employer's agent under common law agency principles. In some cases, the individual defendant has been found to be essentially the alter ego of the employing entity, thereby fitting squarely into the concept of employer.

These courts, in addition to relying on the “plain language” of the statutory definition, have justified their interpretation of the statute's coverage on policy grounds. First, they argue that the remedial provisions of Title VII should be broadly construed to effect the Act's purpose in compensating victims of unlawful discrimination and deterring such discrimination. This liberal inter-

64. See, e.g., Cornwell v. Robinson, 23 F.3d 694, 702 (2d Cir. 1994); EEOC v. Vucitech, 842 F.2d 936, 942 (7th Cir. 1988) (noting that while there is no general right of contribution under Title VII, a court can order contribution among the parties actually named as defendants in a Title VII suit); Hamilton v. Rodgers, 791 F.2d 439, 445 (5th Cir. 1986). The Fifth Circuit later implied that Hamilton is nonauthoritative on the issue of personal liability of agents. Harvey v. Blake, 913 F.2d 226, 227-28, n.2 (5th Cir. 1990); see also Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1527 (M.D. Fla. 1991).


Many courts emphasize the distinction between employees who have a personal or active involvement in discrimination and those who are merely following an institutional policy set by supervisors or the employing entity, assessing personal liability only against those in the former category. See Paroline, 879 F.2d at 104; Lamirande, 824 F. Supp. at 784-85; Hendrix v. Fleming Co., 650 F. Supp. 301, 303 (W.D. Okla. 1986).

With the extension of Title VII's coverage to state and municipal employees and educational institutions under the 1972 amendments, another issue arose as to whether public officials can be held personally liable for violations of the Act. Here again, courts split on resolution of this issue. See Clinton v. Orleans Parish Sch. Bd., 649 F.2d 1084, 1099 (5th Cir. Unit A July 1981) (finding that no authority existed to hold public officials personally liable under Title VII); cf. Packard v. Hopkins, No. HAR-90-1391, 1991 U.S. Dist. LEXIS 3630, at *7-8 (D. Md. Mar. 21, 1991) (holding that public officials can be held personally liable for Title VII violations).


67. See, e.g., Lamirande, 834 F. Supp. at 529.

68. See Vakharia, 824 F. Supp. at 785.
pretation of Title VII requires persons who exercise control over terms and conditions of employment to be held directly responsible for their actions. Failure to allow recourse against these individuals practicing discrimination decreases the deterrence goal and may hold harmless those who have engaged in “active” misconduct. Further, instances may arise where the employing entity goes bankrupt and the only avenue for recovery is against the discriminating agents, or where the employer does not accurately identify and punish the individual employee agents who have engaged in discriminatory conduct.

In contrast, other courts have relied on the doctrine of respondeat superior to justify including agents within the statutory definition of “employer.” Using this analysis, the employee agents are liable only in their official capacities. These courts have relied on two factors. First, the statutory definition exempts employers with fewer than 15 employees. It is asserted that because of this exemption, it is inconsistent to protect small employers from liability under Title VII but not to extend similar protection to individual employees. Second, these courts rely on the types of damages generally available under Title VII prior to the 1991 amendments because these damages — namely injunctions, reinstatement, and backpay — are most appropriately awarded against an employing entity. Furthermore, when an employee is acting

70. See Hamilton, 791 F.2d at 443; Robinson, 760 F. Supp. at 1527.
71. See, e.g., EEOC v. Vucitech, 842 F.2d 936 (7th Cir. 1988). In Vucitech, a company with a discriminatory policy regarding maternity benefits was sold, went bankrupt and was started again as a new entity by a group of former owners and employees. Id.
77. See, e.g., Padway v. Palches, 665 F.2d 965, 968 (9th Cir. 1982); Pelech, 828 F. Supp. at 529.
as an agent of the employer, he or she is merely a surrogate for the employer and thus should only be liable in that representative capacity. 78 Since the employing entity will be liable for the actions of its employees, it is argued that the strong deterrent effect would remain, i.e., no employer will maintain employees who have exposed it to liability for significant civil damages. 79

IV. TITLE VII PROVISIONS AFTER THE 1991 AMENDMENTS

The significant change engendered by the 1991 amendments relative to the issue of personal liability for employee agent defendants was the addition of a provision authorizing the award of compensatory and punitive damages in cases of intentional discrimination. 80 Several courts found this additional remedy pivotal in the determination of whether damages could be awarded against individual employee agents. 81 In Bridges v. Eastman Kodak Co., 82 the court noted that a basic rationale for declining to impose personal liability on employee agents is undercut by the authorization of tort-like damages, since they are traditionally awarded against individuals. 83 In fact, under basic principles of tort law, liability for compensatory damages rests primarily with the wrongdoer. This is true although respondeat superior may offer an alternative avenue for recovering the damages from the wrongdoer’s employer. 84 Liability for punitive damages, on the other hand — which generally cannot be collected from an employer — rests exclusively with the individual wrongdoer or one who has acquiesced in the offending conduct. 85

However, as noted earlier, the provision authorizing both com-

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78. Pelich, 828 F. Supp. at 529.
83. Id. at 1180.
85. Id. § 8:50.
Compensatory and punitive damages imposed a series of caps on the amount of such damages, tying those caps to the size of the offending individual's employer.\(^6\) Because of this link to the employing entity's size, some courts have been unwilling to interpret these damage provisions as applicable against defendants in their personal capacities.\(^7\) Again, it is argued that since Congress elected to limit the burdens of complying with Title VII to employers with at least fifteen employees, Congress could not have intended to impose those burdens on individuals.\(^8\) Moreover, the argument goes, the failure to include single individuals among the list of damage caps implies that individuals were not envisioned to pay these damages.\(^9\) Congress’ failure to amend the definition of employer to specifically include individuals or to eliminate the exemption for small employers, in light of the numerous decisions declining to impose personal liability on employee agents, also cuts against imposition of personal liability under the amendments.\(^10\)

One court has pointed out some practical problems with the imposition of individual liability under the existing scheme.\(^11\) First, because the damage caps are linked to the size of the employer, employee agents found guilty of discrimination will have varying liability exposures depending upon the size of their workplace. Second, it is unclear whether the current system of caps envisions separate applicability to the employer and an employee agent as opposed to some apportionment of the applicable cap amount between the employer and an employee agent. Third, in the situation where damages are awarded against more than one employee agent, it is not clear whether the cap applies to the total award, or to the award against each separate defendant.\(^12\)

86. 42 U.S.C. § 1981a(b)(3)(A)-(D) (Supp. V 1993). The limits on the sum of compensatory and punitive damages awarded for each complaining party range from $50,000 to $300,000. Id. The lesser amount applies to cases where the respondent has between 15 and 100 employees while the greater amount applies to cases where the respondent has greater than 500 employees. Id.


88. Miller, 991 F.2d at 587.

89. Id. at 587-88 n.2.

90. Smith, 850 F. Supp. at 980.

91. Id.

92. Id. However, even in light of such perceived problems, this court noted that an exception to the rule against individual liability may exist where denial of such liability could affect the plaintiff’s opportunity to recover damages (e.g., where the employing entity goes
Contrary to the concerns expressed, however, at least two courts have had no problem applying the stepwise damage cap system in situations where the employing entity and individual defendants shared liability for discrimination. In *EEOC v. AIC Sec. Investigations, Ltd.*, the District Court for the Northern District of Illinois concluded that the only entities specifically excluded under the statutory language regarding damage caps are governments, government agencies and political subdivisions. Since the statutory language defines the damage caps in terms of "each complaining party," the court reasoned that the applicable limits describe the aggregate amount of damages that the complaining party may recover from whichever defendants are found liable. When faced with apportioning the damage award between the employer and individual defendants, that court declared the award to be joint and several in light of the fact that the jury had assessed equal amounts (though amounts in excess of the statutory cap) against both defendants. Similarly, the Second Circuit recently upheld a trial court's award of Title VII compensatory damages against the employing entity and four individuals jointly and severally.

**V. PERSONAL LIABILITY UNDER RELATED ANTI-DISCRIMINATION LAWS**

It is instructive to examine the issue of personal liability under related employment anti-discrimination laws, particularly analyzing the policy considerations which may argue for similar or different treatment of the various provisions. The statutes most apt for comparison are Section 1981 of the Civil Rights Acts of 1866, the bankrupt or where it is necessary to pierce the corporate veil to reach assets of the individual owners or managers. *Id.* at 981.


96. *Id.* The court noted that this view, although contrary to the plaintiff's contentions, comports with the EEOC's policy guidelines which provide that the sliding scale of damage caps applies to each aggrieved party. *Id.* at 576.

97. *Id.* at 579.

98. *Cornwell*, 23 F.3d at 702.

Age Discrimination in Employment Act of 1967 ("ADEA"), and the Americans with Disabilities Act of 1990 ("ADA"); in fact, the latter two are modeled after Title VII to extend protection against employment discrimination on the basis of age and disability respectively.

Section 1981 grants to all persons the same right to make and enforce contracts as is enjoyed by white citizens. This grant has been interpreted to prohibit race discrimination in both public and private employment. The basis for a cause of action for race discrimination in employment under Title VII is coextensive with the basis for the same claim under Section 1981. Section 1981 provides for both equitable and legal relief, including compensatory and — under certain circumstances — punitive damages. Liability, however, depends upon a finding that the discrimination was intentional, but this section contains no statutorily imposed size limits regarding its application. Section 1981 has been widely interpreted and applied to allow the award of damages.

103. The Supreme Court confirmed that Section 1981 applies to discrimination by private employers and labor unions in Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975). The courts have deemed Section 1981 to apply only to discrimination based on race and to some claims of discrimination based on national origin. See Bobo v. ITT, Continental Baking Co., 662 F.2d 340 (5th Cir. Nov. 1981) (holding Section 1981 inapplicable to claims of sex discrimination); Barker v. Caraux, 533 F. Supp. 242 (S.D. Tex. 1982) (holding Section 1981 inapplicable to claims of age discrimination); Khawaja v. Wyatt, 494 F. Supp. 302 (W.D.N.Y. 1980) (holding Section 1981 inapplicable to claims of discrimination based on religion). However, claims have been allowed based on national origin where there is a racial nature to the claim. See, e.g., Gonzalez v. Stanford Applied Eng'g, Inc., 597 F.2d 1298 (9th Cir. 1979) (upholding Section 1981 claim where Mexican-American alleged discrimination was linked to brown skin).

The courts have also applied Section 1981 to all aspects of the employment contract relationship, including recruitment, hiring, compensation, assignment, promotion, layoff, and discharge. See, e.g., Hall v. Pennsylvania State Police, 570 F.2d 86 (3rd Cir. 1978). In Patterson v. McLean Credit Union, 491 U.S. 164 (1989), the Supreme Court limited the application of Section 1981 by interpreting it very narrowly, extending protection only to the formation of contracts and access to legal process for the enforcement of contracts. Id. at 176-78. However, Congress amended the law in conjunction with the 1991 Title VII amendments, explicitly stating that Section 1981 provides protection in the "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1072 (current version at 42 U.S.C. § 1981(b) (Supp. V 1993)).

104. See Kotkin, supra note 4, at 1348.
105. See Johnson, 421 U.S. at 460.
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against individual employee agents of an employer, at least against those who have had personal involvement in the discriminatory action.¹⁰⁷

The provisions of the ADEA were largely modeled after those of Title VII. The substantive prohibitions against discrimination are essentially the same, as is the definition of employer to include persons and agents thereof operating businesses of a certain size.¹⁰⁸ Unlike Title VII, however, the remedial provisions of the ADEA incorporate the remedial scheme of the Fair Labor Standards Act ("FLSA")¹⁰⁹ and offers a broader scope of relief.¹¹⁰ It authorizes the grant of appropriate legal or equitable relief, and provides for liquidated damages in cases of willful violations of Title VII.¹¹¹

Some courts, focusing on the exemption for small employers and other similarities between Title VII and the ADEA, have declined to recognize claims against employee agents in their individual capacities under either statute.¹¹² Similarly, those courts that have interpreted Title VII as authorizing such personal liability claims have extended their reasoning to include age discrimination claims against individuals under the ADEA.¹¹³ Still other courts have analyzed the differences between the remedial provisions of Title VII and the ADEA in the context of personal liability, opining that the availability of other remedies, particularly punitive type


¹⁰⁸ 29 U.S.C. § 630(b) (1988 & Supp. V 1993). The ADEA exempts from coverage employers with fewer than twenty employees and prohibits discrimination based on age, as opposed to race, national origin, religion, or sex.


damages based on willful misconduct under the ADEA, argues for imposition of liability directly upon the wrongdoer under the ADEA. Furthermore, they reasoned that the ADEA’s incorporation of the remedies and procedures of the FLSA indicates congressional intent to hold agents personally liable under the ADEA.

Analysis of personal liability under the ADA has consistently focused on the definition of “covered entities” or “employers” under the ADA and Title VII. Several courts have upheld liability against employee agents in their individual capacities based on various interpretations of Title VII as authorizing such personal liability claims. Some of these reasons include: (1) the availability of compensatory and punitive damages under the acts as amended; (2) the need to ensure compensation to victims of discrimination and to deter future discrimination; and (3) a rejection of the relevance of a distinction between official and individual capacity under the acts. An additional reason for similar treatment of these statutes is the fact that the 1991 amendments to the Civil Rights Act authorizing compensatory and punitive damages in Title VII and ADA cases were treated together in one provision.

Policy considerations similarly dictate that all of these statutes should be coextensive in reach. There is no basis for different treatment of claims of race discrimination under Section 1981 and claims of discrimination based on race and other protected classes.
Personal Liability for Title VII Employee/Agent Defendants

under Title VII, the ADEA, or the ADA, particularly where the same conduct gives rise to a claim of race discrimination under Title VII and Section 1981. Even the proffered reason for exempting individuals, as in keeping with the exemption for small employer entities, pales in light of the fact that those same individuals can be personally liable for acts of race discrimination under Section 1981.122 Individual defendants should face the same liability for all acts of discrimination.123 Certainly the victims of discrimination should be afforded similar opportunity to receive full compensation for injuries suffered as a result of any such discrimination.124 Furthermore, even if a difference in available remedies under the various statutes was a valid reason for recognizing different classes of defendants under the statutes prior to 1991, the damage provisions of the 1991 amendments of Title VII and the ADA vitiate that justification.

VI. PERSONAL LIABILITY FOR EMPLOYEE AGENTS
UNDER TITLE VII IS APPROPRIATE

The case law on the issue of personal liability for employee agents under Title VII is far from consistent. In many cases it involves little real legal analysis or appropriate policy considerations. Courts within federal districts have come to various conclusions as to whether such claims against individual defendants are authorized.125 Of the six Circuit Courts of Appeal that have addressed the issue, only the Ninth Circuit, in Miller v. Maxwell’s Int’l, Inc.,126 has independently commented at any length on the rea-

122. See supra text accompanying note 107. Also note that the same argument holds true for the small employer entity — it too is potentially subject to liability under Section 1981.


126. 991 F.2d 583 (9th Cir. 1993), cert. denied, 114 S. Ct. 1049 (1994).
sons for its position. The other circuits have either specifically relied upon the reasoning in Miller or have summarily taken a position that personal liability is or is not appropriate under the Act; three circuits have decided on each side of the issue. Additionally, several district court cases have been decided on issues tangential to personal liability or with a cursory acceptance of a similar ruling in another non-precedential case.

At least part of the reason why courts have had difficulty with this issue must be attributed to the effects of the compromise positions taken both in the initial enactment and subsequent amendments to Title VII. Structurally, much of the original and amended Act was derived during the debate process, at times without due consideration of the effects of some of the changes adopted. Consequently, there are some apparently anomalous provisions in the Act, especially regarding issues of enforcement and remedies.

127. Id. at 587-89.
128. See Cornwell v. Robinson, 23 F.3d 694 (2d Cir. 1994) (upholding joint and several liability against the employing entity and individuals without any discussion of the appropriateness of personal liability under Title VII); Grant v. Lone Star Co., 21 F.3d 649, 652-53 (5th Cir. 1994) (relying on Miller to justify its extension of an earlier ruling that a public official is liable in an official capacity only); Sauer v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993) (holding that an individual acting in a supervisory fashion can only be sued in a representative capacity); Paroline v. Uniys Corp., 879 F.2d 100, 106 (4th Cir. 1989) (holding that an employee agent is only liable for harassment in which he actually participated), vacated in part, 900 F.2d 27 (4th Cir. 1990); Jones v. Continental Corp., 789 F.2d 1225, 1231 (6th Cir. 1986) (holding that individuals may clearly be held liable as agents of an employer under Title VII).
129. See supra notes 127-28.
130. See Williams-Guice v. Board of Educ., No. 92 C 7904, 1994 U.S. Dist. LEXIS 944, at *16-17 (N.D. Ill. Feb. 1, 1994) (dismissal of action based on failure to allege that individual defendants played a role in hiring decisions of employer), aff’d, 45 F.3d 161 (7th Cir. 1995); Greene v. Term City, Inc., 828 F. Supp. 584, 586-87 (N.D. Ill. 1993) (dismissal of action based on failure to name individual defendants in the EEOC complaint); Bertocini v. Schrimpf, 712 F. Supp. 1336, 1339-40 (N.D. Ill. 1989) (Duff, J.) (disposition of action based on presumption that a named individual is being sued in an official as opposed to a personal capacity). Notably, the same court later ruled that a claim against a supervisor in his individual capacity should be dismissed because the relief authorized under Title VII was that which would only be provided by an employer. Weis v. Coca-Cola Bottling Co., 772 F. Supp. 407, 411 (N.D. Ill. 1991) (Duff, J.).
132. See Employment Discrimination, supra note 8, at 1112. These anomalies were exacerbated by the 1991 amendments, which imposed a stepwise link between the size of the em-
As discussed earlier, the compromises which shifted Title VII's original public enforcement scheme to one which is entirely dependent upon private lawsuits never included a concomitant revision of the statute's remedial scheme to specifically permit a complainant's recovery of compensatory and punitive damages.\textsuperscript{133} The incongruity between enforcement suits directed against individual defendants and the resulting limited remedies of injunction and backpay is a result of sloppy congressional compromise rather than congressional intent to limit or deny recovery against individual participants in a discriminatory employment decision. The reasons for defining "employer" by the size of its workforce were two-fold. First, it was intended to link the reach of the statute to activity with a palpable effect on interstate commerce.\textsuperscript{134} Second, it was intended to limit the statute's reach to employment situations that did not involve close personal ties between employer and employees.\textsuperscript{135} There is no compelling reason to interpret this limitation as anything more than a restraint on the reach of federal legislation imposed by the Commerce Clause and as an exemption to small, family-operated businesses. Furthermore, the pressures exerted on Congress to limit the applicability of the Act's provisions based on the size of the employer came from representatives and advocates of business. Their concerns were that a law providing for excessive damage awards in discrimination suits would: (1) end the free enterprise system; (2) deprive employers of the right to basic control over their operations; and (3) risk widespread loss of jobs and tax revenues as employers faced financial ruin from damage awards resulting from discrimination suits.\textsuperscript{136} The basis for the incremental association between damage awards and the size of the employing entity in the 1991 amendments was the concern that the threat to economic viability posed by damage awards might impact most heavily on small businesses important to the stimulation of jobs in the weak economy.\textsuperscript{137}

\textsuperscript{133} See supra text accompanying notes 86-92.

\textsuperscript{134} See supra text accompanying notes 14-40.

\textsuperscript{135} See supra text accompanying note 19.

\textsuperscript{136} See supra text accompanying note 20.


\textsuperscript{137} A 1991 proposal by President Bush for an amendment to the Civil Rights Act, providing for additional equitable relief in cases of sexual harassment, spelled out considerations
These concerns about protecting small business entities do not provide any basis for the argument that Congress similarly intended to protect individual employee agents. Despite the difficulties created by the ill-considered structure of the damage caps under the 1991 amendments, seemingly ignoring the individual as a defendant, the scheme was obviously designed to limit the potential damage awards against employing entities rather than individuals. Consideration of the caps centered on the risk of losing small businesses due to liability exposure and the basis for the lower step was simply the lower bound of employer size.138 The liability of individual defendants was not addressed because their liability exposure was not of concern in crafting this limitation on damage recovery. In light of the fact that all debate focused on the adoption of damage caps, rather than the incremental link between specific caps and employer size, this anomaly is more likely the result of oversight than of a deliberate decision to protect individuals from personal liability.139

In addition to becoming mired in the difficulties engendered by the lack of clear indicia of congressional intent, many courts grappling with the issue of personal liability under Title VII have ignored general principles guiding the interpretation and application of federal remedial laws. For example, Title VII, in contrast to Title II140 of the same act, contains no language declaring that its listed remedies are intended to be exclusive.141 Without such limitation, even the original statutory authority granting “such affirmative action as may be appropriate” may be interpreted to provide

for a court to undertake in making such an award, including the employer’s size and the effect of the award on the economic viability of the employer. 137 CONG. REC. S3022-23 (daily ed. March 12, 1991). A subsequent Republican compromise offered a separate bill to provide for damages in cases of intentional discrimination and, for the first time, actually scaled the damage award amounts to the size of the employer’s workforce. 137 CONG. REC. S7024-26 (daily ed. June 4, 1991).

138. See supra text accompanying notes 51-52.

139. See supra text accompanying notes 51-53. Soon after passage of the 1991 amendments, there was an effort in the Senate (as yet unsuccessful) to remove the series of caps on compensatory and punitive damage awards under Title VII. See Albert R. Karr, Senate Panel Votes to End Lid on Damages, WALL ST. J., March 12, 1992, at A3. Removal of the damage caps would also dispense with the problems for individual liability presented by the cap structure.


141. See 42 U.S.C. § 2000a-6(b) (1988); Tort Remedies, supra note 33, at 502. Of course, Title VII also expressly authorizes courts to order “other affirmative action,” language which was later amended to authorize the grant of “any other equitable relief as the court deems appropriate.” 42 U.S.C. 2000e(b) (1988).
for an award of tort-like monetary damages where such an award would be necessary to redress the effects of discrimination. The Supreme Court has also recognized the authority of federal courts to imply remedies for violations of federal remedial statutes. Alternatively, it has been argued that courts could compensate victims of discrimination for economic harm or make economic restitution for loss of employment opportunity, “restoring” the plaintiff to the position he would have occupied but for the discrimination. This could be accomplished under the rubric of “equitable” relief with no more stretch of that term than is required to deem backpay an equitable remedy.

Inherent in the idea that the remedies available under Title VII have always been potentially broader than many courts have recognized is the notion that such relief could be granted against appropriate defendants beyond the employing entity. The nature of these additional remedies as well as part of the policy motivation for the award of expanded remedies dictates this result. Because tort law assigns primary liability to the tortfeasor, with recourse also against the employer under the principle of respondeat superior, it is logical that imposition of tort-like damages for victims of discrimina-

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142. See Tort Remedies, supra note 33, at 498.
144. Section 1988 provides:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter [21] and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against the law, the common law, as modified and charged by the constitution and the statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of the punishment of the party found guilty.

146. Kotkin, supra note 4, at 1371-73.
147. Kotkin, supra note 4, at 1373-74.
tion would be directed to the individuals involved in the discriminatory act as well as the employer.\textsuperscript{148} Furthermore, because agency law allows for principal and agent to be joined in an action resulting from the agent’s tortious conduct,\textsuperscript{149} it makes sense to treat both the individual agent acting discriminatorily and the employer as potential defendants.

Finally, other policy considerations also favor this result. The goals of Title VII — to compensate victims of discrimination and deter future discriminatory conduct — are better served by holding those who engage in discrimination directly responsible.\textsuperscript{150} Such a position ensures that victims of discrimination receive the opportunity to seek full redress from all potential liability sources. It also sends the clearest message that discrimination in employment will not be tolerated. Furthermore, it actually promotes Congress’ goal of limiting the liability exposure of businesses by enabling them to share their exposure to liability with the culpable employee agent.\textsuperscript{151} Additionally, a lack of parity on this issue between the various employment anti-discrimination laws produces an intolerable situation by granting some victims of discrimination more avenues of redress than others.\textsuperscript{152}

\section*{VII. Conclusion}

The legislative development of Title VII, through its original enactment and subsequent amendments, has been characterized by compromise positions which have had a significant detrimental impact on courts’ attempts to ascertain the intent of Congress in various provisions of the Act. Of particular note are the remedial provisions of Title VII, which have been subject to various interpretations and applications in the context of the type of damages authorized and the classes of defendants against whom relief may be granted under the Act. The issue of whether Title VII provides for the award of damages against employee agents in their individual capacities has become renewed in light of the 1991 amend-

\begin{flushleft}
\textsuperscript{148} See supra text accompanying notes 84-85.  \\
\textsuperscript{149} See Griffith v. Keystone Steel & Wire, 858 F. Supp. 802, 806 (C.D. Ill. 1994) (quoting \textit{RESTATEMENT (SECOND) OF AGENCY} § 359c(1) (1957)). \\
\textsuperscript{150} See supra note 114 and accompanying text. \\
\textsuperscript{151} Of course, under joint and several liability businesses are still likely to be the deeper pocket from which damages are actually collected. However, if an employer can seek contribution from a culpable employee, there could be instances of employer savings. \\
\textsuperscript{152} See supra text accompanying notes 122-24.
\end{flushleft}
ments to Title VII, which specifically authorize the award of tort-like compensatory and punitive damages in cases of intentional discrimination. Review of the legislative history of Title VII and its amendments, comparison to related anti-discrimination laws, recognition of general principles for the interpretation of remedial statutes, and policy considerations all lead to the conclusion that Title VII does contemplate personal liability for individual employee agent defendants.