Corporate Buyer Beware: Deficiencies in Directors' and Officers' Insurance for Employment Practices Liability

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NOTE

CORPORATE BUYER BEWARE: DEFICIENCIES IN DIRECTORS’ AND OFFICERS’ INSURANCE FOR EMPLOYMENT PRACTICES LIABILITY

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I. INTRODUCTION

In recent years, an increasing source of liability for large and small businesses has resulted from employment discrimination lawsuits brought under Title VII of the Civil Rights Act of 1964¹ ("Title VII"), the Age Discrimination in Employment Act² ("ADEA"), and the Americans with Disabilities Act³ ("ADA"). These federal laws expanded employee rights in the workplace by prohibiting discrimination on the basis of race, religion, sex, national origin, age, or disability. As a consequence, these statutes sparked a remarkable growth in employment practices-related litigation, much of which centers around establishing the boundaries of liability.

The issue concerning who may be subject to liability under the anti-discrimination statutes often focuses on how the statutes define the term “employer.” The three statutes contain virtually identical definitions of the term.⁴ As will be explained below, the overwhelming position taken in the federal circuit courts is that under these statutory definitions of “employer” it is the corporate employers, and not individuals, who are subject to liability under Title VII, the ADEA, and the ADA.⁵

The dramatic increase in employment discrimination litigation and the potential losses associated with such lawsuits threatened many corporations. As a result, many companies turned to directors’ and officers’ ("D&O") insurance policies as a way to protect their assets in the event of an employment discrimination lawsuit.

Although D&O insurance was developed to shield the personal assets of directors and officers from liability, it serves a dual purpose. The D&O policy has two distinct insuring clauses. The first clause insures the directors and officers for their personal liability. The second clause insures the corporation for amounts that it is lawfully permitted or required to expend in indemnifying directors and officers for their liability. In other words, where a director or officer and a corporation are each named in an employment discrimination lawsuit and the director or officer is found liable, the corporation will most likely have to indemnify the director or officer for their personal loss. The D&O policy then

⁴ See infra Part V.
⁵ See infra Part VI.
allows the corporation to be reimbursed to the extent of the indemnification.

Many companies realized the potential of D&O insurance to provide protection against corporate liability in employment practices claims. D&O insurance carriers responded by marketing an employment practices liability insurance ("EPLI") endorsement to the standard D&O policy. As a result, many companies purchased D&O liability insurance, mistakenly believing that the EPLI endorsement would provide the necessary protection against employment practices liability.

Due to recent legal developments regarding the interpretation of the three federal anti-discrimination statutes, the effectiveness of the D&O insurance policy, with or without the EPLI endorsement, has been drastically undermined. In a situation where a director or officer and the corporation are named in an employment practices-related lawsuit, the D&O policy, while reimbursing the corporation to the extent that it indemnifies its directors and officers, will not cover the liability allocated solely to the corporation. If the directors and officers are not subject to individual liability (as the circuit courts are holding), the reimbursement clause of the D&O policy is not triggered and the policy will not provide any corporate protection. Rather, companies should opt for the stand-alone EPLI policy in order to protect themselves from the mounting level of employment discrimination litigation.

This Note will demonstrate how the circuit courts' interpretation of the statutory definition of "employer" has rendered the D&O insurance policy, with or without the EPLI endorsement, ineffective in protecting corporations facing an employment discrimination lawsuit. Part II of this Note provides background information with regard to D&O liability insurance. Part III details the dramatic increase in employment-related litigation over the past several years and the factors which caused this remarkable growth. Part IV briefly outlines the different categories of wrongful employment practices. Part V begins by discussing the three federal anti-discrimination statutes and how they have become a significant factor in the widespread emergence of employment practices litigation. Part VI is an analysis of how various circuit courts held that there is no individual liability under Title VII, the ADEA, and the ADA. These courts have interpreted the agent provision in the "employer" definitions as not providing for individual liability, but rather, established respondeat superior liability on the employer based on agency principles. Part VII concludes that if directors and officers will not be subject to liability in their individual capacities under the anti-discrimination statutes, D&O insurance, with or without the EPLI endorsement, will fail
to provide coverage to corporations against employment practices liability claims brought under these federal statutes.

II. DIRECTORS' AND OFFICERS' LIABILITY INSURANCE

A. Introduction

Serving on the board of directors of a corporation is generally considered to be a prestigious and rewarding experience. However, it is also saddled with the potential for crippling personal liability. A board member or executive officer may be subject to liability if they breach their fiduciary duties of care or loyalty by failing to act in the best interests of the corporation or its shareholders. In light of this possibility, a director or officer will want to take precautions to ensure that his personal assets are not at risk.

First, he should take every measure to ensure that the corporation provides the broadest indemnification provision possible. Generally, a corporation will institute the broadest indemnification provisions within its bylaws allowing it to bear the financial burden of a lawsuit brought against the directors and officers. All fifty states have statutorily authorized corporations to protect directors and officers from personal liability through indemnification. Furthermore, most of these state indemnification statutes expressly empower corporations to purchase and maintain D&O liability insurance.

Second, a corporate director or officer may protect his or her personal assets by making sure that the corporation he is serving purchases the statutorily permissible amount of D&O liability insurance.

7. See Michael Cavallaro, Directors' and Officers' Liability—What to Know, From a Broker's Perspective, 28th Watson Wyatt Directors and Officers Symposium sec. 7, at 1 (1996) [hereinafter D&O Symposium].
8. See id.
10. See Knepper & Bailey, supra note 9, at 688; Ross, supra note 9, at 783-84.
11. See Cavallaro, supra note 7, at 1. Indeed, businesses are being urged to consider the EPLI policy as a measure of protection against the growing number of lawsuits brought by employees. See Marcia Coyle, Employers Under Siege Get Coverage, NAT'L L.J., Dec. 8, 1997, at B1 (noting that "more than 60 companies now offer some variation of it—in the form of stand-alone policies, as part of larger general liability contracts, or as an endorsement to directors' and officers' liability
B. Background

In 1934, Lloyds of London drafted the first D&O liability policies for two large publicly held companies, Flintkote Corporation and Federated Department Stores.\(^\text{12}\) The promulgation of the Securities Act of 1933 and the Securities and Exchange Act of 1934 compelled the directors and officers of these corporations to acquire an insurance policy that would protect them from liability if they violated these securities laws.\(^\text{13}\) However, it was approximately thirty years before D&O liability insurance developed into the widespread type of insurance coverage that it is today.\(^\text{14}\)

In the mid-1970s, the market for D&O liability insurance first began to blossom due to the rise in litigation precipitated by the 1974-1975 recession.\(^\text{15}\) "Up until that time, there was very little, if any, demand for D&O liability insurance as suits against directors and officers were relatively rare and only sporadically successful."\(^\text{16}\) It was not until the mid-1980s that corporations perceived the importance of D&O liability insurance in the nation's economy.\(^\text{17}\)

During this period, directors and officers faced an increase in the bases for the imposition of liability.\(^\text{18}\) The development of government
regulations in the areas of securities and antitrust law, combined with the
greater utilization of derivative and class action suits, also resulted in a
dramatic increase of exposure to liability for directors and officers.\textsuperscript{19}
Without adequate insurance to protect their personal assets, there was a
"serious threat of mass defections from corporate boardrooms."\textsuperscript{20} In fact,
this fear of uninsured liability led many corporate executives either to
resign from their positions or to refuse to serve on a board in the first
instance.\textsuperscript{21}
In an attempt to alleviate these concerns and attract and retain
competent directors and officers, many corporations began to offer these
individuals protection from personal liability.\textsuperscript{22} The traditional method
of protection was corporate indemnification, which was permissible under
state statutes.\textsuperscript{23} However, in this crisis climate, it became apparent that
corporate indemnification would not provide adequate financial protection
for directors and officers.\textsuperscript{24} As a result, corporations began to purchase
D&O liability insurance in order to protect directors and officers from
claims that exceeded the scope of their current indemnification.\textsuperscript{25} At this

\begin{itemize}
\item [\textsuperscript{19}] See Ross, supra note 9, at 775-76.
\item [\textsuperscript{20}] KNEPPER & BAILEY, supra note 9, at 685.
\item [\textsuperscript{21}] See Block et al., supra note 17, at 13. As Business Week observed in a 1986 cover story:

\textquote[Concerned about increasing legal hassles and time demands, scores of directors
are quietly stepping down. Some prominent executives confide that when their current
terms expire, they will not stand for reelection to outside boards. Many more are turning
away all invitations to serve. A number of troubled companies, which need strong
directors, are facing mass defections . . . .]

\dots

\dots [All of this] comes just as many boards face a rash of proposals for
takeovers, divestitures, stock repurchases, and management buyouts that cry out for
scrutiny by strong outside directors.
Laurie Baum, The Job Nobody Wants: Outside Directors Find That the Risks and Hassles Just
Aren't Worth It, Bus. Wk., Sept. 8, 1986, at 56. Furthermore, this situation had become so
precarious for corporate executives that it prompted a Harvard Business School professor to explain
that being the director of a company is an "unattractive if not outright dangerous proposition."
William A. Sahlman, Why Sane People Shouldn't Serve on Public Boards, HARV. BUS. REV., May-
June 1990, at 28.
\item [\textsuperscript{22}] See Ross, supra note 9, at 776.
\item [\textsuperscript{23}] See id.
\item [\textsuperscript{24}] See KNEPPER & BAILEY, supra note 9, at 686.
\item [\textsuperscript{25}] See Ross, supra note 9, at 785. The types of claims that are beyond the scope of
indemnification but are covered by D&O insurance arise most frequently in the context of derivative
and securities lawsuits. See id. When a derivative lawsuit is initiated, directors and officers cannot
be indemnified for judgments or amounts paid in settlement but can be indemnified for expenses.
See id. A D&O policy, on the other hand, will generally cover judgments and amounts paid in the
settlement of a derivative action. See id. at 785-86. Secondly, the Securities and Exchange

Corporation, D&O liability insurance changed from functioning as a minor coverage demanding small premiums to an important and costly issue for corporations.  

C. Two Coverages Within One Policy

The typical D&O liability insurance policy provides two distinct coverages within one policy.  The first coverage, referred to as the D&O individual liability coverage, insures the individual directors and officers when they are not indemnified by the corporation.  The second coverage, known as the corporate reimbursement form, reimburses the corporation for amounts that it is lawfully permitted or required to expend in indemnifying its directors and officers.  Based on these two insuring clauses, "[t]he corporation is not insured directly for its own liability or defense but is only insured to the extent it indemnifies its directors or officers." Therefore, "[d]irectors’ and officers’ liability insurance policies cover directors and officers exclusively and provide no

Commission is of the opinion that indemnification for violations of the federal securities laws is against public policy and, therefore, unenforceable. See id. at 786. However, "[b]ecause the SEC does not consider insurance for these violations unlawful per se, D&O coverage offers important protections against liability arising under the federal securities laws." Id. (footnotes omitted).

D&O insurance is also effective in situations where a corporation is allowed to indemnify its directors and officers but cannot or will not do so. See id. For example, a corporation cannot indemnify in certain circumstances such as insolvency or bankruptcy. See id. In addition, a corporation may be unwilling to indemnify a director after a management change or in the aftermath of a hostile takeover. See id.

26. See Knepper & Bailey, supra note 9, at 685. One commentator notes that other commentators have claimed that the importance of D&O insurance coverage is overstated. See Ross, supra note 9, at 787. However, this argument ignores the fact that D&O insurance coverage is needed to attract and maintain qualified executives to serve as directors and officers. See id. Furthermore, D&O liability insurance is necessary to provide corporate insiders with enough protection so that the fear of liability will not hinder or affect their business judgments. See id.

27. See Knepper & Bailey, supra note 9, at 687; Barry W. Lee & Andrew L. Dudnick, Directors’ and Officers’ Liability Insurance: Policy Exclusions, in Directors’ and Officers’ Liability Insurance 1988, at 487, 490 (PLI Commercial Law & Practice Course Handbook Series No. A4-4223, 1988); Ross, supra note 9, at 783.

28. See Knepper & Bailey, supra note 9, at 687; Lee & Dudnick, supra note 27, at 490; Ross, supra note 9, at 783.

29. See Knepper & Bailey, supra note 9, at 687; Lee & Dudnick, supra note 27, at 491; Ross, supra note 9, at 783.

coverage for defense expenses or liability allocable to the corporation itself."

III. EMPLOYMENT-RELATED LIABILITY ON THE RISE

Employment-related litigation increased dramatically over the past several years. Lawsuits initiated by employees and former employees against their employers are reportedly one of the "fastest growing areas of litigation across the country." Although there are several factors accounting for this remarkable growth in employment practices-related litigation, by far the most important are the federal laws which expanded employees' rights in the workplace and provided new remedies based upon new causes of action. The four federal laws are Title VII, the

31. Dawes & Shannon, supra note 17, at 339. A related topic, allocation of loss between directors and officers and the corporation, is one of the most controversial issues in D&O liability insurance today. As stated, a D&O insurance policy will only cover claims brought against directors and officers in their individual capacity, not claims initiated against the corporation alone. However, the issue of allocation arises whenever a lawsuit is brought against the directors and officers of a corporation and the corporation itself. See D&O Liability Survey Report, 1995 Watson Wyatt Directors and Officers Liability Survey 46 (1995); Allocation in Directors' and Officers' Liability Insurance: A Commentary on the Law's Evolution and a Summary of the Case Law, in D&O Symposium, supra note 7, sec. 10, at 1 (prepared by Wilson, Elser, Moskowitz, Edelman & Dicker).


33. Robert A. Machson & Joseph P. Monteleone, Insurance Coverage for Wrongful Employment Practices Claims Under Various Liability Policies, 49 Bus. Law. 689, 689 (quoting Chrys A. Martin, Coverage for Claims Arising Out of Employment, For the Def., Sept. 1989, at 25, 25). In fact, the number of employment discrimination suits and complaints rose by approximately 2,200% over the past two decades. See Finnegan, supra note 32, at 64; see also Michael Schachner, Suits Send Employers Running for Cover, Bus. Ins., Nov. 21, 1994, at 57, 57 (2,166%). In 1973, only 1,787 lawsuits were brought as opposed to 5,931 in 1977. See Gilbert, supra note 32, at 9. In 1990, the Equal Employment Opportunity Commission received 62,135 complaints, a number which climbed to 90,000 by the end of 1994. See Julianna Ryan, Insurance Policies That May Be Called on to Respond to Employment-Related Claims, in D&O Symposium, supra note 7, at 315; Gilbert, supra note 32, at 9; Zolna, supra note 32, at 40. These figures represent only those persons making claims under federal anti-discrimination employment statutes. See Ryan, supra, at 315. "Employment cases brought in federal courts averaged between 5000 and 6000 cases a year from 1976 to 1980, but have increased since 1980 to an average of over 8000 annually during 1988-1991, rising to 10,771 in 1992." Machson & Monteleone, supra, at 690. In sum, employment discrimination lawsuits now account for an estimated one-fifth of all civil suits filed in U.S. courts. See Finnegan, supra note 32, at 64.

34. See Finnegan, supra note 32, at 66. Other factors, in addition to federal legislation, include the stagnant economy in the early 1990's and the resulting layoffs, see Victoria Sonshine Pasher, Employment-Related Liability Claims on the Rise, Nat'l Underwriter, Nov. 27, 1995, at 25, 25,
ADEA,36 the ADA,37 and the Civil Rights Act of 199138 ("1991 Act") which permitted the recovery of compensatory and punitive damages under Title VII.39 The costs incurred in defending these claims can be overwhelming and the settlements or judgments awarded to the plaintiffs can cripple a small business.40 In addition, the lawsuits can last for a period of years and demand considerable time and energy from management.41 Over the next decade, as the work force grows more diverse, it would be prudent for most companies to assume that they will face a minimum of one, and most likely several, employment practices lawsuits.42 In anticipation, companies have been looking for ways to protect their assets in the event of such a lawsuit.43

Employment practices claims are often brought against directors and officers as well as the corporation. Officers are usually responsible for the day-to-day operations of a company's business, such as making

the erosion of the employment-at-will doctrine, see id., and the extensive media attention to events with a sexual harassment theme, including the Clarence Thomas Supreme Court confirmation hearings in the Fall of 1991, see Monteleone, supra note 30, at 47; Gilbert, supra note 32, at 9; Pasher, supra, at 25.

The employment-at-will doctrine, at one time, recognized by most states, was once a cornerstone of the free enterprise philosophy. See Finnegan, supra note 32, at 66. The doctrine allowed an employer to "fire someone for a good reason, a bad reason, or no reason at all—so long as the firing [was not] discriminatory or [did not] violate a collective bargaining agreement." Id. "By 1989, however, courts in 45 states had accepted several theories that eroded the 'at will' rule, giving rise to claims for wrongful termination." Id.

36. 29 U.S.C. §§ 621-634 (1994) (protecting workers who are 40 years of age or older).
37. 42 U.S.C. §§ 12101-12213 (1994) (making it illegal to discriminate against employees who are disabled, including the obese).

According to Cheryl Blackwell Bryson, the head of the employment practices group at the law firm of Rivkin, Radler & Kremer in Chicago, "[t]he Americans with Disabilities Act, under which about 43 million Americans qualify for protection, has been the single largest headache for employers . . . ." Schachner, supra note 33, at 57. Furthermore, "[t]hrough 1993, the Equal Employment Opportunity Commission has fielded approximately 87,000 ADA-related complaints, about 50% of which were for discriminatory termination. Now that number is approaching 100,000." Id.

39. See Finnegan, supra note 32, at 66; see also Coyle, supra note 11, at B2 (noting that the 1991 Act "exposed employers to compensatory and punitive damages . . . [and] more important, . . . put the claims before juries").
40. See Finnegan, supra note 32, at 66.
41. See id.
42. See Zolna, supra note 32, at 40.
43. According to Cheryl Blackwell Bryson, head of the employment practices group at the law firm of Rivkin, Radler & Kremer in Chicago, "[c]ompanies are now beginning to think about how they can avoid liability." Schachner, supra note 33, at 57.
In addition, officers usually work in close proximity to the employees, thereby exposing officers to potential sexual harassment claims. Similarly, but with less frequency, directors of corporations are named in employment discrimination suits, especially in small corporations where they are involved in the daily operations of the business. In fact, a 1995 study revealed that one out of every four D&O liability claims were brought by employees in employment practices-related lawsuits.

Since employment practices claims often name directors and officers and because one of the primary functions of the D&O policy is to reimburse the corporation to the extent that it indemnifies its directors and officers for their liability, corporations began to look to D&O insurance carriers to protect their corporate assets. D&O insurance carriers seized this opportunity by marketing an EPLI endorsement to the standard D&O policy.

The EPLI enhancement to the D&O policy gives many companies the incentive to purchase D&O insurance by extending coverage to all employees of a corporation as well as to its directors and officers. However, like the standard D&O policy, it does not extend coverage to the corporate entity for employment practices claims. Companies that already have, or are considering a D&O policy, with or without an EPLI endorsement, should beware. Due to recent legal developments regarding the interpretation of the definition of employer in the three federal anti-discrimination statutes—Title VII, the ADEA, and the ADA—the effectiveness of the D&O insurance policy in covering employment practices claims, with or without the EPLI endorsement, has been drastically undermined.

44. See Machson & Monteleone, supra note 33, at 710; Monteleone, supra note 30, at 62.
45. See Machson & Monteleone, supra note 33, at 710; Monteleone, supra note 30, at 62.
47. See When Pigs Fly!, VIEWPOINT, Apr. 1996, at 1, 2. The 1995 Wyatt Study “reported that one quarter of all claims against directors and officers were brought by employees, with the average paid employee claim exceeding $247,000, excluding defense costs.” Friend or Foe?, VIEWPOINT, Apr. 1996, at 8, 8.
48. See Machson & Monteleone, supra note 33, at 711; Ryan, supra note 33, at 320; Schachner, supra note 33, at 58.
49. See Cavallaro, supra note 7, at 39; Machson & Monteleone, supra note 33, at 712.
50. See Cavallaro, supra note 7, at 39; Machson & Monteleone, supra note 33, at 712. This distinction becomes especially noteworthy when analyzing the corporation’s potential exposure in employment litigation. See Coyle, supra note 11, at B2 (noting that the number of sexual harassment lawsuits more than doubled between 1990 and 1995 and the compensatory award for a wrongful termination claim increased by 45 percent).
IV. WRONGFUL EMPLOYMENT PRACTICES

The three most common types of employment practices claims are wrongful termination, discrimination, and sexual harassment. The first category of claims, known as wrongful termination claims, usually arises in the context of a firing or layoff. The terminated employee claims that the discharge violated a statutory right because it was based on factors such as race, sex, disability, or age. Also included in this category are “constructive discharge suits” that occur when an employee is not fired, but where the employer made the work environment so unbearable that the employee was effectively forced to resign to protect his or her financial, physical, and emotional well-being.

The second category of claims, commonly referred to as discrimination claims, cover a wide variety of acts that may or may not result in the termination of employment. These acts include the failure to hire a job applicant, failure to promote an employee, demotion of an employee, creation of a work environment wrought with ethnic, racial, or religious discrimination, or employment-related defamation based on one or more of these characteristics. There are two types of discrimination claims: disparate treatment claims and disparate impact claims. In a disparate treatment case, an employee must establish that he or she was treated differently by the employer, based on his or her gender, race, or age. In a disparate impact case, the employee must prove that the employer’s policies adversely impacted a particular group.

The third category of claims, sexual harassment claims, are a distinct form of gender-based discrimination.

Sexual harassment generally has come to mean unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of an inappropriate sexual nature when:

51. See Machson & Monteleone, supra note 33, at 690. This does not include labor-management issues that may arise in the context of collective bargaining agreements and laws related to them. See id.
52. See id.
53. See id.
54. See id. at 691.
55. See id.
56. See id.
57. See id. at 692.
58. See id.
59. See id.
60. See id.
1. submission to such conduct is made either explicitly or implicitly a term and condition of an individual's employment; or
2. employment decisions affecting an individual are made based upon submission to such conduct; or
3. the conduct unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or otherwise offensive work environment (hostile work environment sexual harassment).

Courts have referred to the first two categories as "quid pro quo" harassment and have termed the third category "as hostile or abusive work environment" harassment. Throughout this Note, the Author refers collectively to all three categories of claims as wrongful employment practices.

V. TITLE VII, ADEA, ADA, AND THE 1991 ACT

The widespread emergence of employment practices litigation is due largely to the enactment and existence of federal anti-discrimination statutes: Title VII, the ADEA, the ADA, and the 1991 Act. These statutes have provided employees with an extensive arsenal to initiate lawsuits against employers in order to combat workplace discrimination.

At one time, discrimination in employment was a societal norm. African-Americans and ethnic minorities were relatively nonexistent in professional or semi-professional fields. Female employees were paid considerably less than male employees and were subject to harassment by their male supervisors, often without legal recourse. Similarly, aged and disabled employees were not considered productive and competent

61. Id. at 693.

62. Id.

63. Due to the fact that employment discrimination is a purely statutory cause of action and is not based on common law, employment practices claims are brought under these federal statutes. See Phillip L. Lamberson, Comment, Personal Liability for Violations of Title VII: Thirty Years of Indecision, 46 Baylor L. Rev. 419, 426 (1994). However, it must be noted that there are state laws which mirror these federal anti-discrimination statutes and can be used as the basis of state employment discrimination claims.


65. See id.

66. See Sanborn, supra note 64, at 145. It was estimated that full-time female employees earned only 61 percent of the income of male employees in the same category in 1960; this figure decreased to 57 percent by 1974. See Joan Abramson, Old Boys-New Women: The Politics of Sex Discrimination 80 (1979).

67. See Sanborn, supra note 64, at 145.
members of the working world. It was not until the New Deal legislation of the 1930s that the first steps were taken to regulate employment practices. However, the major breakthrough did not come about until Congress passed Title VII.

The purpose of Title VII, clearly the focal point of the Civil Rights Act of 1964, was to protect employees from discrimination in the workplace based on race, color, religion, sex, or national origin. Age, due to its distinctive nature, was not included by Congress as a protected characteristic under Title VII. However, Congress did request that the Secretary of Labor create a report addressing age discrimination in employment. This report eventually led to the enactment of the ADEA in 1967.

68. See id. at 145-46.
69. See id. at 146.
70. President Kennedy proposed a civil rights bill in the wake of the Birmingham uprising of May, 1963, which ultimately became the Civil Rights Act of 1964. See id. at 147.
71. See id.
72. Originally, Congress did not include “sex” as one of the protected categories in the Civil Rights Act of 1964. Many members of Congress believed that the nature of sex discrimination required its own legislation. These congressmen feared that including sex in the Civil Rights Act would make the Act too controversial, threatening the entire cause. Nevertheless, at the time the amendment was introduced, the bill already had enough support to withstand the incorporation of gender protections. Over time, the protections against sexual discrimination have indeed strengthened the Act.
73. Title VII provides:
   It shall be an unlawful employment practice for an employer—
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or
   (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.
74. See Sanborn, supra note 64, at 149.
76. See Sanborn, supra note 64, at 150. The ADEA provides:
   It shall be unlawful for an employer—
   (1) 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;
   (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely
A third source of wrongful employment practices litigation manifested when Congress enacted the ADA. The ADA attempted to eradicate discrimination against individuals based on their disabilities. 77

Congress provided another means of legal recourse for employees by passing the 1991 Act, which expanded the scope of remedies available under Title VII. 78 "Prior to the enactment of the Civil Rights Act of 1991, Title VII provided only the equitable remedies of injunctive relief, reinstatement and back pay for the victims of employment discrimination." 79 The 1991 Act broadened Title VII relief to include the legal remedies of compensatory and punitive damages. 80 However, Congress placed limitations on these remedies by scaling the amount of damages

affect his status as an employee, because of such individual’s age;
(3) to reduce the wage rate of any employee in order to comply with this chapter.

77. The ADA provides, in pertinent part, that “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a) (1994).


After Title VII was criticized for failing to provide adequate remedies for plaintiffs, Congress passed the Civil Rights Act of 1990. President George Bush vetoed the Act, labeling it a quota bill. When Congress failed to override the veto, the bill was defeated. Just three months after President Bush’s veto, however, concern over Title VII’s inadequacies resurfaced and the Act was revived in 1991. On November 21, 1992, after much political maneuvering and heated debate, President Bush signed the Civil Rights Act of 1991.


79. Kathleen Dawson, Note, Supervisor Liability for Employment Discrimination Under Federal Law: Substantive Remedy or Procedural Issue?, 41 WAYNE L. REV. 1875, 1883 (1995) (footnotes omitted); see also Manna, supra note 78, at 342 (stating that even though Title VII did not permit compensatory or punitive damages “no matter how egregious the circumstances; it did allow employers to avoid meaningful liability”); Ayvas, supra note 78, at 801 (stating that Title VII remedies, reinstatement and back-pay, were generally assessed against the employer).

available according to the size of the offending individual's employer.81

The scope of liability under the statutes, however, has been subject to extensive judicial scrutiny in the federal circuit courts. Much of the controversy surrounding who may be subject to liability under the anti-discrimination statutes revolves around the statutes' definitions of "employer."82 Title VII defines an "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person."83 Both the ADEA and the ADA mirror Title VII in their definitions.84 Thus, the question became whether these definitions impose liability on individuals unlawfully discriminating against an employee based on the "and any agent" provision. Since the

81. See id. § 1981a(b)(3). The section reads:
   The sum of the amount of compensatory damages awarded under this section . . .
   and the amount of punitive damages awarded under this section, or shall not exceed, for
   each complaining party—
   (A) in the case of a respondent who has more than 14 and fewer than 101
   employees . . . $50,000;
   (B) in the case of a respondent who has more than 100 and fewer than 201
   employees . . . $100,000; and
   (C) in the case of a respondent who has more than 200 and fewer than 501
   employees . . . $200,000; and
   (D) in the case of a respondent who has more than 500 employees . . . $300,000.

82. See Kendra Samson, Note, Does Title VII Allow for Liability Against Individual
83. 42 U.S.C. § 2000e(b) (1994). Title VII of the Civil Rights Act of 1964 provides that "the
   term 'employer' means 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 . . . ." Id.
84. The ADEA of 1967 provides:
   The term 'employer' means a person engaged in an industry affecting commerce
   who has twenty or more employees for each working day in each of twenty or more
   calendar weeks in the current or preceding calendar year: Provided, That prior to June
   30, 1968, employers having fewer than fifty employees shall not be considered
   employers. The term also means (1) any agent of such a person, and (2) a State or
   political subdivision of a State and any agency or instrumentality of a State or a political
   subdivision of a State, and any interstate agency, but such term does not include the
   United States, or a corporation wholly owned by the Government of the United States.
29 U.S.C. § 630(b) (1994). The ADA of 1990 provides:
   The term "employer" means a person engaged in an industry affecting commerce
   who has 15 or more employees for each working day in each of 20 or more calendar
   weeks in the current or preceding calendar year, and any agent of such person, except
   that, for two years following the effective date of this subchapter, an employer means a
   person engaged in an industry affecting commerce who has 25 or more employees for
   each working day in each of 20 or more calendar weeks in the current or preceding year,
   and any agent of such person.
statutes define "employer" similarly, courts have used the same analysis for all three statutes, routinely addressing arguments dealing with individual liability to each of the statutes.85

The issue of whether there is individual liability under Title VII, the ADEA, and the ADA is a matter of statutory construction. The legislative histories of these statutes fail to provide clear guidance of Congressional intent and, therefore, shed very little light on this problem.86 Nevertheless, courts have interpreted the "employer" definitions of the statutes in basically two ways.87 First, some courts have imposed liability on individuals based on the plain meaning of the statutory language.88 In doing so, they have reasoned that the "and any agent" provision subjects both the employer entity and the individuals who participated in the discrimination to liability.89 Second, some courts have decided that the agent provision simply establishes respondeat superior liability on the employer based on agency principles.90 Literally meaning "[I]et the master answer,"91 respondeat superior liability imputes liability to

85. See, e.g., EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1279-80 (7th Cir. 1995) (stating that courts routinely apply arguments regarding individual liability to all three statutes interchangeably).

86. One student commentator highlighted the problem with relying on legislative history to determine whether Congress intended supervisor liability:

While congressional intent is at most a tenuous argument of last resort, it is even more tenuous in the context of Title VII. The legislative history of the 1964 Act is scattered throughout the Congressional Record. There was only one official committee report which addressed Title VII. The issue of supervisor liability was not discussed in either the committee report or during floor debates. Even a cursory review of the Title VII debates in the House and Senate reveals the often hostile attitude toward the proposed legislation. It is difficult to accept that if supervisor liability had been intended, it would not have been discussed once. Rather, it is likely that it would not only have been discussed, but would have been a welter of opposition.

Clara J. Montanari, Comment, Supervisor Liability Under Title VII: A "Feel Good" Judicial Decision, 34 DUQ. L. REV. 351, 360-61 (1996) (footnotes omitted); cf. Lamberson, supra note 63, at 426-27 (stating that although no legislative history directly deals with the issue of personal liability, the limited legislative history that is available is clearly contrary to a determination of no individual liability). For a more extensive discussion of the legislative history of the 1964 Act, see Montanari, supra, at 360-65. For a discussion of the legislative history of the Civil Rights Act of 1991, see id. at 365-67 (stating that "[t]he 102d Congress, like the 78th Congress, did not leave a trail of legislative history indicating an intent to incorporate supervisor liability").

87. See Sanborn, supra note 64, at 155.

88. As will be shown below, this stance has regressed to a minority position in the federal circuits, and this Author believes it is at the point of extinction.

89. See Montanari, supra note 86, at 354.

90. See id.; see also AIC Sec. Investigations, 55 F.3d at 1281.

employers for the wrongful conduct of their employees.92

Although many commentators note the split in the federal circuit courts with regard to individual liability,93 there is a clear consensus in the circuits that the employer definition establishes respondeat superior liability only and that there is no individual liability under the three anti-discrimination statutes.94 This judicial consensus, coupled with the fact that the D&O insurance policy will only insure a corporation for indemnification when its directors and officers are found personally liable, effectively preclude coverage for the corporation under the D&O policy. As a result, many companies will have to endure the staggering defense costs and lofty damage awards associated with employment practices lawsuits without any protection.95

VI. THE FEDERAL CIRCUIT COURTS’ POSITION ON INDIVIDUAL LIABILITY

There is no longer a great divide among the federal circuit courts with regard to the issue of individual liability. In fact, a majority of the circuits have held that there is no individual liability under Title VII, the ADEA, or the ADA. The following is an analysis of the circuits’ position focusing on the most recent and important court decisions.

A. The Second, Seventh, and Ninth Circuits Lead the Way

Three circuits, the Second, Seventh and Ninth, have led the way in holding that there is no basis for individual liability under Title VII, the ADEA, or the ADA. The Ninth Circuit was one of the first circuits to

92. See Ayvas, supra note 78, at 802.
93. See Greer, supra note 76; Davida H. Isaacs, “It’s Nothing Personal”—But Should It Be?: Finding Agent Liability for Violations of the Federal Employment Discrimination Statutes, 22 N.Y.U. REV. L. & SOC. CHANGE 505 (1996); Manna, supra note 78; Ayvas, supra note 78; Dawson, supra note 79; Lamberson, supra note 63; Lappe, supra note 78; Suzanne G. Lieberman, Note, Current Issues in Sexual Harassment, 50 VASH. U.J. URB. & CONTEMP. L. 423 (1996); Montanari, supra note 86; Sanborn, supra note 64.
94. See discussion infra Part VI.
95. This point is limited in that states’ civil rights laws mirror those of the federal anti-discrimination statutes. Therefore, a state law claim may be instituted against a director or officer and individuals may not be precluded from liability under these state statutes. As a result, the directors and officers insurance policy will respond to these claims. However, since a majority of these lawsuits are brought under federal law, liability imposed by state statute should not significantly enhance the limited effectiveness of the D&O liability policy in protecting against employment practices claims.
hold that there is no individual liability under these statutes in Miller v. Maxwell’s International Inc.96

In Maxwell’s International, a former employee brought sex and age discrimination claims against six defendants in their individual capacities, as well as against her corporate employer.97 The Ninth Circuit Court of Appeals relied on its own precedent in Padway v. Palches,98 which stated that “individual defendants cannot be held liable for back pay.”99 The court then addressed the statutory construction argument and found that the purpose of the agent provision in the definition of employer was to incorporate respondeat superior liability into the statute.100 The Ninth Circuit further reasoned that the statutory scheme of Title VII and the ADEA evidenced that Congress did not intend to impose individual liability on employees.101 According to the court, the reason that Title VII limits liability to employers with fifteen or more employees and the ADEA limits liability to employers with twenty or more employees was because “Congress did not want to burden small entities with the costs associated with litigating discrimination claims.”102 The court went on to say that “[i]f Congress decided to protect small entities with limited resources from liability, it is inconceivable that Congress intended to allow civil liability to run against individual employees.”103

Furthermore, the court stated that because individuals cannot be held liable for damages under Title VII, a similar result followed under the ADEA because of the similarities between the statutes.104 Finally, the court rejected the contention that not holding individuals liable will allow them to violate Title VII with impunity.105 Conversely, the court reasoned that the employer has a strong incentive to monitor and control the actions of its employees.106

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96. 991 F.2d 583 (9th Cir. 1993).
97. See id. at 584. Among the defendants was Donald Schupak who was the chief executive officer of Maxwell’s International, the corporate owner of Maxwell’s Plum restaurant, Miller’s employer. See id. The other defendants were two general managers of the restaurant and three “lower level employees.” Id.
98. 665 F.2d 965 (9th Cir. 1982).
99. Id. at 968 (citation omitted).
100. See Maxwell’s Int’l, 991 F.2d at 587.
101. See id.
102. Id.
103. Id.
104. See id. at 587-88.
105. See id. at 588.
106. See id. “No employer will allow supervisory or other personnel to violate Title VII when the employer is liable for the Title VII violation. An employer that has incurred civil damages
The Maxwell’s International court was not, however, unanimous as this seminal case on individual liability met with a dissent. In his dissent, Judge Fletcher rejected the majority's unwillingness to find individual liability under the federal statutes. He argued that there are strong similarities between the ADEA and the Fair Labor Standards Act (“FLSA”), and that “[t]here is no question that an individual can be personally liable as an employer under the FLSA.” Judge Fletcher argued that the FLSA result should apply to actions brought under the ADEA. The majority addressed this argument by noting that although the ADEA incorporates some provisions of the FLSA, it does not specifically incorporate the definition of “employer.”

The Ninth Circuit reaffirmed its holding that there is no personal liability for employees under Title VII in Greenlaw v. Garrett. In Greenlaw, the plaintiff alleged that her former employer, the United States Department of the Navy, and her former supervisor discriminated against her on the basis of sex. The court held that “[u]nder Title VII there is no personal liability for employees, including supervisors.”

Finally, a Ninth Circuit district court applied the rationale of Maxwell’s International with equal force to individual liability under the ADA. The court held that because the ADA definition of “employer” is almost identical to the Title VII definition, and because the Maxwell’s International court held there was no individual liability under Title VII, there should also be no individual liability under the ADA. Thus, it is clear that in the Ninth Circuit there is no individual liability under all three federal anti-discrimination statutes.

The Second Circuit adopted a similar position with regard to individual liability. In Tomka v. Seiler Corp., the Second Circuit

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because one of its employees believes he can violate Title VII with impunity will quickly correct that employee’s erroneous belief.” Id.

107. See id. at 588-89 (Fletcher, J., dissenting).
108. Id. at 589.
109. See id.
110. See id. at 588 n.3.
111. 59 F.3d 994 (9th Cir. 1995).
112. See id. at 995.
113. Id. at 1001.
115. See id.
116. 66 F.3d 1295 (2d Cir. 1995). In Tomka, a female employee initiated a lawsuit against her former employer and three male co-employees, asserting claims of hostile environment sexual harassment and retaliatory discharge in violation of Title VII and New York’s Human Rights Law, among other causes of action. See id. at 1299.
Court of Appeals decided the issue that divided the district courts in the circuit over whether an employer's agent may be held individually liable under Title VII.\textsuperscript{117}

In addressing this issue, the \textit{Tomka} court established that "an employer's agent may not be held individually liable under Title VII."\textsuperscript{118} The court stated that because this was clearly a statutory construction issue, the obvious starting point was the language of the statute.\textsuperscript{119} It further reasoned that although the plain language of the statute normally controls, it will not if it is in direct conflict with the legislative intent of the statute.\textsuperscript{120} The court believed that \textit{Tomka} was one of those cases where the statutory language did not comport with Congress's clearly expressed intent in enacting the statute.\textsuperscript{121}

The \textit{Tomka} court set forth several reasons to support its conclusion. First, the fact that the agent clause is part of a sentence that limits liability to employers with fifteen or more employees was evidence of Congress's intent to protect small entities from expensive discrimination litigation.\textsuperscript{122} The court also adopted the Ninth Circuit's decision in \textit{Maxwell's International} and agreed that it would be inconceivable to immunize small employers and still impose liability against individual employees.\textsuperscript{123}

Second, the court inferred that, based on Title VII's remedial provisions, Congress never intended to hold agents individually liable.\textsuperscript{124} Before the enactment of the 1991 Act, a successful Title VII plaintiff was limited to reinstatement and backpay, remedies which are most appropriately awarded by employers.\textsuperscript{125} The 1991 Act, however, added compensatory and punitive damages. The \textit{Tomka} court believed that even with the addition of monetary remedies, Congress still did not intend individual liability.\textsuperscript{126} The court inferred that "Congress contemplated that only employer-entities [and not individuals] could be held liable for compensatory and punitive damages."\textsuperscript{127}

\begin{footnotes}
\item[117.]	extit{See id.} at 1313.
\item[118.]	extit{Id.} at 1317.
\item[119.]	extit{See id.} at 1313.
\item[120.]	extit{See id.}
\item[121.]	extit{See id.} at 1314.
\item[122.]	extit{See id.}
\item[123.]	extit{See id.}
\item[124.]	extit{See id.} "The relevant legislative history of Title VII is consistent with this conclusion." \textit{Id.}
\item[125.]	extit{See id.}
\item[126.]	extit{See id.} at 1315.
\item[127.]	extit{Id.}
\end{footnotes}
The Tomka court reached this conclusion based on Congress’s calibration of the maximum allowable damage award according to the size of the employer and Congress’s failure to repeal the exemption for defendants with less than fifteen employees. The court also noted that the 1991 Act did not cap the damage award against agents of an employer or even address individual liability.

The Tomka court reasoned that “the practical implications of agent liability would create potential inequities that Congress could not have intended when it enacted the [Civil Rights Act] of 1991." A plaintiff would rarely bring a claim solely against the agent when his or her best chance of recovering would be against the employing entity. Also, there are situations where an agent may have to bear an unfair burden of a Title VII suit, such as when the entity files for bankruptcy or when the plaintiff, after reaching a settlement with the corporate defendant, continues the suit against the agent. Because the employer’s liability is capped based upon the number of employees, these situations would lead to the anomalous result that the agent’s liability would depend upon the size of the employer.

128. See id.
129. See id.
130. Id.
131. See id.
132. See id.
133. See id. at 1315-16.
134. See supra note 81.
135. See Tomka, 66 F.3d at 1316. As in Maxwell’s International, one judge dissented in Tomka. Judge Parker, who submitted the dissent, focused solely on the issue of individual liability. See id. at 1318 (Parker J., dissenting). In Tomka, the court also held that individual defendants could be sued in their personal capacities for sexual harassment under the New York Human Rights Law. See id. at 1317. This is just to show that successful claims may be brought against individual defendants (directors or officers) for employment discrimination under state law. This liability may be covered under a standard D&O policy.

Another important point was addressed in Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235 (2d Cir. 1995), where the Second Circuit affirmed the dismissal of a Title VII action against the individual defendant, relying on their decision in Tomka. See id. at 1241 n.2. There the court stated:

The issue of whether such an individual may be made a party defendant solely in the person’s corporate capacity as an agent of the employer—not subject to individual liability but a party for the purpose of discovery . . . was neither argued to, nor addressed by, the Tomka court. We also do not address the issue because it has not been argued in the instant matter.

Id. (citation omitted). This issue may have a significant impact on whether some D&O policies will cover employment practices claims. Some insurance carriers (such as National Union Fire Insurance Company) have a D&O policy that will cover the defense costs of an employment practices liability claim if the directors and officers are simply named in the lawsuit. Therefore, if it is held that the individual defendant will remain in the lawsuit in his corporate capacity and will not be dismissed.
Although it is clear that there is no individual liability under the federal anti-discrimination statutes in the Second Circuit, some district court cases indicate that it is common for a director or officer to be named in an employment discrimination lawsuit. In *Falbaum v. Pomerantz*, the individual defendants named were the Chairman of the Board of Directors and Chief Executive Officer, a Senior Vice President, the President, and the General Counsel, who was also a Senior Vice President. The Southern District of New York granted the defendants’ motions to dismiss with respect to their individual liability under the ADEA. The court held that based on Congressional intent—as inferred from the text, structure, and history of the statute—the concept of respondeat superior, and the specific definition of “employer,” Congress intended to hold employers, but not individuals, liable for discriminatory acts brought under the ADEA.

After a protracted debate in the district courts, the Seventh Circuit Court of Appeals finally addressed the issue of individual liability under the anti-discrimination statutes in *EEOC v. AIC Security Investigations, Ltd.* There, the plaintiff sued his employer and its sole shareholder under the ADA, claiming that he was fired because he had brain and lung cancer. The Seventh Circuit Court of Appeals stated simply that “individuals who do not independently meet the ADA’s definition of 'employer' cannot be held liable under the ADA.” While the Seventh Circuit ultimately rejected individual liability, the court had to first...
address several arguments favoring liability. In its analysis, the Seventh Circuit adopted a reasoning similar to that employed by both the Second and Ninth Circuit Courts of Appeals.

First, the *AIC Security Investigations* court had to determine the meaning of the “and any agent” provision of the statute. While the court recognized the plain meaning argument, it reasoned that the purpose of the “and any agent” language was to “ensure that courts would impose *respondeat superior* liability upon employers for the acts of their agents.” The court believed that this conclusion accorded with the structure of the statutes. The court further reasoned that since the federal statutes limit employer liability to businesses with at least fifteen or twenty employees, Congress must have intended to protect small entities from litigating discrimination claims.

Additionally, the *AIC Security Investigations* court noted that the original remedial provisions under the federal statutes were reinstatement and backpay and that these remedies were logically provided by the employing entity, not an individual. Like the Second and Ninth Circuits, the Seventh Circuit believed that this was an indication that Congress did not contemplate individual liability under the statutes.

The plaintiffs argued that Congress must have intended for individual liability when it passed the 1991 Act and allowed compensatory and punitive damages under Title VII and the ADA. The court, however, dismissed this argument, noting that the 1991 Act provided further evidence that Congress did not intend for individual liability. The court explained that although it provides for monetary damages, which are typically obtainable from individuals, the 1991 Act placed caps on the total amount of compensatory and punitive damages that could be awarded, with the lowest cap applying to an employer who has fifteen or more employees. The court inferred that Congress’s failure to enact a cap for individuals implies that it did not contemplate individual liability.

The *AIC Security Investigations* court also rejected the argument that

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143. *Id.* at 1281.
144. See *id*.
145. See *id*.
146. See *id*.
147. See *supra* notes 116-39 and accompanying text.
148. See *AIC Sec. Investigations*, 55 F.3d at 1281.
149. *See id*.
150. See *id*.
151. See *id*.
individuals must be punished in order to eradicate discrimination. Rather, the court believed that the employer had adequate incentive to discipline and train employees so that these employees will avoid actions that risk liability.\(^{152}\) The court noted that even without individual liability, an employee who owns all or a significant part of the employing entity will be disciplined by the financial loss he must absorb.\(^{153}\) Finally, the court rejected the argument that individual liability must be imposed when an employer is bankrupt or judgment-proof because it is the only way the plaintiff may recover.\(^{154}\) This contention, while it may be true, did not persuade the court to upset the balance that Congress established.\(^{155}\)

In *AIC Security Investigations*, the court remarked that although its holding only applied directly to the ADA, it will affect the resolution of similar questions under Title VII and the ADEA.\(^{156}\) It noted that since the ADA's definition of "employer" mirrors the definition of "employer" in Title VII and the ADEA, courts routinely apply a similar analysis regarding individual liability to all three statutes interchangeably.\(^{157}\) In fact, the Seventh Circuit Court of Appeals later applied the ruling in *AIC Security Investigations* directly to Title VII in *Williams v. Banning*.\(^{158}\)

In *Williams*, a secretary sued only her former supervisor under Title VII for sexual harassment.\(^{159}\) The court held that the supervisor, in his individual capacity, did not fall within Title VII's definition of employer.\(^{160}\) The court reinforced this holding in a more recent Title VII case, *Geier v. Medtronic, Inc.*,\(^{161}\) where the plaintiff brought a suit under Title VII and the Pregnancy Discrimination Act. There, the plaintiff sued her former employer and supervisor after she was dismissed shortly after informing her supervisor of her second pregnancy while at the company.\(^{162}\) The court held that the supervisor, in his individual capacity, operates without the risk of Title VII liability.\(^{163}\)

Finally, the Seventh Circuit Court of Appeals extended its position

\(^{152}\) See *id.* at 1282.

\(^{153}\) See *id.* at 1282 n.8.

\(^{154}\) See *id.* at 1282 n.9.

\(^{155}\) See *id.*

\(^{156}\) See *id.* at 1282 n.10.

\(^{157}\) See *id.* at 1279-80.

\(^{158}\) 72 F.3d 552 (7th Cir. 1995).

\(^{159}\) See *id.* at 553.

\(^{160}\) See *id.* at 555.

\(^{161}\) 99 F.3d 238 (7th Cir. 1996).

\(^{162}\) See *id.* at 240.

\(^{163}\) See *id.* at 244.
Cavallaro: Corporate Buyer Beware: Deficiencies in Directors' and Officers'

of no individual liability directly to the ADEA in Csoka v. United States. There, the court held that the ADEA, like Title VII, does not authorize individual liability claims against employees.

Despite this clear and overwhelming support disfavored individual liability, a district court in the Seventh Circuit allowed an individual to be sued under Title VII under an "alter ego" theory in Curcio v. Chinn Enterprises, Inc. In Curcio, a Title VII action was instituted against the corporate employer, Chinn Enterprises, Inc., involving, inter alia, the sexual harassment of four restaurant employees. It happened that Bob Chinn was the president, controlling shareholder, and head of management with supervisory authority over the restaurant. The district court stated that the Seventh Circuit did not expressly address alter ego liability, but rather indicated that it would be inclined to reject individual liability under this theory. However, the Curcio court dismissed this statement as pure dicta because the issue was not raised in the trial court and therefore was not subject to review. Until the issue of individual liability is fully addressed by the court of appeals, the district court stated that it would hold that a supervisor may be liable as an employer under Title VII when a supervisor's role is identical to that of the employer.

165. See id.
166. 887 F. Supp. 190 (N.D. Ill. 1995).
167. See id. at 191-93.
168. See id. at 192.
169. See id. at 193. The alter ego theory of liability was premised on a claim that Chinn, as president, controlling shareholder, and head of management of the restaurant, was identical to the corporate employer (the Crab House). See id.
170. See id. at 193-94 (citing EEOC v. AIC Security Investigations, Ltd., 55 F.3d 1276, 1282 n.11 (7th Cir. 1995)).
171. See id. at 194.
172. See id. Until this issue is addressed by the Court of Appeals, the district court will continue to follow this rationale which was set forth in Fabiszak v. Will County Board of Commissioners, No. 94 C 1517, 1994 WL 698509, at *2-3 (N.D. Ill. Dec. 12, 1994). This Author does not believe that this exception will last very long considering the overwhelming support for no individual liability in the Seventh Circuit and the Court of Appeals, indication in AIC Security Investigations that it would be inclined to reject individual liability based on an alter ego theory. A Second Circuit district court case, Leykis v. NYP Holdings, Inc., 899 F. Supp. 986, 991 (E.D.N.Y. 1995), also dealt with this issue.

B. A Number of Circuits Follow Suit

After the Second, Seventh, and Ninth Circuit Courts of Appeals established the rule of no individual liability under the three federal anti-discrimination statutes, several other circuit courts followed.

The Third Circuit Court of Appeals addressed the issue of individual liability in *Sheridan v. E.I. duPont de Nemours & Co.* and held that an individual employee cannot be sued under Title VII based on the great weight of authority from other circuit courts. In *Sheridan*, a restaurant employee brought an action against her former employer, E.I. duPont de Nemours & Co., Inc., and a supervisor, Jacques Amblard, under Title VII. The issue considered on appeal was whether the district court erred in dismissing the claim against Amblard on the ground that Title VII does not impose liability on individual employees. The plaintiff, Sheridan, argued that the "and any agent" language in the statute permitted her to bring a cause of action against Amblard as an agent of her employer. Sheridan further asserted that since a Title VII plaintiff may now obtain compensatory damages under the 1991 Act, it is feasible that an individual defendant such as Amblard may be required to pay damages. The court pointed out that these claims were considered by many other courts in cases under Title VII, as well as the ADEA and the ADA, all of which define "employer" almost identically to Title VII, and a majority of these courts completely

173. No. 94-7509, 1996 WL 36283, vacated, 74 F.3d 1459 (3d Cir. 1996) (order granting a rehearing in banc) (affirming dismissal of the claims against the individual defendant, Amblard, based on the great weight of federal appellate decisions concerning employee liability under Title VII, the ADEA, and the ADA). The Third Circuit Court of Appeals reinforced the *Sheridan* holding in two subsequent decisions. In *Dici v. Commonwealth of Pennsylvania*, 91 F.3d 542 (3d Cir. 1996), an employee who had been denied workers' compensation benefits for injuries resulting from alleged sexual and racial harassment, brought an action against her employer and supervisor under Title VII and the Pennsylvania Human Relations Act. *See id.* at 544. The court concluded that based on the reasons set forth in *Sheridan* and other courts of appeals, individual employees cannot be held liable under Title VII. *See id.* at 552-53. In a later decision regarding this issue, *Kachmar v. Sungard Data Systems, Inc.*, 109 F.3d 173 (3d Cir. 1997), the court of appeals acknowledged that, by way of their *Sheridan* decision, they joined the majority of other circuits in concluding "that Congress did not intend to hold individual employees liable under Title VII." *Id.* at 184.


175. *See id.* at *1.

176. *See id.* at *12.

177. *See id.* at *1.

178. *See id.*

179. *See id.* at *13.
rejected the concept of individual liability.\textsuperscript{180}

The Third Circuit district courts provided little guidance as to the circuit’s position on individual liability.\textsuperscript{181} Several district court decisions from the Third Circuit found no employee liability,\textsuperscript{182} while others held employees liable.\textsuperscript{183} In an attempt to reconcile this split, the court of appeals in \textit{Sheridan} rejected employee liability under Title VII.

The \textit{Sheridan} court reasoned that the definition of “employer” predated the 1991 Act.\textsuperscript{184} As reasoned by other courts, the Third Circuit remarked that prior to the 1991 Act, Title VII did not provide for compensatory or punitive damages.\textsuperscript{185} Rather, it permitted equitable remedies usually directed against the employer, which included backpay and injunctive relief.\textsuperscript{186} The court inferred that since an employee could not be sued prior to 1991, and Congress did not indicate any desire to change this rule when it passed the 1991 Act,\textsuperscript{187} the statutory scheme affirmatively indicated that Congress did not intend for individual liability under Title VII.\textsuperscript{188} The court further reasoned that Congress’s determination of damage caps relative to the size of the defendant was in anticipation of employer liability.\textsuperscript{189}

The Fifth Circuit clearly does not permit individual liability under Title VII and the ADEA. In reaching that conclusion, however, the court of appeals reversed its position several times. First, in \textit{Clanton v. Orleans Parish School Board,}\textsuperscript{190} a group of teachers alleged personal liability under Title VII.\textsuperscript{191} The court refused to hold the defendant school board members individually liable for back pay because it could “find no

\begin{itemize}
\item \textsuperscript{180} See id.
\item \textsuperscript{181} See id. at *13 n.7.
\item \textsuperscript{184} See \textit{Sheridan}, 1996 WL 36283, at *13.
\item \textsuperscript{185} See id.
\item \textsuperscript{186} See id.
\item \textsuperscript{187} See id.
\item \textsuperscript{188} See id.
\item \textsuperscript{189} See id.
\item \textsuperscript{190} 649 F.2d 1084 (5th Cir. 1981). In \textit{Clanton}, the plaintiff challenged the school board’s maternity leave policy as violative of Title VII. See id. at 1086-88.
\item \textsuperscript{191} See id. at 1086.
\end{itemize}
authority for holding public officials personally liable for back pay under Title VII.'

Five years later, the Fifth Circuit appeared to take the opposite position in Hamilton v. V.E. Rodgers. In Hamilton, a fire department employee brought a Title VII action against the fire department and various individuals for alleged racial harassment. The court stated that only employers and agents of employers were subject to liability under Title VII. In determining the bounds of agency, the court asserted that Title VII should be accorded a liberal interpretation in order to effectuate Congress's purpose of eliminating the inconvenience, unfairness, and humiliation of ethnic discrimination. The court noted that if a person participated in the discrimination, that person is an agent under Title VII. Such a result was necessary to prevent supervisory personnel from believing that they may violate Title VII with impunity.

Despite the holding in Hamilton, the Fifth Circuit appeared to reverse itself again in Harvey v. Blake, another case involving public officials. At first, the court of appeals expanded on the Hamilton decision by stating that "immediate supervisors are [e]mployers when delegated the employer's traditional rights, such as hiring and firing." However, the court then stated that "[o]nly when a public official is working in an official capacity can that official be said to be an 'agent' of the [employer]" and that "there can be no liability for backpay under Title VII for the actions of mere co-workers." The Harvey court held that

192. Id. at 1099 (footnote omitted).
193. 791 F.2d 439 (5th Cir. 1986).
194. See id. at 441.
195. See id. at 442.
196. See id. (citing Rodgers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)).
197. See id. at 442-43 (citing Jones v. Metropolitan Denver Sewage Disposal Dist. No. 1, 537 F. Supp. 969, 970 (D. Colo. 1982)).
198. See id. at 443.
199. 913 F.2d 226 (5th Cir. 1990). In Harvey, a city employee brought an action against his immediate supervisor and her superior in both their individual and official capacities alleging, inter alia, Title VII violations. See id. at 227.
200. Id.
201. Id. at 228. Official capacity immunity is the rationale some courts have used to bar individual liability. See Robert Lukens, Comment, Workplace Sexual Harassment and Individual Liability, 69 TEMP. L. REV. 303, 352 (1996). It provides government officials with an "absolute privilege from civil liability should the activity in question fall within the scope of their authority and if the action undertaken requires the exercise of discretion." BLACK'S LAW DICTIONARY 1084 (6th ed. 1990). It has a longer tradition but a more limited application than the doctrine of respondeat superior. See Lukens, supra, at 352.
the district court improperly denied the defendant's summary judgment motion for liability in her personal capacity because the suit may proceed against him in his official, rather than individual, capacity only. 202

In Grant v. Lone Star Co., 203 the court of appeals pointed out that the Fifth Circuit only addressed the issue of whether a public employee should be exempt from liability for employment discrimination. 204 Grant, on the other hand, involved a sexual harassment suit brought by a private sector employee under Title VII. 205 The court stated that, in Harvey, it decided that a Title VII plaintiff cannot recover against a public employee in his individual capacity. 206 The Grant court reconciled the Hamilton decision, favoring individual liability, by explaining that the Harvey decision rejected a reading of Hamilton that would permit personal liability for damages under Title VII. 207

The Fifth Circuit, persuaded by the Ninth Circuit decision in Miller v. Maxwell's International Inc., 208 applied the rule of no individual liability under Title VII to private employers. 209 As part of its own analysis, the Grant court said that "[t]he absence, from the list of potentially liable parties, of individuals who do not otherwise meet the requirements of a Title VII employer also suggests that Congress did not intend to include such natural persons." 210 This is supported by the fact that Congress proscribed conduct by "persons" in other statutory schemes. 211 The absence of specific language making individuals liable under Title VII, when Congress had done so in other statutes, indicated that Congress did not intend for individual liability unless the individual fit the statutory definition of "employer." 212 In conclusion, the Grant court held that "individuals who do not otherwise qualify as an employer cannot be held liable for a breach of [T]itle VII." 213

The Fifth Circuit Court of Appeals addressed individual liability under the ADEA in Stults v. Conoco, Inc., 214 where discharged
employees brought a suit under the ADEA against their former employer and a supervisor. In rejecting this argument, the court noted that the statutory scheme of the ADEA is virtually identical to the statutory scheme of Title VII. Therefore, the court held that the reasoning in Grant applied with equal force to claims made under the ADEA and "that the ADEA provides no basis for individual liability for supervisory employees."

The Tenth Circuit experienced a long period of seemingly contradictory opinions on this issue. Finally, in Haynes v. Williams, the court held that personal capacity suits against individual supervisors are inappropriate under Title VII. The Haynes court reaffirmed the Sauers holding as the law of the circuit.

The Haynes court adopted the reasoning set forth in a prior Tenth Circuit opinion, Sauers v. Salt Lake County. In Sauers, a former secretary with the county attorney's office brought an action against the county and county attorney alleging sexual harassment and retaliation under Title VII, as well as a violation of the Equal Protection Clause. The court of appeals held that suits against individuals under Title VII must proceed in their official capacity, and any individual capacity suits were inappropriate. However, the court stated that an individual will

215. See id. at 654.
216. See id. at 655.
217. See id.
218. Id. The Fifth Circuit Court of Appeals solidified its position supporting no individual liability in two other decisions. First, in Garcia v. Elf Atochem North America, 28 F.3d 446 (5th Cir. 1994), the plaintiff, Garcia, brought a Title VII action against Elf Atochem North America, Jerry Mowell, and Rayford Locke. See id. at 448. The court began its analysis by stating the Garcia's complaint was unclear as to whether he was suing Locke or Mowell in their individual capacity or in their capacity as agents of the employer. The court construed the complaint to be "against Locke and Mowell in their official capacity since Title VII liability does not attach to individuals acting in their individual capacity." Id. at 451 n.2 (citing Grant v. Lone Star Co., 21 F.3d 649 (5th Cir. 1994)).

Finally, in a recent Fifth Circuit opinion regarding individual liability, Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927 (5th Cir. 1996), cert. denied, 117 S. Ct. 767 (1997). The Court of Appeals noted that although individuals may not be held liable under Title VII, "an individual employee's actions may subject the employer to liability under agency principles." Id. at 942 (citations omitted).

219. 88 F.3d 898 (10th Cir. 1996).
220. See id. at 901.
221. 1 F.3d 1122 (10th Cir. 1993).
222. See id. at 1124.
223. See id. at 1125.
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qualify as an employer under Title VII if he or she "exercises significant control over the plaintiff’s hiring, firing or conditions of employment." Furthermore, the court stated that if the individual is deemed an employer, it would be solely for purposes of imputing liability to the true employer. "In such a situation, the individual operates as the alter ego of the employer, and the employer is liable for the unlawful employment practices of the individual without regard to whether the employer knew of the individual’s conduct." 

Prior to Haynes, however, the court of appeals failed to follow Sauers with any consistency. Just six months after the Sauers opinion, in Brownlee v. Lear Siegler Management Services Corp., the court stated that a “principal’s status as an employer can be attributed to its agent to make the agent statutorily liable for his own age-discriminatory conduct.” This appeared to indicate that personal liability may exist on the part of an agent.

The Tenth Circuit touched upon this issue again in Lankford v. City of Hobart and held consistent with Sauers. In Lankford, a former police dispatcher brought a civil rights action against the city and police chief. The court held that since Title VII only applies to an employer, the Title VII claim against the individual police chief need not be addressed. However, this decision did not end the conflict within the circuit. Rather, a year later in Ball v. Renner, the Tenth Circuit concluded

224. Id. (quoting Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989)).
225. Id.
226. 15 F.3d 976 (10th Cir. 1994).
227. Id. at 978.
228. The Brownlee decision relied, in material part, on Owens v. Rush, 636 F.2d 283 (10th Cir. 1980). In Owens, the court of appeals held that the sheriff of Wabaunsee County, Kansas was an “agent” of the county, and thus, an “employer” of his deputies for Title VII purposes, even though the sheriff’s department did not employ fifteen or more employees. See id. at 287.
229. 27 F.3d 477 (10th Cir. 1994).
230. See id. at 478.
231. See id. at 480.
232. 54 F.3d 664 (10th Cir. 1995). In Ball, a former dispatcher brought an action against the City of Cheyenne, Wyoming and a police officer for sexual harassment under Title VII. See id. at 664. The issue was whether the plaintiff can recover against the police officer individually or was her only potential avenue of relief against the police department. See id. at 665-66. The Court of Appeals stated that courts have interpreted the inclusion of the word “agent” in the Title VII definition of “employer” in two distinct ways. One interpretation is that the agent provision expands the category of potential defendants under Title VII to include supervisory and management personnel who discriminate in the workplace. See id. at 666. Another possibility is that the language of § 2000e(b) merely broadens the circumstances in which “corporations and other organizational employers that otherwise meet the 15-employee threshold and the industry-affecting-commerce
that Brownlee casts doubt on Sauers and they declined to resolve the issue of individual liability deeming it to be an "open question."\(^{233}\)

The Haynes decision, however, reconciled these conflicting opinions. First, the court reasoned that the "[Brownlee] reference to the agent's potential status as employer need not be read as a deviation from prior precedent" because it was said as an aside and was not the holding of the case.\(^{234}\) The court explained that the Ball decision did not affect Sauers because the pertinent language in Brownlee, which the Ball court relied on, was "obiter dictum, while the rule previously recognized in Sauers (and later followed in Lankford) controlled the court's analysis on the merits."\(^{235}\) Therefore, the Haynes decision eliminated the confusion generated by these various conflicting decisions and established that there is no individual liability in the Tenth Circuit.

The law is clearly established in the Eleventh Circuit that individual capacity suits under Title VII, the ADEA, or the ADA are inappropriate. In addressing this issue, the Eleventh Circuit Court of Appeals consistently precluded individual liability.

In Busby v. City of Orlando,\(^{236}\) a discharged black employee of the Orlando Police Department brought a civil rights action against the city,
mayor, police captain, police lieutenant, and chief of police. In stating that individual capacity suits under Title VII are inappropriate, the court reasoned that the “relief granted under Title VII is against the employer, not individual employees whose actions would constitute a violation of the Act.” The Busy court further stated that the “proper method for a plaintiff to recover under Title VII is by suing the employer, either by naming the supervisory employees as agents of the employer or by naming the employer directly.” Consequently, the court affirmed the district court’s directed verdicts in favor of the defendants in their individual capacities. The Eleventh Circuit Court of Appeals reaffirmed its position in two recent decisions.

First, in Cross v. Alabama, the plaintiffs, past and current female employees of a state mental health institution, filed Title VII charges against the state and various state officials. After a jury trial, the district court entered judgment on the Title VII claims against the defendants in their individual and official capacities. The court of appeals, however, agreed with Horsley’s contention that in his individual capacity he was not an “employer” within the meaning of Title VII. The court quoted the holding in Busy and further stated that the “Title VII claims are properly rendered against the Department . . . in their official, not individual, capacities.”

The court strengthened its position that individual capacity suits under Title VII are inappropriate in Welch v. Laney. There, the Eleventh Circuit decided a sexual discrimination claim by a female employee of a sheriff’s department for allegedly being paid less than her male counterparts. The court of appeals affirmed the district court’s dismissal of the individual capacity claim. The Eleventh Circuit recently extended its reasoning behind Title VII claims to apply to suits

237. See id. at 770.
238. Id. at 772.
239. Id.
240. See id. The Court of Appeals buttressed the Busy holding in Yeldell v. Cooper Green Hospital, Inc., 956 F.2d 1056 (11th Cir. 1992). The court stated that Title VII actions “may be brought only against individuals in their official capacity and/or the employing entity.” Id. at 1060 (citations omitted).
241. 49 F.3d 1490 (11th Cir. 1995).
242. See id. at 1494.
243. See id. at 1501.
244. See id. at 1504.
245. Id.
246. 57 F.3d 1004 (11th Cir. 1995).
247. See id. at 1011-12.
brought under the ADEA.

In *Smith v. Lomax*, a white female clerk brought an action against Fulton County, Georgia, as well as against the African-American members of the Board of County Commissioners. Two counts of the plaintiff's complaint sought relief against Fulton County under the ADEA and Title VII, and against the defendants in their individual capacities. The court of appeals asserted that Fulton County, not the individual defendants, was the plaintiff's employer, and therefore, the individual defendants could not be held liable under Title VII or the ADEA because the two counts applied only to Fulton County.

Finally, in *Mason v. Stallings*, the court of appeals precluded individual liability under the ADA. The court stated that, with regard to individual liability, there is no sound reason to read the ADA any differently from their prior reading of Title VII and the ADEA. The court concluded that the ADA "does not provide for individual liability, only for employer liability." Therefore, individual liability under Title VII, the ADEA, and the ADA is precluded as a matter of law in the Eleventh Circuit.

The District of Columbia Court of Appeals addressed the issue of individual liability in *Gary v. Long* and held that an employee cannot maintain a Title VII action against his or her supervisor in the supervisor's individual capacity. In *Gary*, a female employee alleged that her employer, the Washington Metropolitan Area Transit Authority ("WMATA"), and one of its supervisory employees violated Title VII and committed various common law torts by subjecting her to sexual harassment.

The plaintiff argued that the plain and unambiguous language of the "employer" definition could only mean that Long, as an agent of the WMATA, is subject to liability. The D.C. Court of Appeals noted

248. 45 F.3d 402 (11th Cir. 1995).
249. See id. at 403.
250. See id.
251. See id. at 403 n.4.
252. See id.
253. 82 F.3d 1007 (11th Cir. 1996).
254. See id. at 1009.
255. Id.
257. See id. at 1399.
258. See id. at 1393.
259. See id. at 1399.
that while it is possible to read the statute as imposing individual liability on an agent, the better approach is that advocated by the Ninth Circuit, which concluded that "[t]he obvious purpose of this agent provision was to incorporate respondeat superior liability into the statute." Furthermore, the Gary court stated 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."

As a result, the court held that although Long's supervisory position qualified him as an "employer" under Title VII, he could not be held liable in his personal capacity. Thus, the plaintiff's claim against the supervisor merged with the claim against the WMATA. Based on this decision, the law in the D.C. Circuit is clear that individuals are not liable in their personal capacity under Title VII.

The Fourth Circuit has not completely solidified its position with regard to the issue of individual liability. While somewhat accepting the idea of no individual liability under the federal anti-discrimination statutes, the court of appeals has carved out a considerable exception to this general rule. The Fourth Circuit Court of Appeals made an initial determination regarding individual liability under Title VII in Paroline v. Unisys Corp. and did not address this issue again until the question of individual liability under the ADEA was raised in Birkbeck v. Marvel Lighting Corp. five years later. From Paroline to Birkbeck, the Fourth Circuit changed its position considerably.

In Paroline, an employee sued her former employer and another employee alleging sexual harassment under Title VII. The court stated that a plaintiff may pursue a sexual harassment claim against an individual defendant only if that person is considered an "employer" within the meaning of Title VII. It held that "[a]n individual qualifies as an 'employer' under Title VII if he or she serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment." The court also stated that "[t]he supervisory employee need not have ultimate authority to hire or fire to

260. Id. (quoting Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 587 (9th Cir. 1993)).
261. Id.
262. See id.
263. 879 F.2d 100 (4th Cir. 1989).
264. 30 F.3d 507 (4th Cir. 1994).
265. See Paroline, 879 F.2d at 102.
266. See id. at 104.
267. Id. (citations omitted).
qualify as an employer, as long as he or she has significant input into such personnel decisions.\textsuperscript{268}

For example, a company may formally designate an individual as the plaintiff’s supervisor. Despite this, another employee may still wield supervisory authority over the plaintiff for Title VII purposes.\textsuperscript{269} “As long as the company’s management approves or acquiesces in the employee’s exercise of supervisory control over the plaintiff, that employee will hold ‘employer’ status for Title VII purposes.”\textsuperscript{270}

The Fourth Circuit’s position regarding individual liability was altered in Birkbeck, where former employees brought an action against their employer and the employer’s vice president for violating the ADEA.\textsuperscript{271} The court noted that the few courts that have found individual liability under the ADEA have reasoned that employees with the authority to make discharge decisions for their employers are individually liable as their employer’s agents.\textsuperscript{272} Accordingly, the court rejected this approach reading the provision of the ADEA defining employer as restricted to those who employ twenty or more workers.\textsuperscript{273}

The court, not wanting to disregard legislative intent, reasoned that Congress defined “employer” as such to protect small businesses from the burden of discrimination lawsuits.\textsuperscript{274} The court also believed that the “agent” language was merely an expression of respondeat superior which means that “discriminatory personnel actions taken by an employer’s agent may create liability for the employer.”\textsuperscript{275}

The court of appeals, however, failed to provide individuals with complete protection from liability. In a footnote, the court stated that an employee “may not be shielded as an employer’s agent in all circumstances.”\textsuperscript{276} The court further asserted that it was only addressing “personnel decisions of a plainly delegable character.”\textsuperscript{277} As a result, the court held that the ADEA limits civil liability to the employer, and that the vice president, in his individual capacity, was not a proper
defendant in the case.\textsuperscript{278}

District court decisions, interpreting the court of appeals decisions, add clarity to the somewhat inconsistent position by the Fourth Circuit on the issue of individual liability. For example, in Mitchell v. RJK of Gloucester, Inc.,\textsuperscript{279} the district court stated that it was compelled to follow the holding in Birkbeck, and that the reasoning in Birkbeck should apply with equal force to Title VII claims.\textsuperscript{280} The Mitchell court stated that applying the Birkbeck rationale to Title VII is not a major leap considering that the definitions in both statutes are virtually identical and that they were designed with the same purpose—to prevent discrimination in the workplace.\textsuperscript{281}

In applying Birkbeck, the Mitchell court had to first deal with Paroline, the controlling Title VII case within the Fourth Circuit. The court conceded that while it supported the Birkbeck decision of no individual liability, this did not mean that an individual would never qualify as an “employer” under Title VII.\textsuperscript{282} The court noted that the Paroline court interpreted the definition of employer as including individuals who “serve[] in a supervisory position and exercise[] significant control over . . . hiring, firing, or conditions of employment.”\textsuperscript{283} However, the court pointed out that Birkbeck narrowed the Paroline ruling.\textsuperscript{284}

Although the Birkbeck court held that individuals were not liable under the ADEA, it did not shield individuals in all circumstances; rather, it shielded individuals only in instances involving “personnel decisions of a plainly delegable character.”\textsuperscript{285} The Birkbeck court did not attempt to clarify what it meant in that brief footnote.\textsuperscript{286} However, the Mitchell court interpreted the restrictive language in Birkbeck to mean that decisions that any employee in a supervisory position might make such as hiring or firing may be delegated within the corporation and thus shield an individual from liability under the employment discrimination laws.\textsuperscript{287} This court believed that Birkbeck implies that sexual harass-

\textsuperscript{278} See id. at 510-11.
\textsuperscript{279} 899 F. Supp. 246 (E.D. Va. 1995).
\textsuperscript{280} See id. at 247-48.
\textsuperscript{281} See id. at 248.
\textsuperscript{282} See id.
\textsuperscript{283} Id. (quoting Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989)).
\textsuperscript{284} See id.
\textsuperscript{285} Id. (quoting Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 510 n.1 (4th Cir. 1994)).
\textsuperscript{286} See id. at 248 n.4.
\textsuperscript{287} See id.
ment is not "plainly delegable" and thus individual liability can apply in such cases.288

In another district court case, Stephens v. Kay Management Co.,289 an employee brought an action against a former employer and a former supervisor under the ADA.290 The district court applied the Birkbeck reasoning that individuals are not liable under the ADEA to ADA claims.291 The Birkbeck court, however, limited its holding to only personnel decisions of a plainly delegable character.292 The Stephens court opined that while it was unfortunate that the Birkbeck court did not define the meaning or scope of that language,293 the fact that Birkbeck addressed termination of employment established at least that those types of decisions were of a "plainly delegable character."294 The court went on to note that "[a]fter Birkbeck, there is no personal liability under either the ADEA or Title VII for individuals making a decision to terminate employment."295

Thus, the court held "that individuals who do not independently meet the ADA's definition of 'employer' cannot be held liable under the ADA in the making of employment decisions of a plainly delegable character."296 However, "individual supervisors remain individually liable for personnel actions which are not of a plainly delegable nature."297 The court also noted that it is doubtful that Birkbeck extends to sexual harassment claims because Paroline involved sexual harassment and it seemed that Birkbeck placed the situation in Paroline beyond the reach of its holding because it did not involve a personnel decision of a plainly delegable character.298 The court did not attempt to set the parameters of "plainly delegable" personnel decisions.299

In conclusion, the general rule in the Fourth Circuit appears to be that there is no individual liability under Title VII, the ADEA, and the ADA. However, there remains this elusive "plainly delegable" language which, until it is more concretely defined by the court of appeals, will

288. See id.
290. See id. at 170-71.
291. See id. at 172.
292. See id. at 173.
293. See id.
294. Id.
295. Id. at 173-74.
296. Id. at 174.
297. Id.
298. See id.
299. See id. at 174-75.
give district courts some latitude in imposing liability on individuals, especially with respect to Title VII sexual harassment claims.

C. The First Circuit Still Perched on the Fence

The First Circuit is yet to make a determination on the issue of individual liability. It is apparent, however, through district court decisions, that the trend is toward following the rule of no individual liability for discriminatory acts under Title VII, the ADEA, or the ADA. While the First Circuit Court of Appeals has not ruled on the issue, two district courts have followed the trend that individuals are not subject to liability under the federal anti-discrimination statutes. Initially, the District Court of Maine was adverse to this position. In Braverman v. Penobscot Shoe Co., the court held that a supervisory employee was subject to suit under both the ADEA and the ADA. In a subsequent decision, the same court found that “shielding workplace supervisors who discriminate from personal liability fails to further the expansive remedial goal of Title VII.”

The District Court of Maine, however, recently changed its position in light of the recent developments in other circuits and held in Quiron v. L.N. Violette Co. that an individual supervisor is not personally liable under the ADA or ADEA. The Quiron court noted that the ADEA limits the scope of its applicability to businesses with twenty or more employees, and the ADA, like Title VII, only applies to employers with fifteen or more employees. The court reasoned that these limits indicate the desire on the part of Congress not to burden small entities with the costs associated with litigating discrimination claims. The court then extended this reasoning and noted that Congress would not impose liability on individuals in larger companies because those

300. In fact, the First Circuit Court of Appeals has explicitly declined to resolve the issue of individual liability in two recent cases. See Serapion v. Martinez, 119 F.3d 982, 992-93 (1st Cir. 1997) (stating that the First Circuit has not resolved the issue and declining to “enter this thicket” in the case at bar); Morrison v. Carleton Woolen Mills, Inc., 108 F.3d 429, 444 (1st Cir. 1997) (declining to answer the question whether a corporate supervisor may be individually liable under Title VII).
302. See id. at 602.
305. See id. at 20.
306. See id.
307. See id. (quoting Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993)).
individuals would bear similar litigation burdens.\textsuperscript{308} The court concluded that the ADA and the ADEA included agents in their definition of employers, not to make agents individually liable, but, to ensure respondeat superior liability.\textsuperscript{309} In the end, the District Court of Maine held that individuals are not subject to suit under either the ADA or the ADEA.\textsuperscript{310}

The District Court of New Hampshire also addressed the change in the legal landscape concerning individual liability under the federal anti-discrimination statutes. In \textit{Miller v. CBC Companies, Inc.},\textsuperscript{311} the court noted that there was considerable change since \textit{Lamirande v. Resolution Trust Corp.}\textsuperscript{312} where the court stated that the circuits were in general agreement that an agent of an employer was subject to individual liability under Title VII based on the plain language of the statute.\textsuperscript{313} The CBC court noted that numerous circuits have now rejected individual liability, believing that Congress included the agent wording simply to impose respondeat superior liability on employers.\textsuperscript{314} Given the virtual consensus among circuit courts that have addressed this issue, the District Court of New Hampshire was persuaded to change its position.\textsuperscript{315} Although the First Circuit Court of Appeals has not addressed the issue of individual liability, these district court decisions reflect a trend or common consensus not to hold individuals personally liable under the anti-discrimination statutes. Recent determinations within the Sixth and Eight Circuit Courts of Appeals have resolved the issue of individual liability.

\textbf{D. Circuits Recently Coming off the Fence}

The Sixth Circuit Court of Appeals squarely considered the issue of whether individual agents may be personally liable under Title VII for discriminatory acts committed on the job in \textit{Wathen v. General Electric Co.}\textsuperscript{316} In \textit{Wathen}, an employee filed suit against her employer and three

\begin{footnotesize}
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\item \textsuperscript{308} See id.
\item \textsuperscript{309} See id.
\item \textsuperscript{310} See id.
\item \textsuperscript{311} 908 F. Supp. 1054 (D.N.H. 1995).
\item \textsuperscript{312} 834 F. Supp. 526 (D.N.H. 1993).
\item \textsuperscript{313} See id. at 529.
\item \textsuperscript{314} See \textit{CBC Cos.}, 908 F. Supp at 1065.
\item \textsuperscript{315} See id. As a result, the court granted the defendants' motion to dismiss the ADA claim against them in their individual capacities. See id.
\item \textsuperscript{316} 115 F.3d 400 (6th Cir. 1997). Prior to the \textit{Wathen} decision, the Sixth Circuit Court of Appeals did not squarely address the issue of individual liability. In fact, the court missed the
\end{itemize}
\end{footnotesize}
management employees in their official and individual capacities, alleging sexual harassment under Title VII and the Kentucky Civil Rights Act, as well as other state law claims. In addressing the issue of individual liability, the court of appeals held that an individual employee/supervisor, who does not otherwise qualify as an employer, may not be held personally liable under Title VII.

The court of appeals arrived at this conclusion based on several factors. First, the court was persuaded by the majority of circuit courts that have held that there is no individual liability under Title VII and similar statutory schemes. Second, the court asserted that the "and any agent" provision in Title VII did not establish individual liability because a narrow and literal reading of a statute will not control if it will produce a result clearly at odds with the express intent of Congress. In this regard, the court was convinced that Congress did not intend to provide for individual employee/supervisor liability under Title VII based on Title VII's statutory scheme and remedial provisions.

The court stated that the statutory scheme of Title VII was a clear indication that Congress did not intend to impose individual liability on employees. Because Title VII limits liability to employers with fifteen or more employees, the court believed that Congress did not want to burden small entities with the costs associated with litigating opportunity in Wilson v. Nutt, 69 F.3d 538 (6th Cir. 1995). However, the court of appeals alluded to this issue in four different opinions, which have been subsequently used by plaintiffs in discrimination suits to support their contention that individuals may be liable under Title VII. However, these remarks supporting liability have been construed as no more than obiter dicta, failing to establish a binding precedent on the circuit supporting individual liability. See Yates v. Avco Corp., 819 F.2d 630 (6th Cir. 1987) (having no persuasive effect on the issue of individual liability because the issue was simply not addressed); Jones v. Continental Corp., 789 F.2d 1225, 1231 (6th Cir. 1986) (stating that the law is clear that individuals may be held liable for violations of § 1981... and as agents of an employer under Title VII," but this statement has been regarded as dictum and not the central point of the case); Romain v. Kurek, 772 F.2d 281 (6th Cir. 1985) (implying that an individual could be liable in his or her personal capacity, although more than one district court did not believe that this case supported the proposition that individual liability is allowed under Title VII); York v. Tennessee Crushed Stone Ass'n, 684 F.2d 360 (6th Cir. 1982) (suggesting that an agent could be sued in his official capacity as a representative of the employer if the principal entity fit within Title VII's "employer" definition).

317. See Wathen, 115 F.3d at 403.
318. See id. at 405. The court of appeals relied on case law under Title VII, the ADEA, and the ADA in reaching this holding because the three statutes define "employer" in essentially the same manner. See id. at 404.
319. See id. at 404.
320. See id. at 405.
321. See id.
322. See id.
Further, the court of appeals agreed with the Second Circuit's conclusion that it is "inconceivable' that a Congress concerned with protecting small employers would simultaneously allow civil liability to run against individual employees." The court of appeals also noted, consistent with the Second Circuit, that no mention was made of agent liability in the floor debates over section 2000e(b), thereby "implying that Congress did not contemplate agent liability under Title VII." The court asserted that Title VII's remedial provisions also indicates that liability should not be imposed on individual employees for violations of the Act. In noting that prior to the 1991 amendment, a successful Title VII plaintiff was limited to remedies available only from an employer such as reinstatement and backpay, the court believed that this limitation on the available remedies suggested that Congress did not intend to allow recoveries against individual employees under Title VII. Although compensatory and punitive damages for intentional discrimination under Title VII were added as potential remedies as a result of the 1991 amendment, the court of appeals pointed out that Congress calibrated the amount of compensatory and punitive damages recoverable to the size of the employer, beginning with employers having at least fifteen employees. Finally, the court believed that since the statute contained no provision for damages to be paid by individuals, Congress did not intend to hold individuals liable. The Eighth Circuit Court of Appeals, although touching upon this issue in a few cases, has also not definitively addressed whether individual supervisors may be personally liable under Title VII. In

323. Id. at 406 (quoting Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993)).
324. Id. (quoting Tomka v. Seller Corp., 66 F.3d 1295, 1314 (2d Cir. 1995)).
325. Id.
326. See id.
327. See id.
328. See id.
329. See id.
330. It seems as though the Eighth Circuit Court of Appeals, although in a cursory manner, has resolved the issue of individual liability under the federal anti-discrimination statutes. See Spencer v. Ripley County State Bank, 123 F.3d 690, 691 (8th Cir. 1997) (affirming summarily the district court's holding that the president of a bank could not be held personally liable for harassing a teller based on the reasons stated by the district court); Bonomolo-Hagen v. Clay Central-Everly Community Sch. Dist., 121 F.3d 446, 447 (8th Cir. 1997) (stating that Spencer established the law of the circuit after squarely holding that supervisors may not be held individually liable under Title VII).
1988, in *Hall v. Gus Construction Co.*, the Eighth Circuit affirmed a Title VII decision against a construction company and one of its foremen individually. However, the issue of liability of a supervisor as an agent was neither appealed nor directly addressed in the decision. Furthermore, although the court of appeals stated that the supervisor and the construction company were liable, it is not clear what the court meant by liability when, prior to 1991, Title VII remedies were of a nature generally not applicable to individual supervisors. In actuality, the *Hall* decision is too ambiguous to provide any real guidance.

The court of appeals again skirted around the question of individual liability six years later in *Smith v. St. Bernards Regional Medical Center*. The court dismissed claims of race discrimination against co-workers, concluding that "the claims against individual defendants were properly dismissed because liability under 42 U.S.C. § 2000e(b) can attach only to employers." Thus, the court was not asked to decide the question of whether supervisory employees, or agents of the employer, fell within the definition of "employer" under Title VII. However, defendants sometimes cite the *Smith* case for the proposition that individual employees cannot be held liable under Title VII because they are not employers. Once again, the Eighth Circuit Court of Appeals failed to take a clear stance on the issue of individual liability.

Still in need of a clear and concise ruling on the question of individual liability, the Eighth Circuit Court of Appeals made statements that may be indicative of their eventual position in *Lenhardt v. Basic Institute of Technology, Inc.*, even though the issue was not before them. In *Lenhardt*, the question was whether an individual defendant, who was the sole shareholder, sole director, and president of the corporate employer, could also be considered an “employer” within the meaning of the Missouri Human Rights Act ("MHRA").

The court introduced the issue by noting that Title VII, the ADEA, and the MHRA are “similar statutory schemes that prohibit discrimination in employment against protected classes.” Furthermore, the court found that the federal statutes include definitions of “employer” that are

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331. 842 F.2d 1010 (8th Cir. 1988).
332. See id. at 1017.
333. See supra notes 78-81 and accompanying text.
334. 19 F.3d 1254 (8th Cir. 1994).
335. Id. at 1255.
336. 55 F.3d 377 (8th Cir. 1995).
337. See id. at 378.
338. Id. at 380.
The Lenhardt court reviewed numerous federal decisions in all the circuits involving Title VII and the ADEA and found compelling that the "more recent cases reflect a clear consensus on the issue before us: supervisors and other employees cannot be held liable under Title VII in their individual capacities." In light of all this, the court could only hold that the definition of the term employer in the MHRA does not subject employees, including supervisors or managers, to individual liability.

A survey of the Eighth Circuit district courts reveals one lone case, Schallehn v. Central Trust and Savings Bank, which stands for the proposition that a supervisory employee can be held individually liable under the ADEA. However, the overwhelming majority opinion in the circuit is that supervisors may not be held individually liable as employers under Title VII. Absent any directive from the Eighth Circuit Court of Appeals, a majority of these district courts adopted the reasoning and conclusions of the Ninth Circuit as set forth in the Maxwell's International decision. Since these decisions are not binding, and the court of appeals has reserved its opinion as to the question of individual liability, the issue remains unsettled in the Eighth Circuit.

VII. CONCLUSION

Based on the current state of the federal case law, it is evident that the overwhelming position taken in the federal circuit courts is that corporations, and not individuals, are subject to liability under Title VII, the ADEA, and the ADA. Therefore, companies that have purchased a standard D&O policy, even with the EPLI endorsement, hoping to insure themselves against liability in an employment discrimination lawsuit should be alarmed. A majority of these employment practices lawsuits,

339. See id.
340. Id. at 381.
341. See id.
343. See id. at 1331.
as demonstrated, are brought against the corporation as well as against
the individuals involved in the discriminatory conduct. The D&O policy
does not cover corporate liability in and of itself, and based on the
federal circuit court decisions, the individual directors, officers, or
employees named in the lawsuit will be precluded from personal liability.
Therefore, the corporation will not be reimbursed for any litigation
expense incurred because it did not have to indemnify the directors or
officers for any personal liability. As a result, the D&O policy will
afford, at most, minimal protection to businesses faced with employment
practices litigation.

Furthermore, companies should beware when acquiring an EPLI
endorsement to their D&O policy because, like the standard D&O policy,
it may be deficient in protecting against employment practices liability.
The EPLI endorsement, although insuring the directors, officers, and all
of the employees (in some cases), does not extend coverage to the
corporate entity for employment practices claims. Companies pur-
chasing this extension will be in the same position they were in prior to
purchasing the policy. The claims against any individual engaged in
wrongful discrimination will be dismissed, and complete liability will
rest with the corporate employer. As a result, the EPLI endorsement will
have no practical value.

Companies, however, may seek shelter against employment practices
liability by purchasing a relatively new insurance policy known as
EPLI. EPLI is the “first insurance product specifically intended by
insurers to provide coverage for employment-related perils such as
discharge from employment, workplace discrimination, and sexual
harassment.” It specifically covers the corporation as well as its
directors, officers, and employees. In fact, EPLI coverage is now widely
available from some major insurance companies.

Although companies have the option to purchase the stand-alone

345. See Cavallaro, supra note 7, at 39; Machson & Monteleone, supra note 33, at 712.
346. These claims against individuals in their personal capacity will be dismissed if they are
brought under Title VII, the ADEA, or the ADA. However, individual liability is permitted under
some related state laws. Notwithstanding, based on the previous analysis of individual liability in
the circuit courts, it does not matter in which circuit the claim is brought.
347. See Machson & Monteleone, supra note 33, at 712.
348. See id. at 711; Monteleone, supra note 30, at 47; Gilbert, supra note 32, at 9; Zolna, supra
note 32, at 40.
349. Monteleone, supra note 30, at 47.
350. Such companies include Reliance, Zurich/American, AIG, and Shand Morahan & Co. See
Zolna, supra note 32, at 41.
EPLI policy, which does extend coverage to the corporate entity, they may neglect to do so based on the false sense of security derived from possessing a D&O policy, with or without the EPLI endorsement, and their reluctance to pay premiums for two separate policies that they believe provide the same coverage. This is simply an unwise business practice, and this Author urges corporate employers to reconsider their options when seeking protection against employment discrimination suits.

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