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INTRODUCTION

Suppose you become the victim of intentional discrimination in your workplace. Perhaps your immediate supervisor, having authority over such decisions, threatens either not to promote you or to fire you unless you succumb to his or her sexual advances. Or perhaps you are denied an employment opportunity for which you are otherwise qualified simply because you are over forty. If you sue both the company and your supervisor, a court may determine that you were the subject of intentional discrimination. If the company is bankrupt or otherwise judgment proof, however, you may not be compensated for your suffering. Why? The court may dismiss your claim against your former supervisor because it interprets the anti-discrimination statutes under which you have sued as inapplicable to individuals. Although it may seem incredible that the laws aimed at eliminating employment discrimination would not provide remedies against individuals who actually violate them, many courts have so held.[1]

Pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII")[2] and the Age Discrimination and Employment Act ("ADEA"),[3] it is unlawful for employers to discriminate on the basis of an individual's race, color, sex, national origin, or age. Victims of such discrimination choosing to bring legal action often sue both their employer and their supervisor(s) or others who had authority over the decisions or acts which formed the basis of the alleged discrimination.

At common law, it is well established that the employer is liable under the doctrine of respondeat superior for the intentional torts of its employees committed in the scope and furtherance of their employment.[4] Similarly, courts have imputed liability to an employer for discriminatory acts of supervisory personnel toward other employees.[5] Although it seems clear that an aggrieved party may sue the corporate entity for its employee's discriminatory acts, it is not clear whether an aggrieved party may also require that a supervisor be held accountable for his own dis-

1. *See infra* notes 32-46, 76-83 and accompanying text.

2. 42 U.S.C. §§ 2000e-2000e-17 (1988 & Supp. III 1991).

3. 29 U.S.C. §§ 621-633(a) (1988 & Supp. III 1991).

4. *See, e.g.*, Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990) ("[A] supervisory employee who fires a subordinate is doing the kind of thing that he is authorized to do, and the wrongful intent with which he does it does not carry his behavior so far beyond the orbit of his responsibilities as to excuse the employer.") (citing Restatement (Second) of Agency § 228 (1958)).

5. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 70 (1986); Levendos v. Stern Entertainment, Inc., 909 F.2d 747, 752 (3rd Cir. 1990); Anderson v. Methodist Evangelical Hosp., Inc., 464 F.2d 723, 725 (6th Cir. 1972).

criminatory acts. In many circumstances, a supervisor sued individually has defeated a cause of action by successfully arguing that the anti-discrimination statutes do not provide for a remedy against individuals, only against the employer entity.[6]

Courts have disagreed, however, over whether the language of Title VII and the ADEA creates a basis for individual liability. The dispute involves the construction given to the statutes' definitions of "employer": specifically, who may be held liable as an employer under these statutes. 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*."[7] Similarly, the ADEA defines an employer as "a person engaged in an industry affecting commerce who has twenty or more employees . . . [and] *any agent of such a person*."[8] Several courts have concluded that by including the "any agent of such a person" language in the statutes, Congress intended to provide for the liability of supervisors who affect employment decisions.[9] Other courts have held that the use of this language merely ensures that the acts of individuals are imputed to the employer entity through respondeat superior, and is not intended to provide for a remedy against the actual individual transgressors.[10]

Part I of this Note discusses the purposes and legislative histories of Title VII and the ADEA, which reflect Congress' desire to eradicate employment discrimination. Part II outlines and analyzes the relevant case law regarding the issue of individual liability for employment discrimination acts. Part III argues that based on the purposes of the Acts, their statutory language, and the case law, individuals can and should be held liable for their discriminatory acts under both Title VII and the ADEA.

I. THE PURPOSE OF THE STATUTES

By enacting Title VII in 1964, Congress sought to create a "national policy of nondiscrimination" in the workplace by prohibiting discrimination by those controlling employment and promotion.[11] Accordingly, courts have held that

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6. *See* John P. Furfaro & Maury B. Josephson, *Liability of Supervisors*, 210 N.Y.L.J. 3 (1993).

7. 42 U.S.C. § 2000e(b) (1988) (emphasis added).

8. 29 U.S.C. § 630(b) (1988) (emphasis added).

9. *See, e.g.*, House v. Cannon Mills, Co., 713 F. Supp. 159, 159 (M.D.N.C. 1988) ("The liability provisions of both [Title VII and ADEA] . . . permit suits against individual supervisory employees who are deemed 'employer[s].' " (citations omitted)); Barger v. Kansas, 630 F. Supp. 88, 90 (D. Kan. 1985) (finding that the President, Vice President, Dean, and Department Chairperson were agents of the University); Kelly v. Richland Sch. Dist., 463 F. Supp. 216, 218 (D. S.C. 1978) (holding that the superintendent of a school district, as an agent of the district, was an "employer" within the meaning of § 2000e(b)).

10. *See* Elias v. Sitomer, 60 Fair Empl. Prac. Cas. (BNA) 758, 761 (S.D.N.Y. 1992).

11. *See* 110 Cong. Rec. 13, 169 (1964), *reprinted in* EEOC, Legislative History of Titles VII and XI of the Civil Rights Act of 1964, at 11 (1969).

> 'Title VII . . . provides . . . a clear mandate from Congress that no longer will the United States tolerate this form of discrimination. It is, therefore, the duty of the courts to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute in a battle with semantics.'[12]

Because "Title VII is remedial in character and should be liberally construed to achieve its purposes,"[13] courts have "rejected a myriad of procedural and technical defenses invoked by defendants to limit the effectiveness of court-ordered remedies in Title VII cases."[14] The trend, therefore, has been toward granting broader remedies[15] and, despite any "exceptions and limitations incorporated in the 1964 Act, the courts have creatively interpreted Title VII and have found its meaning in the basic, underlying purposes of the statute."[16]

Congress' frustration with the relative ineffectiveness of Title VII resulted in attempts to improve the Act almost immediately after its enactment.[17] Subsequent amendments in 1972 and 1991 exhibited Congress' increased commitment to a national policy against employment discrimination.[18] In enacting these amendments, Congress reiterated its intention that Title VII be liberally construed by courts,[19] and acknowledged that "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification"[20] was essential to achieve the Act's ultimate purpose of eradicating employment discrimination.

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12. Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986) (quoting Culpepper v. Reynolds Metal Co., 421 F.2d 888, 891 (5th Cir. 1970)).

13. Coles v. Penny, 531 F.2d 609, 615 (D.C. Cir. 1976).

14. Herbert Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law*, 2 Indus. Rel. L.J. 1, 27 (1977).

15. *See id.* at 23.

16. *Id.* at 26.

17. *See id.* at 32. As a result, in Congressional hearings in 1971, it was argued that the Act "in most respects, proved to be a cruel joke . . . [and] the time has come for Congress to correct the defects of its own legislation. The promises of equal job opportunity made in 1964 must be made realities. . . ." *Id.* at 48 (quoting S. Rep. No. 415, 92d Cong., 1st Sess, 8 (1971)). Thus, Congress sought to expand Title VII's scope and to provide the EEOC necessary enforcement powers. *See id.* at 47.

18. *See* Jennifer M. Follette, *Complete Justice: Upholding the Principles of Title VII Through Appropriate Treatment of After-Acquired Evidence*, 68 Wash. L. Rev. 651, 652 (1993). Follette argues that "[t]he policy, clearly supported in the purposes and remedies of Title VII and the establishment of the EEOC, embodies both a deterrent goal of eliminating discrimination in the workplace and a remedial goal of providing relief to discrimination victims." *Id.* For a more thorough discussion of the 1991 Amendments, see *supra* notes 105-16 and accompanying text.

19. *See* Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970).

20. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). These barriers may exist in the form of psychological and dignitary harms. *See, e.g.*, Meritor Savings Bank v. Vinson, 477 U.S. 57, 65 (1986) (stating that Title VII gives employees the right to work in an atmosphere without "discriminatory intimidation, ridicule and insult").

Congress again demonstrated its commitment to ending employment discrimination when it passed the ADEA. While Title VII and the ADEA are similar, the scope of relief under the ADEA is broader than that under Title VII.[21] While adopting Title VII's substantive prohibitions against age discrimination in the workplace, Congress applied the procedures of the Fair Labor Standards Act ("FLSA").[22] Under the FLSA, an 'employer' "includes any person acting directly or indirectly in the interest of an employer in relation to an employee"[23] and courts will impose personal liability on such an individual.[24] In adopting Title VII's substantive prohibitions for the ADEA, Congress stated that the ADEA's purpose, like that of Title VII, was to "eliminate discrimination from the workplace."[25]

Specifically, the ADEA prohibits arbitrary age discrimination against any employee over forty.[26] It provides that "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age."[27] The ADEA prevents employers from predicating employment decisions on arbitrary age limits regardless of an employee's ability to perform a given job.[28] To achieve this goal, the ADEA authorizes courts to grant relief to eradicate such discrimination and to return the victims to the positions they would have occupied had the discrimination not occurred.[29] To that end, a court may grant " 'such legal and equitable relief as may be appropriate to effectuate the purposes of [the Act].' "[30]

Thus, Congress's intent, evidenced by the legislative histories and language of both Title VII and the ADEA, is to eradicate unlawful discrimination in the workplace. These statutes should be liberally interpreted to achieve that end.[31]

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21. *See* Lorillard v. Pons, 434 U.S. 575, 584-85 (1978).

22. *See id.* at 580.

23. 29 U.S.C. § 203(d) (1988).

24. *See* 29 U.S.C. § 216(a) & (b) (1988). The FLSA was intended, moreover, to be a "broadly remedial and humanitarian statute." Dunlop v. Carriage Carpet Co., 548 F.2d 139, 143 (6th Cir. 1977).

25. House v. Cannon Mills Co., 713 F. Supp. 159, 162 (M.D.N.C. 1988).

26. *See* Lorillard v. Pons, 434 U.S. 575, 577.

27. 29 U.S.C. § 623(a)(1) (1988). Older workers are also protected against age based classification, expulsion from labor groups and retaliatory discharges. *See* David A. Niles, *The Older Workers Benefit Protection Act: Painting Age-Discrimination Law With a Watery Brush*, 40 Buff. L. Rev. 869, 872 (1992) (citations omitted).

28. *See* Daniel B. Frier, *Age Discrimination and the ADA: How the ADA May Be Used to Arm Older Americans Against Age Discrimination By Employers Who Would Otherwise Escape Liability Under the ADEA*, 66 Temp. L. Rev. 173, 177 (1993).

29. *See* J. Hardin Marion, *Legal and Equitable Remedies Under the Age Discrimination in Employment Act*, 45 Md. L. Rev. 298, 298 (1986).

30. *Id.* at 302 (quoting 29 U.S.C. § 626(b) (1982)).

31. *See, e.g.*, Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (finding that Title VII was "broad-gauged innovation legislation" that should be regarded as "a charter of principles which are to be elucidated and explicated by experience, time, and expertise").

II. WHO IS AN EMPLOYER—THE COURTS DIVERGE

Recently, the Ninth Circuit in *Miller v. Maxwell's International Inc.*[32] held that individual employees cannot be held liable for their own discriminatory acts under either Title VII or the ADEA. This decision partially conflicts with decisions in the Fifth Circuit and several district courts regarding Title VII, and the Seventh Circuit and several district courts regarding the ADEA.[33] The plaintiff in *Miller* sued six defendants in their individual capacities[34] under Title VII, the ADEA, and the Equal Pay Act of 1963 (the "EPA"),[35] claiming she was not promoted due to her age and sex.[36] The Ninth Circuit stated that although the argument advanced in support of individual liability, which was based on the interpretation of Title VII's "and any agent" language, was "not without merit," it was bound by *Padway v. Palches*[37] which, in its opinion, provided a better rule.[38] The court determined that the "and any agent" language was intended only to incorporate respondeat superior liability into the statute, and supervisors are therefore protected from liability in their individual capacities.[39] It reasoned that "[t]he statutory scheme itself indicates that Congress did not intend to impose individual liability on employees."[40] The court found that by limiting liability under Title VII to employers with at least 15 employees, Congress did not want to impose the costs of litigating discrimination claims on small entities. The court, noting that the ADEA and Title VII are statutorily similar, applied this analysis to the ADEA as well.[41]

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32. 61 Fair Empl. Prac. Cas. (BNA) 948 (9th Cir. 1993).

33. *See infra* notes 49-77, 86-96 and accompanying text.

34. These included the Chief Executive Officer of Maxwell's International, the corporate owner of Maxwell's Plum restaurant where the plaintiff was employed, the general managers of the restaurant and several lower level employees. *See Miller*, 61 Fair Empl. Prac. Cas., at 949-50.

35. 29 U.S.C. § 206(d) (incorporated into and enforced through the Fair Labor Standards Act of 1938 (the "FLSA"), 29 U.S.C. § 201-219 (1988)).

36. In retaliation for her complaint to the union, Miller was fired, reinstated twice, and ultimately fired for a third time. Upon receiving her right to sue letter from the EEOC, she filed suit in the district court, where her claims were eventually dismissed. *See Miller*, 61 Fair Empl. Prac. Cas. (BNA) at 950.

37. 665 F.2d 965 (9th Cir. 1982).

38. *See id.* at 952. In *Padway*, an elementary school principal brought suit against the school board and the superintendent of her school alleging sex discrimination in her compensation, reassignment and discharge. When granting summary judgment for the defendants, the court noted "that 42 U.S.C. § 2000e-2 speaks of unlawful practices by the employer, and not of unlawful practices by officers or employees of the employer. . . . [Thus] individual defendants cannot be held liable for back pay." *Padway*, 665 F.2d at 968. The court also notes, however, that the plaintiff sought compensatory and punitive damages rather than back pay, but still dismisses the claim as these damages were not yet provided for in the statute. *Id.*

39. *See Miller*, 61 Fair Empl. Prac. Cas. (BNA) at 952 (citing Padway v. Palches, 665 F.2d 968 (9th Cir. 1982)).

40. *Id.* The court found it "inconceivable" that Congress intended to expose individuals to such liability. *See id.*

41. *See id.* at 952-53.

The *Miller* dissent argued that the majority did not adequately address the 1991 amendments to the Civil Rights Act of 1964 ("the 1991 Amendments"), which imposed compensatory and punitive damages for intentional discrimination.[42] The dissent reasoned that the 1991 Amendments and the provision for compensatory and punitive damages justified imposing individual liability where the discrimination is intentional.[43] It also rejected the majority's rationale regarding the ADEA because, although there are many similarities between the statutes, the ADEA's scope of relief is broader than that afforded by Title VII.[44] The ADEA, moreover, incorporates the remedies and procedures of the FLSA,[45] under which an individual may be held personally liable.[46]

The *Miller* decision conflicts with several cases holding individuals personally liable. In *Hamilton v. Rodgers*,[47] the Fifth Circuit held that not only was the employer (the fire department) itself liable for discrimination under Title VII under respondeat superior, but its individual employees and immediate supervisors as its agents were also liable.[48] In *Hamilton*, an employee brought a Title VII action against the fire department and several supervisors alleging racial harassment and retaliation.[49] The court noted that "[t]he definition of 'employer' is . . . broad, including agents of the actual employer."[50] Thus, Title VII " 'should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination.' "[51] Indeed, according to the court, "[t]o hold otherwise would encourage supervisory personnel to believe that they may violate Title VII with impunity."[52] Consequently, it extended liabil-

42. *See id.* at 953 (Fletcher, J., dissenting).

43. *See id.*

44. *See id.* at 954. "The availability of additional remedies, particularly one based on willfulness of conduct, argues against a construction of the ADEA that limits to injunctive relief the liability of the individual who acted willfully." House v. Cannon Mills Co., 713 F. Supp. 159, 160 (M.D.N.C. 1988).

45. *See supra* note 22-24 and accompanying text.

46. *See* Miller v. Maxwell's Int'l Inc., 61 Fair Empl. Prac. Cas. (BNA) 948, 954 (9th Cir. 1993).

47. 791 F.2d 439 (5th Cir. 1986). In holding for the plaintiff, the lower court found that there was a racist work environment and a deliberate effort to punish the plaintiff for aggressively seeking equal treatment. *See id.* at 441. The supervisors were found liable because they not only ignored the racist behavior of the plaintiff's co-workers, but also intentionally discriminated against him themselves. *See id.* at 442. The supervisors did not provide the plaintiff with adequate training. As a result, his skills diminished, and the supervisors were able to then claim justifiable dismissal. *See id.*

48. *See id.* at 442-44.

49. *See id.* at 441. The elements necessary to make out a prima facie case for unlawful retaliation are: (1) the plaintiff was engaged in an activity protected by Title VII; (2) an adverse employment action occurred; and (3) the plaintiff's participation in the protected activity caused the adverse employment action. *See* Dickerson v. Dade County, 659 F.2d 574, 580 (5th Cir. 1981).

50. *Hamilton*, 791 F.2d at 442.

51. *Id.* at 442 (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)).

52. *Id.* at 443.

ity to Hamilton's immediate supervisors, "despite their intermediate standing within the [d]epartment's hierarchy," because they had authority over staffing, assignment, and other employment decisions which formed the basis of the discrimination.[53]

Other courts have also held individuals liable under Title VII. For example, in *Kolb v. Ohio, Department of Mental Retardation & Development Disabilities*,[54] the court held that individuals may be liable for intentional discrimination in the workplace.[55] In *Kolb*, the plaintiff brought charges against her employer and three individual supervisors for twice failing to promote her, for discharging her on the basis of her race and sex, and for retaliating against her for past charges of discrimination.[56] The court rejected the individual defendants' summary judgment motions stating:

> 'Holding responsible those who control the aspects of employment accorded protection under Title VII is consistent with the congressional intent both that the Act's effectiveness not be frustrated by an employer's delegating authority . . . and that the Act be interpreted liberally in order to achieve its remedial purpose of eradicating discrimination in employment.'[57]

The court concluded that "those individuals who are charged with the responsibility of making and/or contributing to employment decisions for the defendant employer may be liable as its agents under Title VII."[58]

Similarly, in *McAdoo v. Toll*,[59] the court held that agents of a University were individually liable for discrimination.[60] In *McAdoo*, a black woman sued a University and its Chancellor, President, Department Deans and Department Heads, for failing to uphold its job offer because of her race.[61] The court denied the defendants' motion for summary

53. *Id.* at 442. *Hamilton* was subsequently limited by Harvey v. Blake, 913 F.2d 226 (5th Cir. 1990), which distinguished between public officials' liability in their unofficial and official capacities. *See id.* at 227-28. In *Harvey*, the plaintiff, employed as an Inspector in Houston's Public Service Department, alleged that he was sexually harassed by his supervisor, the defendant. *See id.* at 227. The court said that under a "liberal construction" of the statute's definition of employer, "immediate supervisors are Employers when delegated the employer's traditional rights, such as hiring and firing." *Id.* But any recovery against the defendant had to be predicated on the defendant's role as an agent of the city in her official capacity. *See id.* at 227-28.

54. 721 F. Supp. 885 (N.D. Ohio 1989).

55. *See id.* at 891.

56. *See id.* at 888. The elements of discriminatory failure to promote are: (1) that she is a member of a protected class; (2) that she applied for and was qualified for a position for which the employer was seeking applicants; (3) that, despite her qualifications, she was rejected; and (4) that a member of a non-protected class subsequently received the position. *See id.* at 889-90.

57. *Id.* at 891 (quoting Spirt v. Teachers Ins. & Annuity Ass'n., 475 F. Supp. 1298, 1308 (S.D.N.Y. 1979), *aff'd in relevant part*, 691 F.2d 1054 (2d Cir. 1982)).

58. *Id.*

59. 591 F. Supp. 1399 (D. Md. 1984).

60. *See id.* at 1405-06.

61. The plaintiff claimed that after she orally accepted a professorship, she received a

judgment, and held them individually liable.[62] The *McAdoo* court relied upon, among other cases, *Dague v. Riverdale Athletic Association*,[63] which rejected the individual defendants' claim that they were not "employers" within the statutory definition of Title VII.[64] The *Dague* court said that the defendants failed to "explain why officers of an organization should be treated any differently from the organization's agents, who are clearly subject to liability under the Act."[65] Furthermore, the court found it inconceivable that Congress could have intended to relieve from liability the very persons who engaged in the discriminatory acts.[66]

Courts have also held individuals liable in ADEA actions. In *Shager v. Upjohn Co.*,[67] the Seventh Circuit reversed a lower court's grant of a summary judgment motion in favor of the employer, finding that an intentional act of an employee performed within the scope of his authority is an act of the employer and is properly imputed to the employer under respondeat superior. The court implied that individual supervisors should also be held liable under the ADEA. It stated that "[t]he statutory language . . . could mean . . . that [the supervisor] is liable along with [the employer], or even possibly instead of [the employer]."[68]

In *Wanamaker v. Columbian Rope, Co.*,[69] the court expressly held that individuals who exercise control over a particular employee may be held individually liable for discrimination under the ADEA. In *Wanamaker*, the plaintiff claimed that during his interview for a position as in-house counsel for the defendant company, he received verbal assurances that it would be a "career position."[70] After thirteen years, however, he was terminated. He claimed this violated the ADEA, citing as evidence the directors' and officers' stated desires for "new blood" and "young

letter saying her application had been denied. The position was subsequently filled, as a lower level position, by a white woman. *See id.* at 1401.

62. *See id.* at 1406. The court looked to several cases for support. *See, e.g.*, York v. Tennessee Crushed Stone Ass'n., 684 F.2d 360, 362 (6th Cir. 1982) ("[A]n agent of an employer who may be sued as an employee in Title VII suits has been construed to be a supervisory or managerial employee to whom employment decisions have been delegated by the employer."); Rivas v. State Bd. for Community Colleges, 517 F. Supp. 467, 470 (D. Colo. 1981) ("For Title VII purposes, it is not necessary for individuals . . . to have total control or ultimate authority over hiring decisions. If the involvement is sufficient and necessary to the total employment process, the individual is considered an employer.").

63. 99 F.R.D. 325, 327 (N.D. Ga. 1983). The opinion does not clearly set forth the facts of this case.

64. *See id.*

65. *Id.*

66. *See id.*

67. 913 F.2d 398 (7th Cir. 1990).

68. *Id.* at 404. The court added that because "all employees are agents," and the statute states that agents are "liable along with [the employer] . . . [plaintiff] could have sued [the individual defendant]." *Id.* (citing House v. Cannon Mills Co., 713 F. Supp. 159, 159-62 (M.D.N.C. 1988)).

69. 60 Fair Empl. Prac. Cas. (BNA) 764 (N.D.N.Y. 1990).

70. *Id.* at 765. "Career position" seemed to imply that the position would continue until retirement, as it did for plaintiff's predecessor. *See id.*

blood."[71] The court determined that "corporate officers and directors may be individually liable for violations of the ADEA if they exercise control over an employee."[72]

Similarly, in *House v. Cannon Mills Co.*,[73] the court found the defendants individually liable for violations of the ADEA, even though they were not high ranking officers or shareholders. Because the defendants had authority over the discriminatory acts that resulted in the plaintiff's discharge, the court found that they were " 'agents' . . . and 'employers' within the express language of the statute."[74] Furthermore, because the existing scope of relief under the ADEA is much broader than that under Title VII, and because the ADEA incorporated much of the FLSA, which imposes personal liability on all "employers," the defendants were held liable under the ADEA.[75]

As there are conflicting interpretations among different circuits and different districts that have considered the issue of individual liability under Title VII and the ADEA, there are conflicting interpretations within district courts as well. The Southern District of New York, for example, seems to have abandoned its initial denial of individual liability under Title VII and the ADEA, and has recently imposed such liability.

In 1980, the Southern District of New York, in *Friend v. Union Dime Savings Bank*,[76] found that individual defendants could not be held liable for age discrimination under the ADEA. The plaintiff, a sixty-five year old bank employee, sued three officers and trustees of the bank after they replaced him with a thirty-nine year old employee and terminated him after he refused to sign a voluntary retirement plan.[77] The court examined the legislative histories of the ADEA and Title VII,[78] but found that they were both silent on the issue of individual liability, despite the "and any agent" language.[79]

The court then looked at the National Labor Relations Act[80] for guidance, because Title VII was "in large part" based on the language of the NLRA.[81] Analyzing the legislative history of the NLRA, it concluded

71. *Id.* at 766.

72. *Id.* at 769 (citing House v. Cannon Mills Co., 713 F. Supp. 159 (M.D.N.C. 1988)).

73. 713 F. Supp. 159 (M.D.N.C. 1988).

74. *Id.* at 161.

75. *Id.* at 161-62. The court says that individuals were held accountable under the FLSA, not because of their control of or ownership in the company, but because the FLSA violations were "attributable to them due to their authority over employment decisions." *Id.* at 161.

76. 24 Fair Empl. Prac. Cas. (BNA) 1307 (S.D.N.Y. 1980).

77. *See id.* at 1307-08.

78. Title VII was used as an example in enacting the ADEA. *See id.* at 1309.

79. *Id.* at 1309-10.

80. 29 U.S.C. §§ 141-157 (1988).

81. *See* Friend v. Union Dime Savs. Bank, 24 Fair Empl. Prac. Cas. (BNA) 1307, 1310 (S.D.N.Y. 1980). The NLRA was amended in 1947, changing the definition of employer from "any person acting in the interest of an employer," to "any person acting as an agent of the employer." *Id.* (citations omitted). In amending the NLRA, Congress

that the "and any agent" language of the NLRA was "an attempt to limit the employer's liability rather than to grant a new cause of action against all agents or employees of an employer."[82] Applying the same reasoning to the ADEA, the court held that the individual defendants were employees of the bank and not agents within the meaning of the statute.[83]

Twelve years later, however, in *Bridges v. Eastman Kodak Co.*,[84] the same court found that the "[c]ases in this Circuit . . . appear to assume that both individual and official liability can be imposed under Title VII."[85] In *Bridges*, three women alleged constructive discharge due to sexual harassment under Title VII. Without reference to *Friend*, which had been decided before the 1991 Amendments, the court followed Second Circuit cases which assumed that individual liability could be imposed.[86] It declined to read Title VII narrowly, especially in light of the 1991 Amendments providing compensatory and punitive damages.[87] Instead, it noted that compensatory and punitive damages are payable by individuals, and that the cases interpreting Title VII narrowly were decided before the 1991 Amendments. It concluded, therefore, that individual liability should be imposed.[88]

In *Elias v. Sitomer*,[89] the same court upheld individual liability under the ADEA. Unlike the defendant in *Friend*, who was not found individually liable, the defendant here was a president of a corporation and therefore an actual employer within the meaning of the Act.[90] In *Elias*, the plaintiff alleged that the president of the company in which he was employed denied him salary increases while giving raises to younger employers; required him to answer to younger, less experienced employees; barred him from client meetings; withheld assistance from him; and referred to him as "the old fashioned, old time salesman using old time methods."[91] The court explained that although the *Friend* court considered the supervisor's lack of ownership interest to be dispositive,[92] other decisions were "more persuasive."[93] It concluded that "a substantial

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intended to restrict an employer's liability for the acts of individuals "remotely connected with the employer." *Id.* (citing H.R. Rep. No. 510, 80th Cong., 1st Sess. (1947), *reprinted in* 1947 U.S.C.C.S. 1135).

82. *Id.*

83. *See id.*

84. 800 F. Supp. 1172 (S.D.N.Y. 1992).

85. *Id.* at 1180 (citing Zaken v. Boerer, 964 F.2d 1319, 1322-24 (2d Cir. 1992)).

86. *See id.*

87. *See id.* (citing Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072-74 (1991)).

88. *See Bridges*, 800 F. Supp. at 1180.

89. 60 Fair Empl. Prac. Cas. (BNA) 758 (S.D.N.Y. 1992).

90. *See id.* at 761.

91. *Id.* at 759 (quoting plaintiff's complaint).

92. *See id.* at 761 (citing *Friend v. Union Dime Sav. Bank*, 24 Fair Empl. Prac. Cas. (BNA) 1307, 1310 (S.D.N.Y. 1980)).

93. *Elias*, 60 Fair Empl. Prac. Cas. at 761. The other decisions the court was referring to were House v. Cannon Mills Co., 713 F. Supp. 159 (M.D.N.C. 1988) and Wanamaker v. Columbia Rope Co., 60 Fair Empl. Prac. Cas. (BNA) 764 (N.D.N.Y.

ownership interest is not necessary . . . to create employer status."[94] This reasoning seems to evidence a broader view of individual liability in the context of employment discrimination.

Interpretation of the statutory language and the legislative histories has resulted in conflicting decisions regarding individual liability under both Title VII and the ADEA. Without guidance from the Supreme Court, the Fifth Circuit, the Seventh Circuit implicitly, and several district courts have imposed individual liability under either Title VII or the ADEA,[95] while most recently the Ninth Circuit has rejected such liability under both Title VII and the ADEA.[96] Part III argues that based on a review of the purposes and legislative histories of Title VII and the ADEA, courts should, contrary to the Ninth Circuit's decision in *Miller*, hold individuals liable for their own acts of discrimination.

III. COURTS CAN AND SHOULD HOLD INDIVIDUALS LIABLE UNDER TITLE VII AND THE ADEA

The crux of the courts' disputes over individual liability focuses on the statutory definitions of "employer."[97] Both Title VII and the ADEA define "employer" as "a person engaged in an industry . . . and any agent of such person."[98] While interpreting these definitions to mean that *any* employee or agent of an employer is an employer seems overly broad, the view that those employees with direct control over substantive employment decisions are employers is consistent with the Acts' definitions and purposes.[99] Indeed, as the Southern District of New York reasoned as to Title VII, holding responsible those with direct control over hiring, firing and other pertinent employment decisions who intentionally discriminate is consistent with congressional intent to not frustrate the Act's effectiveness through the delegation of authority. It also satisfies congressional desire that Title VII be liberally interpreted to achieve its goal of eradicating employment discrimination.[100]

1990), both holding that officers with authority over hiring and firing decisions are agents of the corporation and employers within the statutory definition. *See supra* notes 67-73 and accompanying text.

94. *Elias*, 60 Fair Empl. Prac. Cas. at 761.

95. *See supra* notes 47-75, 76-94 and accompanying text.

96. *See supra* notes 32-41 and accompanying text.

97. *See supra* notes 7-12 and accompanying text.

98. 42 U.S.C. § 2000e(b) (1988); 29 U.S.C. § 630(b) (1988).

99. *See, e.g.*, York v. Tennessee Crushed Stone, Ass'n, 684 F.2d 360, 362 (6th Cir. 1982) ("Generally, an agent of an employer who may be sued as an employee in Title VII suits has been construed to be a supervisory or managerial employee to whom employment decisions have been delegated. . . ."); McAdoo v. Toll, 591 F. Supp. 1399, 1406 (D. Md. 1984) ("[A]n individual occupying a supervisory position could be held liable for the acts of his underlings when the employer of both can also be held liable, [even] where the supervisor has no personal involvement . . . . [because] placing an affirmative duty to prevent discriminatory acts on those who are charged with employment decisions appears to be consistent with the aims of Title VII.").

100. *See* Spirt v. Teachers Ins. & Annuity Ass'n, 475 F. Supp. 1298, 1308 (S.D.N.Y. 1979), *aff'd in relevant part*, 691 F.2d 1054 (2d Cir. 1982).

Several courts adopting this view have imposed individual liability under Title VII.[101] This view is consistent with congressional intent that Title VII "eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination."[102]

The 1991 Amendments[103] further clarify the purpose of Title VII and support holding individuals liable.[104] Specifically, in the "findings and purposes" of the 1991 Amendments, Congress noted the need for additional remedies and protections to eradicate discrimination and harassment in the workplace, and the need to expand the scope of the statute.[105] Accordingly, Section 102(a)(1) of the 1991 Amendments provides that "the complaining party may recover compensatory and punitive damages" from those who intentionally discriminated.[106] As the *Bridges* court recognized, these are the types of damages individuals would and could be expected to pay.[107] Imposing liability on such individuals for their own acts of intentional discrimination corresponds with Congress's desire to provide increased remedies and protections under Title VII to the victims of employment discrimination and harassment.[108]

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101. *See, e.g.*, Jones v. Metropolitan Denver Sewage Disposal Dist., 537 F. Supp. 966, 970 (D. Colo. 1982) ("A person is an agent under 2000e(b) if he participated in the decision making process that forms the basis of the discrimination."); *see also supra* notes 48-64, 82-91 and accompanying text.

102. Hamilton v. Rodgers, 791 F.2d 439, 442 (5th Cir. 1986) (quoting Rodgers v. EEOC, 454 F.2d 234, 238) (5th Cir. 1971)).

103. *See* Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C. (1991)).

104. *See id.*

105. *See id.* The Act states in pertinent part:

> The Congress finds that-
>
> (1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;
>
> . . .
>
> (3) legislation is necessary to provide additional protections against unlawful discrimination in employment.
>
> . . .
>
> The purposes of this Act are-
>
> (1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;
>
> . . .
>
> (4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

Id. The series of Supreme Court cases to which the Act refers are Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); Martin v. Wilks, 490 U.S. 755 (1989); Lorance v. AT & T Technologies, Inc., 490 U.S. 900 (1989); and Patterson v. McLean Credit Union, 491 U.S. 164 (1989). *See* J.R. Franke, *The Civil Rights Act of 1991: Remedial Civil Rights Policies Prevail*, 17 S. Ill. U. L.J. 267, 269-72 (1993). These cases "altered existing law [and represented a] retreat from civil rights protections." *Id.* at 267.

106. Pub. L. No. 102-166, 105 Stat. 1072 (1991).

107. *See* Bridges v. Eastman Kodak Co., 800 F. Supp. 1172, 1180 (S.D.N.Y. 1992).

108. *See id.*

In adopting the 1991 Amendments, Congress sought to strengthen Title VII's protections and remedies[109] by legislatively overturning several Supreme Court decisions that had limited Title VII protections.[110] Thus, the 1991 Amendments sought "to reinstate the previous scope and effectiveness of the civil rights laws and to expand remedies to more adequately compensate victims and deter unlawful discrimination."[111]

Accordingly, the 1991 Amendments provide remedies for previously unrecoverable injuries.[112] These remedies "not only reflect the continuing congressional belief in the principles of Title VII; they also reflect the gradual development and societal commitment to the national policy against discrimination,"[113] and "Congressional intent to . . . support liberal interpretation and application of . . . the civil rights laws."[114] Finding individual liability under Title VII, therefore, corresponds with a broad interpretation of the statute.

A flexible approach to interpreting "employer" is appropriate for the ADEA as well.[115] Before looking at the ADEA, one must first consider the FLSA, the statute from which the ADEA adopts many of its provisions.[116] As noted in *House v. Cannon Mills Co.*,[117] relief under the ADEA is even broader than that under Title VII because of the ADEA's incorporation of FLSA provisions.[118] Under the FLSA, " '[e]mployer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee."[119] For purposes of the ADEA, then,

> any person who acts directly or indirectly in the interest of the employer in relation to an employee shall be subject to the same liability as the employer . . . [L]iability is predicated not on the existence of the employer employee relationship . . . *but on the acts [the person] performs in relation to the employee.*[120]

This broad interpretation of "employer" further supports the ADEA's purpose of eliminating employment discrimination.[121] It advances the

109. *See* Heather K. Gerken, Note, *Understanding Mixed Motives Claims Under the Civil Rights Act of 1991: An Analysis of Intentional Discrimination Claims Based on Sex-Stereotyped Interview Questions*, 91 Mich. L. Rev. 1824, 1838 (citing H.R. Rep. No. 40, *infra* note 110, pt 2, at 1, *reprinted in* 1991 U.S.C.C.A.N. at 694).

110. *See* H.R. Rep. No. 40, 102d Cong., 1st Sess., pt 2, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 694.

111. Franke, *supra* note 105, at 272 (citing H.R. Rep. No. 856, 101st Cong., 2d Sess., § 2 (1990)).

112. *See* Follette, *supra* note 18, at 655.

113. *Id.*

114. Franke, *supra* note 105, at 298.

115. *See supra* notes 21-29 and accompanying text.

116. *See supra* note 45 and accompanying text.

117. 713 F. Supp. 159 (M.D.N.C. 1988); *see supra* notes 70-73.

118. *See House*, 713 F. Supp. at 160-62.

119. 29 U.S.C. § 203(d) (1988).

120. Wanamaker v. Columbian Rope, Co., 60 Fair Empl. Prac. Cas. (BNA) 764, 769 (N.D.N.Y. 1990) (emphasis added) (quoting Schultz v. Chalk-Fitzgerald Const. Co., 309 F. Supp. 1255 (D. Mass. 1970)).

121. *See supra* notes 26-28 and accompanying text. Specifically, the ADEA prohibits

goals of the ADEA to prevent discrimination based on age without regard to ability and to promote the employment of older workers.[122] Supporting these goals will prevent situations where older people arbitrarily lose their jobs without remedy or recourse, while the discriminating supervisors shield themselves with the statute that was intended to be swords for those discriminated against.

The law of agency also supports individual liability under Title VII and the ADEA. Agency law seems to dictate that the "and any agent" language in the statutes was not included to ensure that the acts of an employee be imputed to the employer through respondeat superior.[123] Instead, because "[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment,"[124] the "and any agent" language is more likely intended to apply to supervisors who intentionally discriminate. The Restatement (Second) of Agency adds that an agent's conduct is within the scope of employment if "(a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master."[125] A supervisor or manager, then, with authority over specific employment decisions who intentionally discriminates in the administration of those decisions is an agent of the company for the purpose of liability under both Title VII and the ADEA. Faithful application of the laws of agency and interpretation of the statutory language, therefore, militate strongly toward imposing individual liability on supervisors who discriminate.

Some may argue, however, that individual liability is inapplicable under both Title VII and the ADEA because the prospect of potentially debilitating judgments against those found individually liable may make courts less likely to find discrimination than if the corporate entity with deep pockets and/or hefty insurance coverage were being burdened with the damages.

This result, however, is not likely. Compensatory and punitive damages are awarded only when the conduct complained of is egregious. Presumably, these damages will not be awarded where the conduct does not so merit, and a finding of a Title VII violation should not depend on the size of the damage award or who is paying it. Moreover, Title VII imposes limits on the amount of punitive damages that may be awarded,

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age discrimination where compensation, terms or benefits of compensation are concerned and prohibits classifications that serve to limit or otherwise adversely affect one's employment status. *See* 29 U.S.C. § 623(a) (1988).

122. *See supra* note 28 and accompanying text

123. *See supra* notes 9-10 and accompanying text.

124. Restatement (Second) of Agency, § 219(1) (1958). Also, "courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employee knew, should have known, or approved of the supervisor's actions." Meritor Sav. Bank v. Vinson, 477 U.S. 57, 70-71 (1986). Thus, respondeat superior liability is built into the statute.

125. Restatement (Second) of Agency, § 228(1)(a)-(c) (1958).

ranging from $50,000 to $300,000,[126] further protecting the individual from excessive awards.

Another potential argument against individual liability is that supervisors may become reluctant to fire or not promote employees because of fears that Title VII or ADEA actions will be brought against them individually. If, however, the employment action is legitimate, such fears are unwarranted, because justified dismissals or non-promotions have not, do not, and will not lead to a finding of liability for either the employer or the supervisors. Failure by the plaintiff to prove his dismissal was due to unlawful discrimination would preclude a finding in his favor,[127] as the

126. The limitations imposed on intentional discrimination by Title VII are

> (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;
>
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000;
>
> (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000;
>
> (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

42 U.S.C. § 1981a(b)(3) (Supp. III 1991).

Although the individual defendant may not employ the statutory minimum, the individual as an agent of an employer with at least fifteen employers is an employer within the statutory definition. *See, e.g.*, Owens v. Rush, 636 F.2d 283, 287 (10th Cir. 1980) (determining that a Sheriff, as agent of the county, is an employer under Title VII). In Owens, a former deputy sheriff brought a Title VII action against the sheriff for sexual discrimination in her pay and promotion. *See id.* at 285. The court found that although the sheriff's department itself did not employ fifteen employees, it was an agent of the County which did employ more than fifteen people. The sheriff, therefore, was an "employer" within the meaning of Title VII, and plaintiff's suit should not have been dismissed. *See id.* at 286-87. The court added that "[w]hatever the reason for excluding employers with fewer than fifteen employees from Title VII coverage, it should not be construed to exempt a . . . subdivision with many employees from Title VII proscriptions on grounds that the immediate employing agent has fewer than fifteen employees." *Id.* at 287.

127. As to the ADEA,

> the fact that an older worker is treated worse than a younger one . . . is not enough to establish a prima facie case of age discrimination. . . . [O]nce the employee shows that he was replaced by a younger person even though he was performing up to his employer's expectations, the burden shifts to the employer to present evidence that the employee was replaced for a reason unrelated to his age or that of his replacement.

Shager v. Upjohn Co., 913 F.2d 398, 400-01 (7th Cir. 1990) (citing Dale v. Chicago Tribune Co., 797 F.2d 458, 462-63 (7th Cir. 1986)). Moreover, "[t]he statute is not a guarantee of tenure for the older worker," so that "it is not a violation of the age discrimination law to fire an employee for insufficient cause, merely because the employee is more than forty . . . and is replaced by a younger person." *Id.* at 401 (citations omitted).

As to Title VII, "[t]he plaintiff . . . must carry the initial burden of establishing a prima facie case of discrimination." Kolb v. Ohio Dep't of Mental Ret. & Dev., 721 F. Supp. 885, 889 (N.D. Ohio 1989) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). The prima facie case "raises an inference of discrimination 'only because we presume these acts, *if otherwise unexplained*, are more likely than not based on the con-

imposition of individual liability does not alter the plaintiff's burden of proof.

Furthermore, because the statutes were originally intended to eliminate employment discrimination and, in the case of Title VII, later amended to strengthen that aim,[128] they should be liberally and flexibly construed to meet that goal.[129] A reasonable and faithful interpretation of the statutory language would, therefore, impose liability where it belongs: on those who actually discriminate.

CONCLUSION

To further advance the goals of Title VII and the ADEA, and to accomplish the purposes which Congress intended through the statutes, the "and any agent" language in the statutes' definitions of "employer" should be read, not as ensuring that individuals who discriminate can escape liability, but rather as ensuring that individuals who act within their supervisory positions to render discriminatorily motivated decisions are held accountable for those acts.

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sideration of impermissible factors.' " *Id.* (emphasis added) (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).

128. *See supra* notes 102-04 and accompanying text.

129. *See supra* note 19 and accompanying text.