

INDIVIDUAL LIABILITY OF SUPERVISORS FOR SEXUAL HARASSMENT UNDER TITLE VII: COURTS' RELIANCE ON THE RULES OF STATUTORY CONSTRUCTION

Abstract: The United States Supreme Court has not considered the issue of individual liability under Title VII for workplace sexual harassment. There is, however, almost complete consensus on this issue among the federal courts. Only the United States Circuit Court of Appeals for the First Circuit has refused explicitly to rule on the issue. Several district courts in the First Circuit allow supervisors to be sued in their individual capacities under Title VII. Other district courts, however, have rejected such lawsuits. This Note reviews the case law addressing the issue of individual liability of supervisors under Title VII, and concludes that Title VII imposes liability only on employers. Simply stated, supervisors cannot be sued as individuals under Title VII.

INTRODUCTION

Title VII of the Civil Rights Act of 1964 ("Title VII") is a federal statute that protects employees from sexual harassment in the workplace.¹ Specifically, Title VII prohibits workplace practices that discriminate because of sex for no bona fide job-related reason.² For example, under Title VII an employer is subject to damages and equitable remedies for discriminatory hiring and promotion practices

¹ See Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a), 78 Stat. 241, 255 (codified in scattered sections of 42 U.S.C. § 2000a-2000h (1994)). Title VII declares that "[i]t 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." § 2000e-2; see also *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) (recognizing two categories of sexual harassment: quid pro quo and hostile work environment).

² See 42 U.S.C. § 2000e-2. Title VII also prohibits employment discrimination on the basis of race, color, religion and national origin. See *id.*

and sex-related conduct that has a sufficiently adverse affect on the employee's work environment.³

If the court finds that the employer has violated Title VII, the court may order the employer to pay back-pay, compensatory damages and punitive damages to the employee.⁴ The court may also order appropriate injunctive relief.⁵ For example, the court can enjoin the employer from continuing discriminatory workplace practices such as maintaining a formal policy of treating women differently than men for no bona fide reason based upon the requirements of the particular job.⁶

Despite Title VII's mandate against sexual harassment in the workplace, there remains some disagreement among federal courts—especially among federal district courts within the First Circuit—as to whether supervisors may be sued in their individual capacities for sexual harassment.⁷ This controversy results from the statute's argua-

³ See *id.* at § 2000e-5(b),(g)(1); *Faragher v. City of Boca Raton*, 524 U.S. 775, 786-88 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751-58 (1998); *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 78-80 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-23 (1993); *Meritor*, 477 U.S. at 62-70.

⁴ See 42 U.S.C. § 2000e-5(g)(1); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).

⁵ See 42 U.S.C. § 2000e-5(g)(1).

⁶ See *id.*; *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 702 (1978) (requiring female employees to pay more than men into pension plan is prohibited disparate treatment).

⁷ See *Morrison v. Carleton Woolen Mills, Inc.*, 108 F.3d 429, 444 (1st Cir. 1997) (recognizing the controversy, declaring that "[t]he question has no very obvious answer," and declining to address this "relatively complex issue."); *Horney v. Westfield Gage Co.*, 95 F. Supp. 2d 29, 33 (D. Mass. 2000) (collecting cases and rejecting individual liability of supervisors under Title VII); *Wyss v. General Dynamics Corp.*, 24 F. Supp. 2d 202, 204-09 (D.R.I. 1998) (holding individual supervisors liable); *Chatman v. Gentle Dental Ctr. of Waltham*, 973 F. Supp. 228, 236-40 (D. Mass. 1997) (holding that individuals are not personally liable under Title VII); *Contreras-Bordallo v. Banco Bilbao Vizcaya De Puerto Rico*, 952 F. Supp. 72, 73-74 (D.P.R. 1997) (same); *Iacampo v. Hasbro, Inc.*, 929 F. Supp. 562, 572 (D.R.I. 1996) (holding supervisors liable under Title VII because they are agents of the employer); *Ruffino v. State Street Bank and Trust Co.*, 908 F. Supp. 1019, 1048 (D. Mass. 1995) (holding supervisors "bound by Title VII's dictates"). The consensus among federal circuit courts of appeal is that Title VII does not provide for individual liability of supervisors. See, e.g., *Lissau v. Southern Food Service, Inc.*, 159 F.3d 177, 180 (4th Cir. 1998); *Wathen v. General Elec. Co.*, 115 F.3d 400, 403-06 (6th Cir. 1997); *Sheridan v. E. I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1077-78 (3d Cir. 1996); *Haynes v. Williams*, 88 F.3d 898, 899-901 (10th Cir. 1996); *Gary v. Long*, 59 F.3d 1391, 1399 (D.C. Cir. 1995); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313-16 (2d Cir. 1995); *Williams v. Banning*, 72 F.3d 552, 554-55 (7th Cir. 1995); *Grant v. Lone Star Co.*, 21 F.3d 649, 651-52 (5th Cir. 1994), *cert. denied*, 513 U.S. 1015 (1994); *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993); *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991); see also Patrick J. McGrath, *Ambiguity Surrounding Individual Sexual Harassment Liability on the Federal and State Level in*

bly ambiguous definition of the term "employer."⁸ Although Title VII's language addresses explicitly an employer's conduct, it defines the term employer to include employers with certain characteristics "and any agent of such a person"⁹ It is this "and any agent clause" that has caused courts to disagree about whether supervisors can be sued in their individual capacities.¹⁰ Some courts interpret the "and any agent" as unambiguously providing for individual liability of supervisors.¹¹ Supervisors are common law agents of the employer after all, they reason.¹² The majority of courts, however, interpret the "and any agent" clause as an expression of Congress's intent to incorporate the concept of respondeat superior within Title VII.¹³ In other words, the clause ensures that employers will be held liable for the conduct of all of their agents, including supervisors.¹⁴

Because Title VII is a statute, perhaps it is unsurprising that courts support their construction of the "and any agent" clause using various rules of statutory construction.¹⁵ Simply stated, the rules of statutory construction are a commonly accepted technical framework for determining what the language of a statute means in any given

Massachusetts, 3 SUFFOLK J. TRIAL & APPELLATE ADVOC. 129 (1998) (collecting cases; noting that the First Circuit has not yet decided this issue and that district courts in the First Circuit are split; and, calling for the First Circuit to resolve the controversy).

⁸ See 42 U.S.C. § 2000e(b) ("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 person") (emphasis supplied); *Horney*, 95 F. Supp. 2d at 33; McGrath, *supra* note 7, at 133-140.

⁹ See 42 U.S.C. § 2000e(b).

¹⁰ Compare, e.g., *Iacampo*, 929 F. Supp. at 571-72 (interpreting the clause to allow individual liability of supervisors); *Weeks v. State of Maine*, 871 F. Supp. 515, 515 (D. Me. 1994) (same) with *Meara v. Bennett*, 27 F. Supp. 2d 288, 288 (D. Mass. 1998) (rejecting individual liability) and *Chatman*, 973 F. Supp. at 236 (same).

¹¹ See *Iacampo*, 929 F. Supp. at 571-72; *Ruffino*, 908 F. Supp. at 1048.

¹² See *Wyss*, 24 F. Supp. 2d at 204-08; *Ruffino*, 908 F. Supp. at 1048.

¹³ See *Miller*, 991 F.2d at 587; McGrath, *supra* note 7, at 135-36.

¹⁴ See, e.g., *Miller*, 991 F.2d at 587.

¹⁵ See Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 806 (1983) (noting that courts frequently use the rules of statutory construction to interpret statutes even though their utility has been criticized by scholars like Professor Llewellyn); Llewellyn, *infra* note 16, at 400-06.

situation.¹⁶ "If the language of a statute is plain and unambiguous it must be given effect" is one rule, for example.¹⁷

What is perhaps most interesting about the controversy over individual liability of supervisors for sexual harassment is the extent to which courts rely on the rules of statutory construction to support their decisions.¹⁸ This reliance has brought to light again the rules' primary limitation.¹⁹ For every rule, there is an equally valid but opposing rule which, when applied, will yield an opposite conclusion.²⁰ "Although plain and unambiguous, statutory language will not be given effect when a literal interpretation would lead to absurd or mischievous consequences or thwart the statute's manifest purpose" is the opposing rule to the rule last mentioned.²¹ Although application of opposing rules will lead to opposite conclusions, both conclusions are "correct" in that they follow logically from applying a rule of statutory construction.²²

The United States Supreme Court has not considered the issue of individual liability under Title VII.²³ There is, however, almost complete consensus on this issue among the federal circuit courts of appeal.²⁴ Currently, the United States Courts of Appeal for the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh and District of Columbia Circuits have rejected individual liability for supervisors.²⁵ Furthermore, the Court of Appeals for the Eighth Circuit has rejected individual liability for supervisors under a state human rights

¹⁶ See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 400-06 (1950) (cataloging the rules and explaining their primary limitation: "there are two opposing canons on almost every point."). Professor Llewellyn seems to conclude that the rules are more properly "tools of argument". See *id.* at 401.

¹⁷ See *id.* at 403.

¹⁸ See, e.g., *Ruffino*, 908 F. Supp. 1019, 1047-48 (relying on the rule: every word and clause must be given effect).

¹⁹ See Llewellyn, *supra* note 16, at 401; Posner, *supra* note 15, at 805-06 ("The usual criticism of the canons [of statutory construction] . . . is that for every canon one might bring to bear on a point there is an equal and opposite canon so that the outcome of the interpretative process depends on the choice between paired opposites—a choice the canons themselves do not illuminate.").

²⁰ See Llewellyn, *supra* note 16, at 401 (contrasting the "thrust" of one rule with the "parry" of an opposing, but equally valid rule). Professor Llewellyn gives substantial credit for his "thrust and parry" organization to Charles Driscoll. *Id.* at 395. See also Posner, *supra* note 15, at 805-06.

²¹ See Llewellyn, *supra* note 16, at 403.

²² See Llewellyn, *supra* note 16, at 399-401; Posner, *supra* note 15, at 805-07.

²³ See *Grant*, 21 F.3d at 649.

²⁴ See *Horney*, 95 F. Supp. 2d at 33; McGrath, *supra* note 7, at 133-34.

²⁵ See, e.g., *Tbmka*, 66 F.3d at 1313; *Grant*, 21 F.3d at 651.

statute analogous to Title VII, even though the court has yet to decide the issue definitively under Title VII.²⁶ Indeed, the First Circuit Court of Appeals is the only federal appeals court that has refused to rule explicitly on the issue.²⁷ Federal district courts within the First Circuit have disagreed on the question of individual liability for supervisors.²⁸ Several district courts in the First Circuit allow supervisors to be sued in their individual capacities under Title VII.²⁹ Other courts, however, have rejected such lawsuits.³⁰

This Note reviews the case law addressing the issue of individual liability of supervisors under Title VII and emphasizes the current split among federal district courts in the First Circuit.³¹ Like the majority of courts, I conclude that Title VII imposes liability only on employers—people or entities employing fifteen or more employees in an industry affecting commerce.³² Simply stated, supervisors cannot be sued as individuals under Title VII.³³ In addition, my purpose in analyzing the current state of the law is to alert observers and practitioners to courts' reliance on the rules of statutory construction and which rules are likely to be relied on by a court addressing this issue.³⁴ Part I provides background for the reader concerning the history of sexual harassment.³⁵ Part II reviews the current state of the law concerning individual liability of supervisors under Title VII in the federal courts—especially in the First Circuit.³⁶ In Part II, I also discuss the courts' reliance on the rules of statutory construction and explain that the controversy brings to light again the primary limitation of the

²⁶ See *Lenhardt v. Basic Inst. of Tech., Inc.*, 55 F.3d 377, 381 (8th Cir. 1995) (interpreting Missouri Human Rights Act).

²⁷ See *Morrison*, 108 F.3d at 444 (declining to rule on whether supervisors are liable in individual capacities under Title VII); *Horney*, 95 F. Supp. 2d at 33.

²⁸ Compare *Iacampo*, 929 F. Supp. at 562 (holding supervisors personally liable under Title VII); *Ruffino*, 908 F. Supp. at 1019; and *Weeks*, 871 F. Supp. at 515 (same) with *Horney*, 95 F. Supp. 2d at 33 (rejecting individual liability of supervisors under Title VII); *Meara*, 27 F. Supp. 2d at 288 (same); and *Chatman*, 973 F. Supp. at 228 (same).

²⁹ See *Iacampo*, 929 F. Supp. at 562; *Ruffino*, 908 F. Supp. at 1019; *Weeks*, 871 F. Supp. at 515.

³⁰ See *Horney*, 95 F. Supp. 2d at 33; *Meara*, 27 F. Supp. 2d at 288; *Chatman*, 973 F. Supp. at 228.

³¹ Compare *Iacampo*, 929 F. Supp. at 562; *Ruffino*, 908 F. Supp. at 1019; and *Weeks*, 871 F. Supp. at 515; with *Horney*, 95 F. Supp. 2d at 33; *Meara*, 27 F. Supp. 2d at 288; and *Chatman*, 973 F. Supp. at 228.

³² See *infra* notes 202–288 and accompanying text.

³³ See *Miller*, 991 F.2d at 583; *Busby*, 931 F.2d at 772.

³⁴ See *Llewellyn*, *supra* note 16, at 401; *Posner*, *supra* note 15, at 805–06.

³⁵ See *infra* notes 43–87 and accompanying text.

³⁶ See *infra* notes 88–201 and accompanying text.

rules.³⁷ Part III argues that the better reasoned view is that, under Title VII, there is no individual liability for supervisors and that a plaintiff-employee's sole remedy is against his or her employer.³⁸ Application of the rules of statutory construction provides more than one "right" answer.³⁹ Moreover, the legislative history concerning sexual harassment in general and Title VII's "and any agent clause," in particular, is completely lacking.⁴⁰ As a result, support for my conclusion is based largely on a common sense evaluation of the current problem of sexual harassment in the workplace, the resources available to combat it, and the language and structure of Title VII's remedial framework.⁴¹ I conclude that expanding Title VII's reach to include liability for individual supervisors is unwarranted.⁴²

I. A BRIEF SUMMARY OF SEXUAL HARASSMENT UNDER TITLE VII

Title VII provides that it is unlawful for employers to fail to hire or fire anyone because of their sex.⁴³ In addition, Title VII makes it ille-

³⁷ See Llewellyn, *supra* note 16, at 401; Posner, *supra* note 15, at 805-06.

³⁸ See *infra* notes 202-287 and accompanying text.

³⁹ Llewellyn, *supra* note 16, at 401; Posner, *supra* note 15, at 805-06.

⁴⁰ The principal aim of Title VII's drafters was to prohibit race discrimination by employers against African Americans and that the inclusion of "sex" in the statute was a eleventh-hour tactical move by opponents to prevent Title VII's enactment. See, e.g., Thomas C. Kohler, *The Employment Relation and Its Ordering at Century's End: Reflections on Emerging Trends in the United States*, 41 B.C. L. REV. 103, 115-16 (1999). This explains the lack of legislative history on the subject of sex discrimination in general and sexual harassment in particular. See *id.* Because of the lack of legislative history, much of the substantive law concerning discrimination because of sex has come from the courts. See *id.* ("[t]he prohibition against sexual discrimination was a last-minute addition to [Title VII] by its legislative opponents, who had hoped that its inclusion would result in the statute's defeat. Despite the addition of the new category and the lack of any debate about its scope and meaning, the amended version of Title VII quickly was passed and became law. Bereft of legislative history to guide it, the interpretation of Title VII's prohibition of sexual discrimination has posed some considerable challenges for the judiciary."); see also *Meritor*, 477 U.S. at 63 ("[t]he prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives . . . the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex'") citing 110 Cong.Rec. 2577-2584 (1964); *Tomka*, 66 F.3d at 1323 (dissenting opinion).

⁴¹ Courts have not relied exclusively on the rules of statutory construction to support their decisions. See, e.g., *Miller*, 991 F.2d at 587 (analyzing Title VII's structure to determine Congressional intent); *Horney*, 95 F. Supp. 2d at 33-36 (same). Indeed all courts look to the language and structure of Title VII as well. See McGrath, *supra* note 7, at 133-140.

⁴² See *infra* notes 201-88 and accompanying text.

⁴³ See 42 U.S.C. § 2000e-2(a)(1) (1994). Specifically, section 2000e-2(a)(1) provides, "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with

gal for an employer to discriminate against anyone with regard to compensation, terms, conditions or privileges because of his or her sex.⁴⁴ The term employer is defined in Title VII as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person"⁴⁵ Early on, courts held that Title VII's prohibition against sex discrimination encompassed only disparate treatment such as an employer's refusal to hire or promote employees into positions for which they were otherwise qualified because of their sex.⁴⁶ More recently, however, federal courts have interpreted Title VII to prohibit sexual harassment in the workplace.⁴⁷

Generally, sexual harassment may be defined as a type of employment discrimination that includes unwelcome sexual advances, requests for sex and other sexual conduct prohibited by federal or state law.⁴⁸ In its decisions, the United States Supreme Court has recognized two categories of sexual harassment: *quid pro quo* and hostile work environment.⁴⁹ *Quid pro quo* sexual harassment occurs when a job applicant or employee suffers a tangible adverse employment action for refusing the sexual advances of her employer or supervisor.⁵⁰ A tangible adverse employment action includes not only decisions that affect the hiring and promotion of employees, but also the reassignment of employees to less desirable tasks.⁵¹ In contrast, hostile work environment sexual harassment occurs when employees are subjected to abusive behavior in the workplace "because of" their sex.⁵² For a hostile work environment to exist, the harassment must be

respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." *Id.*

⁴⁴ See *id.* at § 2000e-2(a)(2).

⁴⁵ 42 U.S.C. § 2000e(b).

⁴⁶ See *Manhart v. City of Los Angeles*, 435 U.S. 702, 702 (1978); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971) (rejecting married female applicant but imposing no marital requirements on men is prohibited discrimination).

⁴⁷ See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 752 (1998); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64-67 (1986).

⁴⁸ See BLACK'S LAW DICTIONARY 1375 (6th ed. 1969); see also *Ellerth*, 524 U.S. at 752; *Meritor*, 477 U.S. at 64-67; .

⁴⁹ See *Ellerth*, 524 U.S. at 752; *Meritor*, 477 U.S. at 64-67.

⁵⁰ See *Ellerth*, 524 U.S. at 752; *Meritor*, 477 U.S. at 65.

⁵¹ See 42 U.S.C. § 2000e-2(a)(1); *Faragher v. City of Boca Raton*, 524 U.S. 775, 790 (1998).

⁵² See *Meritor*, 477 U.S. at 64-68.

sufficiently severe or pervasive to alter the terms and conditions of employment.⁵³

To prevail in a *quid pro quo* sexual harassment case, plaintiffs must demonstrate that they suffered tangible adverse employment actions that result from their rejection of sexual advances made by their employer or the employer's agent.⁵⁴ When an agent of the employer, such as a supervisor, inflicts a tangible adverse employment action on an employee for rejecting a sexual advance, courts have determined that the employer is vicariously liable for the supervisor's actions.⁵⁵ In other words, the acts of the supervisor are imputed to the employer and legal responsibility for the supervisor's actions rests with the employer.⁵⁶

In contrast, hostile work environment claims involve no tangible adverse employment action.⁵⁷ In a hostile work environment case, plaintiffs can prevail by proving that they were subjected to harassing conduct that altered the terms and conditions of their employment.⁵⁸ To be actionable, the conduct must be unwelcome, sufficiently severe or pervasive to alter a term or condition of employment and "because of" sex.⁵⁹ Whether conduct is unwelcome is determined by subjective factors.⁶⁰ For example, an employee's voluntary participation or acceptance of offensive conduct does not mean that the conduct was welcome; however, evidence that the employee invited and joined in the conduct probably would bar an employee's claim of hostile work environment.⁶¹ Further, whether harassment is sufficiently severe or pervasive is determined by looking at the totality of the circumstances.⁶² The totality of the circumstances includes factors such as the frequency of the discriminatory conduct, its severity, whether the conduct is physically threatening or humiliating or a mere offensive utterance and whether the conduct unreasonably interferes with an employee's work performance.⁶³ Finally, the discriminating conduct

⁵³ See *Harris v. Forklift Sys. Inc.*, 510 U.S. 10, 21 (1993).

⁵⁴ See *Ellerth*, 524 U.S. at 752; *Meritor*, 477 U.S. at 64-68.

⁵⁵ See *Faragher*, 524 U.S. at 802-03.

⁵⁶ See *id.*

⁵⁷ See *id.* at 786.

⁵⁸ See *Harris*, 510 U.S. at 21-23.

⁵⁹ See *Faragher*, 524 U.S. at 790; *Ellerth*, 524 U.S. at 752; *Oncale v. Sundowner Offshore Serv. Inc.*, 523 U.S. 75, 78 (1998); *Harris*, 510 U.S. at 21; *Meritor*, 477 U.S. at 64.

⁶⁰ See *Meritor*, 477 U.S. at 68.

⁶¹ See *id.*

⁶² See *Harris*, 510 U.S. at 22.

⁶³ See *id.* at 23.

must be "because of" sex.⁶⁴ Courts have found gender-specific harassment, unwelcome conduct of a sexual nature and conduct motivated by sexual desire to be "because of" sex.⁶⁵

In 1986, the Supreme Court first recognized hostile work environment sexual harassment in *Meritor Savings Bank v. Vinson*.⁶⁶ In *Meritor*, the Supreme Court held that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex created a hostile or abusive work environment.⁶⁷

The Court rejected explicitly the contention that, to prevail, plaintiffs must show a tangible economic effect on their employment condition.⁶⁸ The Court reasoned that the language of Title VII is not limited to "economic" or "tangible" discrimination.⁶⁹ Rather, the phrase "terms, conditions, or privileges of employment" in Title VII demonstrates that Congress's purpose in enacting Title VII was to prohibit a broad spectrum of workplace disparate treatment based on sex.⁷⁰ Thus, severe or pervasive sexual harassment could affect the terms and conditions of a person's employment just as severely as other forms of discrimination.⁷¹

The Supreme Court in *Meritor* did not address what conduct is sufficiently "severe" or "pervasive" to transform the workplace into a hostile work environment.⁷² In 1993, in *Harris v. Forklift Systems, Inc.*, however, the Supreme Court held that Title VII is violated when the workplace is permeated by discriminatory intimidation, ridicule and

⁶⁴ See 42 U.S.C. § 2000e-2(a)(1); *Oncale*, 523 U.S. at 80.

⁶⁵ See *Oncale*, 523 U.S. at 80.

⁶⁶ See 477 U.S. at 64-65.

⁶⁷ See *id.* at 73.

⁶⁸ See *id.* at 64-65.

⁶⁹ See *id.* at 64-67.

⁷⁰ See *id.* at 64.

⁷¹ See *Meritor*, 477 U.S. at 64. The Supreme Court's rationale in holding that sexually hostile work environments violated Title VII paralleled the Court of Appeals for the Fifth Circuit's rationale in *Rogers v. EEOC*. See *id.* at 65-68; *Rogers v. EEOC*, 454 F.2d 234, 234 (5th Cir. 1971). In *Rogers*, the Fifth Circuit became the first court to hold that racial discrimination could create a discriminatory work environment. See *Rogers*, 454 F.2d at 238. The plaintiff in *Rogers* was Hispanic and claimed that her employer's discriminatory service to Hispanic customers created an offensive work environment for employees. See *id.* The Fifth Circuit based its reasoning on the relevant language of Title VII which states: "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . ." *Id.*

⁷² See *Meritor*, 477 U.S. at 57; *Harris*, 510 U.S. at 21-24.

insult that is sufficiently severe or pervasive to alter the conditions of a victim's employment and create an abusive working environment.⁷³

The Court determined that whether a work environment is "hostile" or "abusive" depends upon a number of factors including the frequency of the discriminatory conduct, its severity, whether the conduct is physically threatening or humiliating and whether the conduct unreasonably interferes with an employee's work performance.⁷⁴ Furthermore, the Court determined that whether the harassment seriously affected the worker's psychological well-being or had led her to suffer injury was not necessary to a finding of actionable sexual harassment.⁷⁵

Neither *Meritor* nor *Harris* addressed definitively the question as to what circumstances the employer is liable for its employees' discriminatory conduct.⁷⁶ In 1986, in *Faragher v. City of Boca Raton*, the Supreme Court addressed directly the issue of employer liability for the actions of its employees.⁷⁷ In *Faragher*, the Supreme Court held that an employer is vicariously liable for actionable discrimination caused by a supervisor with immediate or successively higher authority over the employee-victim.⁷⁸ Further, the Court held that the employer's liability in a hostile work environment case, where no tangible employment action is taken, is subject to an employer's affirmative defense.⁷⁹ If the employer proves that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior and that the plaintiff-employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise, then the employer is not liable.⁸⁰ The Court reasoned that providing the employer with an affirmative defense strikes a balance between the interests of the employer and the employee-victim.⁸¹ On the one hand, the Court recognized strict vicarious liability in quid pro quo cases to protect employees from tan-

⁷³ See 510 U.S. at 21-24.

⁷⁴ See *id.* at 23.

⁷⁵ See *id.* at 21.

⁷⁶ See *Harris*, 510 U.S. at 17; *Meritor*, 477 U.S. at 7. Although the issue was raised in *Meritor*, the Supreme Court merely stated that Congress intended courts to consider common law agency principles in resolving this question. See *Meritor*, 477 U.S. at 72.

⁷⁷ See 524 U.S. at 775.

⁷⁸ See *id.* at 807.

⁷⁹ See *id.*

⁸⁰ See *id.*

⁸¹ See *id.* at 806-07.

gible adverse employment actions.⁸² On the other hand, the court recognized an affirmative defense for the employer in hostile work environment cases to encourage the employer to implement workplace policies prohibiting sexual harassment and also to encourage employee-victims to report incidents of sexual harassment to the employer.⁸³

The responsibility for defining sexual harassment under Title VII has generally fallen on the federal courts, especially since the Supreme Court's decisions in *Meritor*, *Harris* and *Faragher*.⁸⁴ Presently, employers, at least those employing fifteen or more employees, are on notice that their active participation in sexually discriminatory employment practices or failure to police sexually hostile work environments that violate Title VII will result in liability to employee-victims.⁸⁵ As a result, Title VII's objective of eliminating sexually discriminatory employment practices has been furthered substantially.⁸⁶ One question that remains open—at least in the First Circuit—is whether supervisors, who themselves do not employ fifteen or more employees, can be found personally liable for conduct that violates Title VII.⁸⁷

II. COURTS APPLY DIFFERENT RULES OF STATUTORY CONSTRUCTION TO EITHER ACCEPT OR REJECT INDIVIDUAL LIABILITY OF SUPERVISORS FOR SEXUAL HARASSMENT UNDER TITLE VII

Professor Karl N. Llewellyn thoroughly catalogued the rules of statutory construction in a 1950 law review article.⁸⁸ He also explained the primary limitation of their use in interpreting statutes.⁸⁹ His thesis was that, in any situation requiring the interpretation of a statute,

⁸² See *Faragher*, 524 U.S. at 806–07.

⁸³ See *id.*

⁸⁴ See *Faragher*, 524 U.S. at 775; *Harris*, 510 U.S. at 17; *Meritor*, 477 U.S. at 72.

⁸⁵ See *Faragher*, 524 U.S. at 775; *Harris*, 510 U.S. at 17; *Meritor*, 477 U.S. at 72.

⁸⁶ See *Faragher*, 524 U.S. at 775; *Harris*, 510 U.S. at 17; *Meritor*, 477 U.S. at 72.

⁸⁷ See *Morrison v. Carleton Woolen Mills, Inc.*, 108 F.3d 429, 444 (1st Cir. 1997) (refusing to decide whether Title VII imposes individual liability). Compare, e.g., *Iacampo v. Hasbro, Inc.*, 929 F. Supp. 562, 571–72 (D.R.I. 1996) (interpreting the clause to allow individual liability of supervisors); *Ruffino v. State Street Bank & Trust Co.*, 908 F. Supp. 1019, 1047–48 (D. Mass. 1995) (same); and *Weeks v. State of Maine*, 871 F. Supp. 515, 515 (D. Me. 1994) (same) with *Horney v. Westfield Gage Co.*, 95 F. Supp. 2d 29, 32–33 (D. Mass. 2000) (rejecting individual liability); *Meara v. Bennett*, 27 F. Supp. 2d 288, 288 (D. Mass. 1998) (same) and *Chatman v. Gentle Dental Ctr. of Waltham*, 973 F. Supp. 228, 236 (D. Mass. 1997) (same).

⁸⁸ See Llewellyn, *supra* note 16, at 401–06.

⁸⁹ See *id.* at 401.

there are at least two opposing rules.⁹⁰ When applied, the rules lead to different conclusions and there will always be at least two "correct" interpretations.⁹¹

Although the "and any agent" clause in Title VII's definition of employer is arguably ambiguous, Congress did not explicitly provide for individual liability of supervisors in either the original language of Title VII or in the 1991 Civil Rights Act.⁹² Furthermore, the United States Supreme Court has never considered the question of personal liability of supervisors under Title VII.⁹³ Because Title VII's prohibitions are directed to "employers," some courts have disagreed as to whether Title VII's definition of "employer" should be construed to mean that individual supervisors are "statutory employers" personally liable for violations of Title VII.⁹⁴

Title VII makes it unlawful for an "employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual [] because of such individual's race, color, religion, sex, or national origin."⁹⁵ Moreover, Title VII defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees" and "any agent of such a person."⁹⁶ Unfortunately, Title VII's drafters did not define further the term "agent," or explain the meaning and purpose of the "and any agent" clause.⁹⁷ Thus, courts have been forced to interpret the meaning of the "and any agent" clause.⁹⁸ All courts that have addressed this issue have relied at least in part on the rules of statutory construction to interpret

⁹⁰ See *id.*

⁹¹ See *id.* at 401-06; Posner, *supra* note 15, at 805-06.

⁹² See 42 U.S.C. § 2000e(b) (1994). The 1991 Civil Rights Act amended Title VII by providing compensatory and punitive damages for violations of Title VII. See 42 U.S.C. § 1981a(b) (1994). Congress found that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace." *Id.*

⁹³ See *Grant v. Lone Star Co.*, B.L., 21 F.3d 649, 649 (5th Cir. 1994).

⁹⁴ See 42 U.S.C. § 2000e(b); compare, e.g., *Iacampo v. Hasbro, Inc.*, 929 F. Supp. 562, 571-72 (D.R.I. 1996); *Ruffino v. State Street Bank & Trust Co.*, 908 F. Supp. 1019, 1047-48 (D. Mass. 1995); and *Weeks v. State of Maine*, 871 F. Supp. 515, 515 (D. Me. 1994) with *Meara v. Bennett*, 27 F. Supp. 2d 288, 288 (D. Mass. 1998) and *Chatman v. Gentle Dental Cir. of Waltham*, 973 F. Supp. 228, 236 (D. Mass. 1997).

⁹⁵ 42 U.S.C. § 2000e-2(a)(1).

⁹⁶ *Id.* at § 2000e(b).

⁹⁷ See *id.*

⁹⁸ See *Wathen v. Gen'l Elec. Co.*, 115 F.3d 400, 405 (6th Cir.1996); *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1077-78 (3rd Cir. 1996); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir. 1995); *Grant*, 21 F.3d at 649; *Miller v. Maxwells' Int'l Inc.*, 991 F.2d 583, 587 (9th Cir. 1993).

the "and any agent" clause and decide whether supervisors may be sued under Title VII in their individual capacities.⁹⁹

A. Most Federal Appellate Courts Apply Rules of Construction to Reject Individual Liability of Supervisors for Sexual Harassment Under Title VII.

Whether the drafters included the "and any agent" clause to allow agents of the employer, such as supervisor-employees, to be held individually liable for their conduct initially caused much disagreement among federal appellate courts.¹⁰⁰ Today, however, there is almost complete consensus.¹⁰¹ The list of federal appellate courts that have rejected, or have reversed earlier decisions allowing individual liability under Title VII for supervisors—who are not themselves employers of fifteen or more employees—includes the Courts of Appeals for the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh and D. C. Circuits.¹⁰² Only the Courts of Appeals for the First and Eighth Circuits have not ruled definitively on the issue of individual liability of supervisors under Title VII.¹⁰³

Many courts that have rejected individual liability recognize that finding supervisors personally liable under Title VII is not completely implausible because Title VII's "and any agent" clause is vague or ambiguous.¹⁰⁴ Nevertheless, these courts have rejected individual liability for supervisors finding, almost uniformly, that Title VII's statutory scheme indicates clearly that Congress intended employers—not individual employees—to be the proper defendants in Title VII lawsuits.¹⁰⁵

⁹⁹ See, e.g., *Tomka*, 66 F.3d at 1313–14 ("the plain meaning of a statute is normally controlling, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters . . . [i]n such cases, it is the intentions of the legislators, rather than the strict language, that controls.").

¹⁰⁰ See *Morrison v. Carleton Woolen Mills, Inc.*, 108 F.3d 429, 444 (1st Cir. 1997); *Wathen*, 115 F.3d at 405; *Sheridan*, 100 F.3d at 1077–78; *Tomka*, 66 F.3d at 1313; *Grant*, 21 F.3d at 649; *Miller*, 991 F.2d at 587; *Paroline v. Unisys Corp.*, 879 F.2d 100, 100 (4th Cir.1989); *Iacampo*, 929 F. Supp. at 571–72; *Ruffino*, 908 F. Supp. at 1047–48; *McGrath*, *supra* note 7, at 133.

¹⁰¹ See *Horney v. Westfield Gage Co.*, 95 F. Supp. 2d 29, 33 (D. Mass. 2000); *Wyss v. Gen'l Dynamics Corp.*, 24 F. Supp. 2d 202, 204 (D.R.I. 1998).

¹⁰² See *Lissau v. Southern Food Serv., Inc.*, 159 F.3d 177, 180 (4th Cir. 1998); *Wathen*, 115 F.3d at 403; *Sheridan*, 100 F.3d at 1077–78; *Haynes v. Williams*, 88 F.3d 898, 899–901 (10th Cir. 1996); *Williams v. Banning*, 72 F.3d 552, 554 (7th Cir. 1995); *Tomka*, 66 F.3d at 1313; *Gary v. Long*, 59 F.3d 1391, 1399 (D.C. Cir. 1995); *Grant*, 21 F.3d at 651; *Miller*, 991 F.2d at 587; *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991).

¹⁰³ See, e.g., *Morrison*, 108 F.3d at 444; *Lenhardt v. Basic Inst. of Tech., Inc.*, 55 F.3d 377, 381 (8th Cir. 1995).

¹⁰⁴ See, e.g., *Tomka*, 66 F.3d at 1314.

¹⁰⁵ See *id.*; *McGrath*, *supra* note 7, at 133–40.

Generally, these courts list five reasons why imposing personal liability on individual supervisors under Title VII is improper.¹⁰⁶ First, supervisors are not subject to Title VII in their individual capacities because Title VII's definition of employer limits Title VII's application to persons who employ fifteen or more employees.¹⁰⁷ In other words, Title VII's plain language excludes individuals from liability unless they employ a certain number of employees.¹⁰⁸ Second, under the original version of Title VII, plaintiffs could only be awarded equitable relief and back pay—remedies typically provided by an employer, not by a supervisor in his or her individual capacity.¹⁰⁹ This indicates that Congress never contemplated individual liability because employers typically have provided these remedies.¹¹⁰ Third, the 1991 Civil Rights Act caps compensatory and punitive damages for violations of Title VII at specific limits based on the number of workers employed by the employer.¹¹¹ These caps also signal that Congress did not intend to provide for individual liability.¹¹² Because no cap is mentioned for individuals, it makes no sense that Congress would limit liability for employers based on the size of their operations and subject individuals to unlimited liability.¹¹³ Fourth, because the legislative history of Title VII indicates that no mention was made of individual agent liability, Congress did not contemplate individual liability when Title VII was enacted.¹¹⁴

Finally, all courts that reject individual liability for supervisors support their conclusion using the rules of statutory construction.¹¹⁵ Courts vary in their reliance on these rules.¹¹⁶ In deciding whether Title VII's "and any agent" clause imposes individual liability on su-

¹⁰⁶ See, e.g., *Tomka*, 66 F.3d at 1314; McGrath, *supra* note 7, at 133–40.

¹⁰⁷ See *Tomka*, 66 F.3d at 1314; McGrath, *supra* note 7, at 136.

¹⁰⁸ See *Tomka*, 66 F.3d at 1314; McGrath, *supra* note 7, at 136.

¹⁰⁹ See *Tomka*, 66 F.3d at 1314–15; McGrath, *supra* note 7, at 137–38.

¹¹⁰ See *Tomka*, 66 F.3d at 1314–15; McGrath, *supra* note 7, at 137–38.

¹¹¹ See *Tomka*, 66 F.3d at 1315; McGrath, *supra* note 7, at 137–38.

¹¹² See *Tomka*, 66 F.3d at 1315; McGrath, *supra* note 7, at 137–38.

¹¹³ See 42 U.S.C. § 1981a(b)(3) (1994); see also *Tomka*, 66 F.3d at 1315; McGrath, *supra* note 7, at 137–38.

¹¹⁴ See *Tomka*, 66 F.3d at 1314.

¹¹⁵ See *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 258 (5th Cir. 1999); *Lissau*, 159 F.3d at 180–83; *Wathen*, 115 F.3d at 400; *Haynes*, 88 F.3d at 901; *Williams*, 72 F.3d at 554; *Tomka*, 66 F.3d at 1314; *Gary*, 59 F.3d at 1399; *Smith v. Lomax*, 45 F.3d at 402, 402 (1995); *Miller*, 991 F.2d at 587; *Busby*, 931 F.2d at 772; *Ruffino*, 908 F. Supp. at 1047–48.

¹¹⁶ See, e.g., *Indest*, 164 F.3d at 258; *Lissau*, 159 F.3d at 177; *Wathen*, 115 F.3d at 400; *Haynes*, 88 F.3d at 901; *Williams*, 72 F.3d at 554; *Tomka*, 66 F.3d at 1314; *Gary*, 59 F.3d at 1399; *Smith*, 45 F.3d at 402; *Miller*, 991 F.2d at 587; *Busby*, 931 F.2d at 772; *Ruffino*, 908 F. Supp. at 1047–48.

pervisors, courts frequently recite one or more of the following rules of statutory interpretation: (1) a statute cannot go beyond its text; (2) if the language is plain and unambiguous it must be given effect; (3) when the literal interpretation [of statutory language] would lead to absurd or mischievous consequences or thwart the manifest purpose [of the statute] then plain and unambiguous language *need not* be given effect; (4) if inadvertently inserted or if repugnant to the rest of the statute, words or clauses may be rejected as surplusage; and (5) rules of grammar will be disregarded where strict adherence would defeat [the] purpose [of the statute].¹¹⁷

If the drafters of Title VII did not intend the "and any agent" clause to create individual liability for employees such as supervisors, then what does the "and any agent" clause mean?¹¹⁸ Those courts rejecting individual liability under Title VII typically explain the "and any agent" clause as merely incorporating the doctrine of respondeat superior into the statute: conduct by a supervisor that violates Title VII will be imputed to the employer who will be legally responsible.¹¹⁹

For example, in 1993, in *Miller v. Maxwell's International, Inc.*, the Ninth Circuit Court of Appeals held that liability did not extend to individual employees for their violations of Title VII.¹²⁰ The Ninth Circuit stated summarily: "[t]he obvious purpose of this [agent] provision was to incorporate respondeat superior liability into the statute."¹²¹ Furthermore, the Ninth Circuit reasoned that Title VII's "statutory scheme" indicates that Congress did not intend to hold supervisors directly liable because the plain language of Title VII limits employer liability to those with fifteen or more employees.¹²² Here, the Ninth Circuit relied heavily on the rules of statutory interpretation to support its assertion.¹²³ Additionally, the court found that Congress's purpose in establishing this fifteen-employee floor was to avoid burdening small employers with the costs of employment discrimination litigation.¹²⁴ From this finding, the Ninth Circuit con-

¹¹⁷ See *Tomka*, 66 F.3d at 1314-15; *Ruffino*, 908 F. Supp. at 1047-48.

¹¹⁸ See *Tomka*, 66 F.3d at 1313-15.

¹¹⁹ See *id.* at 1313; McGrath, *supra* note 7, at 136.

¹²⁰ 991 F.2d at 587.

¹²¹ *Id.*

¹²² See *id.*

¹²³ See *id.* at 587-88. The Ninth Circuit relied on the rules of statutory construction which state: one starts [their analysis] with the [plain] language of the statute, a statute cannot go beyond its text and if the language is plain and unambiguous it must be given effect. See *id.*

¹²⁴ See *id.* at 587.

cluded that "it is inconceivable that Congress intended to allow civil liability to run against individual employees" who would presumably be more greatly burdened by the costs associated with defending allegations of employment discrimination under Title VII than would small employers.¹²⁵

Similarly, in 1995, in *Tomka v. Seiler Corp.*, a split panel of the Second Circuit Court of Appeals held that three supervisors could not be held personally liable for sexual harassment under Title VII.¹²⁶ Although the Second Circuit's decision recognized that a narrow and literal reading of Title VII's "and any agent" clause suggested that individual agents could be liable as statutory employers, the court rejected such a narrow reading.¹²⁷ The court found that such a reading conflicted with Congress's clear intent that Title VII was addressed to employers, not individuals.¹²⁸ Implicitly, the court used the rules of statutory construction to support its decision.¹²⁹ Specifically, the court relied on two rules.¹³⁰ First, plain and unambiguous statutory language *need not* be given effect when its literal interpretation would lead to absurd or mischievous consequences or thwart the manifest purpose of the statute.¹³¹ Second, words or clauses may be rejected as surplusage if inadvertently inserted or if repugnant to the rest of the statute.¹³² As proof of Congress's intent to limit Title VII liability to employers, the Second Circuit cited Title VII's statutory scheme and remedial provisions which exempt employers with less than fifteen employees.¹³³ Because an individual supervisor could never be an employer with fifteen or more employees, the court found that Title VII simply does not impose individual liability upon supervisors.¹³⁴ Moreover, the Second Circuit found that the "and any agent" language in Title VII's definition of employer should be interpreted as a simple expression of respondeat superior: discriminatory actions taken by an employer's agent create legal liability for the employer.¹³⁵

¹²⁵ See *Miller*, 991 F.2d at 587.

¹²⁶ See 66 F.3d at 1317.

¹²⁷ See *id.* at 1314.

¹²⁸ See *id.* at 1313-15.

¹²⁹ See *id.*

¹³⁰ See *id.*

¹³¹ See *Tomka*, 66 F.3d at 1313-15.

¹³² See *id.* at 1314-15.

¹³³ See *id.*

¹³⁴ See *id.* at 1314.

¹³⁵ See *id.* at 1313-15.

More recently, in 1996, in *Haynes v. Williams*, the Court of Appeals for the Tenth Circuit held that a supervisor could not be personally liable under Title VII.¹³⁶ The Tenth Circuit reasoned that Title VII's structure and remedial scheme indicated that suits against individuals are inappropriate and contrary to Congress's intent in enacting Title VII.¹³⁷ Specifically, the Tenth Circuit cited to the 1991 Civil Rights Act's caps on compensatory and punitive damages as further indication that Congress did not intend individual liability under Title VII because Congress included no cap for individuals.¹³⁸ That omission, the Court reasoned, implied that Congress did not consider individuals liable.¹³⁹ Congress provided damage caps to avoid burdening small entities with litigation costs.¹⁴⁰ If Congress protected small entities with limited resources from liability, it is inconceivable that Congress intended to allow civil liability to run against individual employees.¹⁴¹

B. Federal District Courts in the First Circuit Disagree as to Whether Supervisors May Be Sued as Individuals under Title VII for Sexual Harassment

Over the past five years, the prevailing view among federal circuit courts of appeal is that Title VII imposes no individual liability on supervisors for sexual harassment.¹⁴² Despite this growing consensus, the First Circuit Court of Appeals has not ruled on this issue and federal district courts within the First Circuit are split.¹⁴³ Some courts have held that supervisors can be sued in their individual capacities

¹³⁶ See 88 F.2d at 899 ("Under Title VII, suits against individuals must proceed in their official capacity; individual capacity suits are inappropriate. The relief granted under Title VII is against the employer, not individual employees whose actions would constitute a violation of the Act. We think 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.").

¹³⁷ See *id.* at 899-901.

¹³⁸ See *id.* at 900-01.

¹³⁹ See *id.*

¹⁴⁰ See *id.*

¹⁴¹ See *Haynes*, 88 F.2d at 900-01.

¹⁴² See *id.* at 899 (collecting cases); see also McGrath, *supra* note 7, at 133-34 (same).

¹⁴³ See *Morrison*, 108 F.3d at 444 (refusing to decide whether Title VII imposes individual liability); *Horney*, 95 F. Supp. 2d at 32-33 (collecting cases and rejecting individual liability); *Meara*, 27 F. Supp. 2d at 288 (same); *Chatman*, 973 F. Supp. at 228 (same); *Ia-campo*, 929 F. Supp. at 562 (same); *Ruffino*, 908 F. Supp. at 101 (allowing individual liability under Title VII); *Weeks*, 871 F. Supp. at 515 (same); McGrath, *supra* note 7, at 133-134 (collecting cases and calling for the First Circuit Court of Appeals to resolve the controversy over individual liability of supervisors for sexual harassment under Title VII).

for sexual harassment under Title VII.¹⁴⁴ According to these courts, Congress intended the "and any agent" clause in Title VII to reach supervisors in their individual capacities.¹⁴⁵ Because supervisors are common law agents empowered by the employer to make economic decisions such as hiring, promotion and firing that affect other employees under their control, they are statutory "employers."¹⁴⁶ As a result, they may be held jointly and severally liable for conduct that violates Title VII.¹⁴⁷ Generally, courts provide three reasons for interpreting Title VII to impose personal liability on supervisors for sexual harassment.¹⁴⁸ First, a literal reading of the "and any agent" clause's plain language indicates clearly and unambiguously that Congress intended supervisors who qualify as agents of the employer to be personally liable.¹⁴⁹ Second, Title VII's broad remedial purpose is best served by reading the "and any agent" clause to provide for joint and several liability because the threat of individual liability deters supervisors directly.¹⁵⁰ Third, a narrow reading of the "and any agent" clause reduces it to mere surplusage.¹⁵¹ This violates the longstanding rule of statutory construction that every word and clause of a statute must be given effect.¹⁵²

Throughout their opinions, courts imposing individual liability on supervisors under Title VII rely for support on the rules of statutory construction.¹⁵³ Specifically, these courts rely—either implicitly or explicitly—on the following rules:

[t]o effect its purpose a statute may be implemented beyond its text;
the language of remedial statutes will be liberally construed;
and

¹⁴⁴ See *Wyss*, 24 F. Supp. 2d at 204; *Ruffino*, 908 F. Supp. at 1019; *Weeks*, 871 F. Supp. at 515.

¹⁴⁵ See, e.g., *Ruffino*, 908 F. Supp. at 1047-49.

¹⁴⁶ See *id.*

¹⁴⁷ See *Tomka*, 66 F.3d at 1318-24 (dissenting opinion).

¹⁴⁸ See *id.*; see also *Wyss*, 24 F. Supp. 2d at 204; *Ruffino*, 908 F. Supp. at 1047-49; *Weeks*, 871 F. Supp. at 515.

¹⁴⁹ See *Tomka*, 66 F.3d at 1318-24 (dissenting opinion); *Ruffino*, 908 F. Supp. at 1047-49.

¹⁵⁰ See *Tomka*, 66 F.3d at 1318-24 (dissenting opinion); *Ruffino*, 908 F. Supp. at 1047-49; *Weeks*, 871 F. Supp. at 515.

¹⁵¹ See *Ruffino*, 908 F. Supp. at 1047-49.

¹⁵² See *id.* at 1047.

¹⁵³ See *id.* 1047-49.

if language is plain and unambiguous it must be given effect.¹⁵⁴

For example, in 1994, in *Weeks v. Maine*, the United States District Court for the District of Maine held that supervisors could be personally liable under Title VII.¹⁵⁵ In *Weeks*, a tax examiner in the State of Maine's Bureau of Taxation Enforcement Office sued her employer and two of her former supervisors.¹⁵⁶ She claimed that the two supervisors retaliated against her—in violation of Title VII—for filing sex discrimination complaints against them.¹⁵⁷ The District Court held that the supervisors could be personally liable under Title VII.¹⁵⁸ The court reasoned that if supervisors could not be sued in their individual capacities, then they would not be sufficiently deterred by threat of dismissal or discipline by the employer from engaging in conduct violative of Title VII.¹⁵⁹ The court opined that this lack of deterrence would undermine Title VII's "expansive" remedial purpose: "eradicating the evils of employment discrimination."¹⁶⁰ Explicitly, the Court's opinion relied on the following rules of statutory construction: [t]o effect its purpose a statute may be implemented beyond its text, and the language of remedial statutes will be liberally construed.¹⁶¹

Frequently, those federal courts that have imposed personal liability on supervisors under Title VII cite to the dissenting opinion in *Tomka v. Seiler Corp.*¹⁶² There, the dissent argued that an "employer's agent" could be held personally liable for discriminatory acts under Title VII.¹⁶³ The dissent reasoned that the plain language of Title VII allowed for personal liability because Title VII specifically defined "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a per-

¹⁵⁴ See *Indest*, 164 F.3d at 258; *Lissau*, 159 F.3d at 177; *Wathen*, 115 F.3d at 400; *Sheridan*, 100 F.3d 1061 at 1077-78; *Haynes*, 88 F.3d at 901; *Williams*, 72 F.3d at 554; *Tomka*, 66 F.3d at 1313; *Gary*, 59 F.3d at 1399; *Smith*, 45 F.3d at 402; *Miller*, 991 F.2d at 587; *Busby*, 931 F.2d at 772; *Horney*, 95 F. Supp. 2d at 33; *Wyss*, 24 F. Supp. 2d at 204; *Ruffino*, 908 F. Supp. at 1019; *Weeks*, 871 F. Supp. at 515; Llewellyn, *supra* note 16, at 400 (listing rules).

¹⁵⁵ See 871 F. Supp. at 517.

¹⁵⁶ See *id.* at 516.

¹⁵⁷ See *id.*

¹⁵⁸ See *id.* at 517.

¹⁵⁹ See *id.*

¹⁶⁰ *Weeks*, 871 F. Supp. at 517 ("shielding workplace supervisors fails to further the expansive remedial goal of Title VII. . .").

¹⁶¹ See *id.*

¹⁶² See 66 F.3d at 1318 (dissenting opinion); see also *Wyss*, 24 F. Supp. 2d at 205.

¹⁶³ See *Tomka*, 66 F.3d at 1318.

son."¹⁶⁴ The dissent based its argument on the rules of statutory interpretation.¹⁶⁵ Specifically, it found that the rules required a literal reading of the statutory language.¹⁶⁶ The dissent argued that Title VII's plain language unambiguously provided for joint and several liability: successful plaintiffs could recover all relief provided for by Title VII against either the employer or any agent of the employer.¹⁶⁷ Furthermore, the dissent found that, in limiting the term "agent" in Title VII to merely incorporate the doctrine of respondeat superior, the majority read the statute too narrowly.¹⁶⁸ According to the dissent, a narrow reading of the "and any agent" clause conflicted with Congress's avowed desire that Title VII be construed broadly, consistent with its remedial purpose—ending discrimination in the workplace.¹⁶⁹ Again, the dissent relied upon the rules of statutory interpretation and construction to support its conclusion.¹⁷⁰

Two months after the *Tomka* decision in 1995, the United States District Court for the District of Massachusetts held that supervisors could be sued in their individual capacities under Title VII in *Ruffino v. State Street Bank and Trust Company*.¹⁷¹ In that case, a corporate manager sued her employer and five supervisors alleging hostile work environment sexual harassment and retaliation.¹⁷² The supervisors filed motions for summary judgment with the court, arguing that they could not be sued in their individual capacities under Title VII.¹⁷³ The court denied their motions for summary judgment.¹⁷⁴ In reaching this conclusion, the court rejected explicitly the Ninth Circuit's reasoning in *Miller* that the "and any agent" clause was meant to incorporate the doctrine of respondeat superior.¹⁷⁵ The court found that the plain meaning of Section 2000e(b) provided for joint and several liability

¹⁶⁴ See *id.* at 1318–19.

¹⁶⁵ See *id.*

¹⁶⁶ See *id.*

¹⁶⁷ See *id.*

¹⁶⁸ See *Tomka*, 66 F.3d at 1318–19.

¹⁶⁹ See *id.*

¹⁷⁰ See *id.* at 1319 ("I dispute [the majority's] reading [of the statute] primarily because I believe it violates two independent canons of statutory construction."). In *Tomka*, the dissent was based in part on the rules of statutory construction which state: [t]o effect its purpose a statute may be implemented beyond its text and the language of remedial statutes will be liberally construed. See *id.*

¹⁷¹ See 908 F. Supp. at 1047–48.

¹⁷² See *id.* at 1027–29.

¹⁷³ See *id.* at 1047.

¹⁷⁴ See *id.*

¹⁷⁵ See *id.* at 1048.

holding that both employers, as entities, and their agents, as individuals, are liable for violations of Title VII.¹⁷⁶ Relying for support on the rule of statutory interpretation which requires that every word and clause must be given effect, the court found that the Ninth Circuit's interpretation would reduce the "and any agent" clause to surplusage.¹⁷⁷ Implicitly, the court found that this interpretation would clearly violate the rules of statutory construction and, therefore, held that the "and any agent" clause meant that anyone who qualified as an agent of a statutory employer could be held personally liable for violating Title VII.¹⁷⁸

More recently, in 1998, in *Wyss v. General Dynamics Corporation*, the United States District Court for the District of Rhode Island held that supervisors were subject to individual liability under Title VII.¹⁷⁹ In *Wyss*, the plaintiff sued her employer and her two immediate supervisors alleging sex discrimination and retaliation in violation of Title VII.¹⁸⁰ Subsequently, the plaintiff's supervisors filed motions to dismiss with the court arguing that they could not be sued under Title VII in their individual capacities.¹⁸¹ Denying their motions, the court held that the employee-supervisors were subject to personal liability under Title VII.¹⁸² Referring to the dissent in *Tomka* as "the best reasoned and most comprehensive opinion written on the subject," the court relied heavily on that opinion's analysis and on the rules of statutory construction to support its holding.¹⁸³ Applying the rules of statutory interpretation, the court stated that it had to look first to Title VII's plain language.¹⁸⁴ The court cited a "long-standing view of statutory construction . . . grounded upon a jurisprudential interest in the separation of federal powers under the Constitution," that courts should not look beyond the plain language of a statute for its meaning, if the plain language of the statute is clear and unambiguous.¹⁸⁵ According to the court, to do so would amount to judicial usurpation of legislative power.¹⁸⁶ Looking to Title VII's definition of employer,

¹⁷⁶ See *Ruffino*, 908 F. Supp. at 1048.

¹⁷⁷ See *id.* at 1047-48.

¹⁷⁸ See *id.*

¹⁷⁹ See 24 F. Supp. 2d at 205.

¹⁸⁰ See *id.* at 203.

¹⁸¹ See *id.*

¹⁸² See *id.* at 205.

¹⁸³ See *id.*

¹⁸⁴ *Wyss*, 24 F. Supp. 2d at 205-06.

¹⁸⁵ See *id.*

¹⁸⁶ See *id.*

the court found that the "and any agent" clause was an unambiguous statement providing joint and several liability for violations of Title VII.¹⁸⁷ Furthermore, the court found no internal conflict within Title VII's language that would require another interpretation.¹⁸⁸ In addition, the court reasoned that this interpretation best served Title VII's broad remedial purpose of discouraging discrimination.¹⁸⁹ Here, implicitly, the court applied the rule of statutory interpretation that remedial statutes should be interpreted broadly to effect their purpose.¹⁹⁰

The court criticized the argument that it was inconceivable Congress would cap damages on small employers in the 1991 Civil Rights Act's amendments to Title VII and not mention caps on individuals if it had contemplated individual liability under Title VII.¹⁹¹ The Court found it logical, even likely, that Congress would protect small companies without providing caps on damages for individual violators of Title VII.¹⁹² Thus, the court found that individual supervisors are liable under Title VII.¹⁹³ Here, the court invoked another rule of construction: a court should not look for an "implication" of congressional intent and should not infer intent from silence.¹⁹⁴ Furthermore, the court disputed the contention that the remedies available to successful plaintiffs under the original Title VII—back pay and equitable relief—indicated that Congress did not intend for individuals to be personally liable because these remedies are more readily provided by employers.¹⁹⁵ The court found this reasoning dubious because individuals could just as easily be ordered to pay back wages and be ordered to comply with court ordered injunctions to refrain from discriminatory practices.¹⁹⁶

By contrast, other federal district courts within the First Circuit have rejected individual Title VII liability of supervisors for sexual harassment.¹⁹⁷ The most recent example is *Horney v. Westfield Gage*

¹⁸⁷ See *id.* at 206.

¹⁸⁸ See *id.*

¹⁸⁹ Wyss, 24 F. Supp. 2d at 205.

¹⁹⁰ See *id.* at 209; Llewellyn, *supra* note 16, at 402.

¹⁹¹ See Wyss, 24 F. Supp. 2d at 209.

¹⁹² See *id.*

¹⁹³ See *id.*

¹⁹⁴ See *id.*

¹⁹⁵ See *id.* at 204.

¹⁹⁶ See Wyss, 24 F. Supp. 2d at 204.

¹⁹⁷ See *Horney*, 95 F. Supp. 2d at 33; *Meara*, 27 F. Supp. 2d at 288; *Chatman*, 973 F. Supp. at 228.

Company.¹⁹⁸ In that case, the court granted a supervisor's motion to dismiss for failure to state a claim holding that there is no individual supervisor liability under Title VII.¹⁹⁹ The court relied in part on the rule of statutory construction that the interpretation of a statute must begin with its plain language and end there if the language is unambiguous.²⁰⁰ The court also relied on the Ninth Circuit's reasoning in *Miller* and the Second Circuit's reasoning in *Tomka* concerning the language and remedial structure of Title VII.²⁰¹

III. THE RULES OF STATUTORY CONSTRUCTION ARE INSUFFICIENT TO RESOLVE THE DISPUTE AS TO WHETHER TITLE VII IMPOSES INDIVIDUAL LIABILITY ON SUPERVISORS FOR SEXUAL HARASSMENT

Courts' reliance on the rules of statutory construction to determine whether Title VII's "and any agent clause" provides for individual liability may mislead observers and practitioners into thinking that applying the rules is sufficient to resolve this dispute.²⁰² Even a cursory analysis of court opinions demonstrates that courts on both sides of this issue—those holding no individual liability and those holding supervisors personally liable—rely to a great extent on the rules of statutory construction to support their conclusions.²⁰³

¹⁹⁸ 95 F. Supp. 2d at 33.

¹⁹⁹ See *id.* A motion to dismiss is a request posed by the defendant to the court requesting that a plaintiff's complaint be dismissed because it does not state a claim for which the law provides a remedy. FED.R.CIVIL P. 12(b).

²⁰⁰ See *Horney*, 95 F. Supp. 2d at 33.

²⁰¹ See *id.*

²⁰² See Posner, *supra* note 15, at 805-07 ("Judicial opinions in America are less formalistic than they once were; courts are less prone to pretend that their conclusions follow by ineluctable logic from premises found in earlier cases, without any leavening of policy or common sense. But judicial opinions continue to pretend far more often than they should that the interpretation of statutes is the mechanical application of well understood interpretative principles—the canons [rules of statutory construction] to legislative materials."); see also Llewellyn, *supra* note 16, at 401.

²⁰³ See, e.g., *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 258 (5th Cir. 1999); *Lis-sau v. Southern Food Service, Inc.*, 159 F.3d 177, 180 (4th Cir. 1998); *Wathen v. General Elec. Co.*, 115 F.3d 400, 403-06 (6th Cir. 1997); *Sheridan v. E. I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1077-78 (3rd Cir. 1996); *Haynes v. Williams*, 88 F.3d 898, 899-901 (10th Cir. 1996); *Williams v. Banning*, 72 F.3d 552, 554-55 (7th Cir. 1995); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313-16 (2d Cir. 1995); *Gary v. Long*, 59 F.3d 1391, 1399 (D.C. Cir. 1995); *Grant v. Lone Star Co.*, 21 F.3d 649, 651-52 (5th Cir. 1994) *cert. denied* 513 U.S. 1015 (1994); *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993); *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991); *Wyss v. Gen'l Dynamics, Corp.*, 24 F. Supp. 2d 202, 204 (D.R.I. 1998); *Ruffino v. State Street Bank & Trust Co.*, 908 F. Supp. 1019, 1047-48 (D. Mass. 1995); *Weeks v. State of Maine*, 871 F. Supp. 515, 515 (D. Me. 1994).

Some opinions seem to suggest that the straightforward application of one or more rules of construction will lead unavoidably to the "right" conclusion.²⁰⁴ This implication depends on at least two assumptions—each of which may mislead practitioners and observers.²⁰⁵ The first assumption is that, in interpreting the meaning of statutory language, courts apply only the rules of statutory construction.²⁰⁶ The second assumption is that applying one or more of the rules leads mechanically to one "right" answer.²⁰⁷ The first assumption is misleading because, in reality, courts do not reach a particular result in interpreting a statute by applying only the rules of statutory construction.²⁰⁸ Even before looking to the "plain language" of the statute, all courts—whether consciously or subconsciously—consider Congress's purpose in enacting the statute, or the problem Congress sought to redress.²⁰⁹ The second assumption is misleading because, in any given situation calling for the interpretation of statutory language, there are at least two rules of statutory construction in direct opposition to each other that courts can select to reach different "right" answers.²¹⁰ For every rule or canon of statutory construction, there is another equally venerable but contradictory rule.²¹¹ For example, the rule "a statute cannot go beyond its text" can be contrasted with the rule "to effect its purpose a statute may be implemented beyond its text."²¹² There is never only one "right" way to interpret statutory language using the rules of statutory construction, there are always at least two.²¹³ For example, in *Ruffino*, *Weeks*, and *Wyss*, the courts implied that their decisions were based primarily on the rules of statutory construction; especially the rules which state:

no construction of a statute should be adopted if it makes words or clauses in the statute redundant or meaningless;
in interpreting a statute all words should be given effect; and

²⁰⁴ See, e.g., *Tomka*, 66 F.3d at 1319; *Ruffino*, 908 F. Supp. at 1048; Llewellyn, *supra* note 16, at 399–401; Posner, *supra* note 15, at 805–07.

²⁰⁵ See Llewellyn, *supra* note 16, at 399–401; Posner, *supra* note 15, at 805–07.

²⁰⁶ See Llewellyn, *supra* note 16, at 399–401; Posner, *supra* note 15, at 805–07.

²⁰⁷ See Llewellyn, *supra* note 16, at 399–401; Posner, *supra* note 15, at 805–07.

²⁰⁸ See Llewellyn, *supra* note 16, at 399–401; Posner, *supra* note 15, at 805–07.

²⁰⁹ See Llewellyn, *supra* note 16, at 399–401; Posner, *supra* note 15, at 805–07.

²¹⁰ See Llewellyn, *supra* note 16, at 399–401; Posner, *supra* note 15, at 805–07.

²¹¹ See Llewellyn, *supra* note 16, at 399–401; Posner, *supra* note 15, at 805–07.

²¹² See Llewellyn, *supra* note 16, at 399–401; Posner, *supra* note 15, at 805–07.

²¹³ See Llewellyn, *supra* note 16, at 399–401; Posner, *supra* note 15, at 805–07.

the language of remedial statutes will be liberally construed.²¹⁴

Explicitly, these courts found that interpreting the "and any agent" clause in Title VII's definition of "employer" to simply incorporate the doctrine of respondeat superior would reduce the clause to "mere surplusage."²¹⁵ The doctrine of respondeat superior, they argued, would be applied under common law principles even absent the "and any agent" clause.²¹⁶ As a result, the courts in *Ruffino*, *Wyss* and *Weeks* found this interpretation of the "and any agent" clause redundant and meaningless.²¹⁷ Such an interpretation would violate the statutory rules of construction that no interpretation of a statute should be adopted if it makes words or clauses in the statute redundant or meaningless, and the rule that all words of a statute should be given effect.²¹⁸

Further, the courts in *Ruffino* and *Wyss* found that the "and any agent" clause is unambiguous.²¹⁹ Thus, reference to anything other than the plain language of the "and any agent" clause is unnecessary.²²⁰ For these courts, there simply is no question that Congress meant supervisors, as agents with hiring and firing authority, to be liable.²²¹ Seemingly, to support their conclusion that supervisors are individually liable under Title VII, these courts would prefer to rely exclusively on the most powerful rule of statutory construction—a statute cannot go beyond its text.²²² This rule of statutory interpreta-

²¹⁴ See *Wyss*, 24 F. Supp. 2d at 204; *Ruffino*, 908 F. Supp. at 1047; *Weeks*, 871 F. Supp. at 516-17.

²¹⁵ See *Wyss*, 24 F. Supp. 2d at 204; *Ruffino*, 908 F. Supp. at 1047; *Weeks*, 871 F. Supp. at 516-17.

²¹⁶ See *Wyss*, 24 F. Supp. 2d at 204; *Ruffino*, 908 F. Supp. at 1047; *Weeks*, 871 F. Supp. at 516-17.

²¹⁷ See *Wyss*, 24 F. Supp. 2d at 204; *Ruffino*, 908 F. Supp. at 1047; *Weeks*, 871 F. Supp. at 516-17.

²¹⁸ See *Wyss*, 24 F. Supp. 2d at 204; *Ruffino*, 908 F. Supp. at 1047; *Weeks*, 871 F. Supp. at 516-17; Llewellyn, *supra* note 16, at 399-401; Posner, *supra* note 15, at 805-07.

²¹⁹ See *Wyss*, 24 F. Supp. 2d at 204; *Ruffino*, 908 F. Supp. at 1047.

²²⁰ See *Wyss*, 24 F. Supp. 2d at 204; *Ruffino*, 908 F. Supp. at 1047.

²²¹ See *Wyss*, 24 F. Supp. 2d at 204; *Ruffino*, 908 F. Supp. at 1047.

²²² See *Wyss*, 24 F. Supp. 2d at 204; *Ruffino*, 908 F. Supp. at 1047. This is the so-called Golden Rule of statutory interpretation, which has been stated as follows: "The general rule is perfectly well-settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which adduced the act in question, the mischief intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to

tion means that, in general, courts will consider extrinsic evidence such as legislative history, the structure of the act, and its purpose to interpret the statute's language only if the language is facially vague or ambiguous.²²³ Apparently, some courts would not look at anything beyond the words "and any agent" to determine the meaning of this clause.²²⁴ Thus, courts finding supervisors liable under Title VII arrive at their holdings seemingly through a mechanical application of one or more rules of statutory construction.²²⁵ Observers may be misled into thinking that supervisors are liable under Title VII because the rules of statutory construction demand this result.²²⁶

Similarly, courts finding no individual liability of supervisors under Title VII arrive at their holdings through an equally mechanical application of one or more rules of statutory construction.²²⁷ These courts, however, rely in most cases on conflicting rules.²²⁸ For example, in *Miller and Tomka*, the courts supported their rejection of individual liability for supervisors under Title VII by relying on opposing rules of statutory construction, such as:

Statutory language must not be given effect when the literal interpretation would lead to absurd or mischievous consequences or thwart the manifest purpose of the statute.²²⁹

it. . . . The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be referred to solve but not to create an ambiguity." See Kenneth J. Vandeveld, *Thinking Like a Lawyer, An Introduction to Legal Reasoning*, Westview 72 (Westview) (1996) (quoting *Hamilton v. Rathbone*, 175 U.S. 414, 420-21 (1899)).

²²³ See *id.*; cf. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 ("Courts must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.").

²²⁴ See *Wyss*, 24 F. Supp. 2d at 204; *Ruffino*, 908 F. Supp. at 1047.

²²⁵ See *Wyss*, 24 F. Supp. 2d at 204; *Ruffino*, 908 F. Supp. at 1047; Llewellyn, *supra* note 16, at 399-401; Posner, *supra* note 15, at 805-07.

²²⁶ See Llewellyn, *supra* note 16, at 399-401; Posner, *supra* note 15, at 805-08.

²²⁷ See, e.g., *Tomka*, 66 F.3d at 1213 ("The starting point in any statutory construction case, of course, is the language of the statute."); *Chatman*, 973 F. Supp. at 238 ("If the words are a clear expression of congressional intent, the inquiry need go no further."); Llewellyn, *supra* note 16, at 399-401; Posner, *supra* note 15, at 805-07.

²²⁸ See Llewellyn, *supra* note 16, at 399-401; Posner, *supra* note 15, at 805-07; compare, e.g., *Ruffino*, 908 F. Supp. at 1047-48 (every word and clause must be given effect) with *Tomka*, 66 F.3d at 1313-14 (if inadvertently inserted or if repugnant to the rest of the statute, words or clauses may be rejected as surplusage).

²²⁹ See *Tomka*, 66 F.3d at 1314; *Miller*, 991 F.2d at 587. This rule of statutory construction was stated most clearly in *Cartledge v. Miller*: "So read, plaintiff may be correct, but, [o]n the other hand, it is a commonplace that a literal interpretation of the words of a statute is not always a safe guide to its meaning and should be disregarded when it defeats the manifest purpose of the statute as a whole." 457 F. Supp. 1146, 1146 (S.D.N.Y. 1978) (Weinfeld, J.)

The courts in *Miller* and *Tomka* found that interpreting the "and any agent" clause to impose individual liability on supervisors was "inconceivable" to Title VII's drafters because the statute as originally enacted was addressed only to employers and provided remedies only employers could provide.²³⁰ Thus, the courts in *Miller* and *Tomka* relied on the rules of statutory construction to reject individual liability for supervisors as an "absurd" or "mischievous" result.²³¹ Observers may be misled into thinking that the rules of statutory construction demand this result.²³² They should be aware of the limitations of the rules of statutory construction.²³³ To avoid confusing practitioners and observers, Courts should rely less on the rules of statutory construction.²³⁴ Instead, courts' should rely more on an examination of Congress's purpose in enacting Title VII and the measures Congress selected to effect this purpose.²³⁵ By considering Congress's purpose and chosen measures—as evidenced by the language and structure of Title VII—it seems that the better reasoned view is that Congress did not intend to impose Title VII liability on individual supervisors for sexual harassment.²³⁶

It is true that when viewed on its face and in isolation from the rest of the statute, the "and any agent" clause suggests that individuals who qualify as agents of the employer are individually liable.²³⁷ Strict reliance on the rule of construction which states that a statute's language should be given effect if it is plain and unambiguous would lead to the conclusion that supervisors are liable because they are common law agents of the employer.²³⁸ Viewed in this way, it is not

(quoting *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (L. Hand)).

²³⁰ See *Tomka*, 66 F.3d at 1314; *Miller*, 991 F.2d at 587.

²³¹ See *Tomka*, 66 F.3d at 1314; *Miller*, 991 F.2d at 587.

²³² See *Indest*, 164 F.3d at 258; *Lissau*, 159 F.3d at 177; *Wathen*, 115 F.3d at 400; *Sheridan*, 100 F.3d 1061 at 1077-78; *Haynes*, 88 F.3d at 901; *Williams*, 72 F.3d at 554; *Tomka*, 66 F.3d at 1313; *Gary*, 59 F.3d at 1399; *Smith*, 45 F.3d at 402; *Miller*, 991 F.2d at 587; *Busby*, 931 F.2d at 772; *Wyss*, 24 F. Supp. 2d at 204; *Ruffino*, 908 F. Supp. at 1019; *Weeks*, 871 F. Supp. at 515; *Llewellyn*, *supra* note 16, at 399-401; *Posner*, *supra* note 15, at 805-07.

²³³ See *Llewellyn*, *supra* note 16, at 399-401; *Posner*, *supra* note 15, at 805-07.

²³⁴ See *Llewellyn*, *supra* note 16, at 399-401; *Posner*, *supra* note 15, at 805-07.

²³⁵ See, e.g., *Miller*, 991 F.2d at 587; *Posner*, *supra* note 15, at 805-07. As an alternative to using the rules of statutory construction to interpret a statute, Judge Posner suggests that a judge should "try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar." *Id.* at 817.

²³⁶ See, e.g., *Horney v. Westfield Gage Co.*, 95 F. Supp. 2d 29, 32-36 (D. Mass. 2000); *McGrath*, *supra* note 7, at 129-41; *Posner*, *supra* note 15, at 808.

²³⁷ See 42 U.S.C. § 2000e(b) (1994).

²³⁸ See *id.*; *Llewellyn*, *supra* note 16, at 401-05.

implausible to argue that the "and any agent" clause is independent from the first clause of the sentence and, therefore, plainly means that "agents" are themselves "statutory employers" answerable directly under Title VII's substantive sections.²³⁹ When viewed in light of Title VII's language and structure and Congress's purpose in enacting Title VII, however, this interpretation is untenable.²⁴⁰ Both Congress's purpose in enacting Title VII and the statute's language and structure indicate clearly that Congress meant only employers and not individual supervisors to be proper defendants in Title VII lawsuits.²⁴¹

As the courts said in *Miller*, *Tomka* and *Wathen*, the language and structure of Title VII, as originally enacted, indicate that Congress did not contemplate individual liability of supervisors for sexual harassment.²⁴² The prohibitive sections of Title VII are addressed to "employers."²⁴³ Title VII provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer [] to discriminate against any individual with respect to his [] terms, conditions, or privileges of employment, because of such individual's [] sex."²⁴⁴ Further, Title VII defines employer as "a person engaged in an industry affecting commerce who has fifteen or more employees"²⁴⁵ Seemingly, Congress limited Title VII liability to employers with 15 or more employees because employers have the most control over the workplace.²⁴⁶ Thus, Congress placed the burden of liability on those entities in the best possible position to effect change and eliminate discriminatory workplace practices to the greatest extent possible.²⁴⁷

In addition, Congress's passage of the 1991 Civil Rights Act without mention of individual liability confirms that Congress did not intend individual liability for supervisors under Title VII.²⁴⁸ The language of the 1991 Civil Rights Act indicates that Congress meant to limit liability under Title VII to "employers" and not extend liability to individual supervisors.²⁴⁹ If Congress had contemplated individual

²³⁹ See 42 U.S.C. § 2000e(b).

²⁴⁰ See, e.g., *Horney*, 95 F. Supp. 2d at 32-36; McGrath, *supra* note 7, at 129-41.

²⁴¹ See, e.g., *Horney*, 95 F. Supp. 2d at 32-36; McGrath, *supra* note 7, at 129-41.

²⁴² See *Wathen*, 115 F.3d at 400; *Tomka*, 66 F.3d at 1313; *Miller*, 991 F.2d at 587;

²⁴³ 42 U.S.C. § 2000e-2.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at § 2000e(b).

²⁴⁶ See *id.*

²⁴⁷ See *id.*

²⁴⁸ See 42 U.S.C. § 1981a(b)(1994); *Horney*, 95 F. Supp. 2d at 32-36; McGrath, *supra* note 7, at 137-38.

²⁴⁹ See 42 U.S.C. § 1981a(b)(1994); *Horney*, 95 F. Supp. 2d at 32-36; McGrath, *supra* note 7, at 137-38.

liability under Title VII for compensatory or punitive damages, it would have included individuals in the listing of limitations on damages and would have discontinued the exemption for small employers.²⁵⁰ Congress enacted the 1991 Civil Rights Act in part because it found that additional remedies were needed to deter employment discrimination.²⁵¹ To effect this purpose, Congress made compensatory and punitive damages available as additional remedies for violations of Title VII.²⁵² Before the Civil Rights Act was enacted, a court could order injunctive relief, such as reinstatement, or award back pay with interest on behalf of a successful Title VII plaintiff.²⁵³ Compensatory damages could include amounts for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish and loss of enjoyment of life.²⁵⁴ Punitive damages could be awarded under the 1991 Civil Rights Act to a plaintiff who shows that the defendant engaged in discrimination with "reckless indifference" or "malice."²⁵⁵ Importantly, though, Congress provided for limitations on the amounts of compensatory and punitive damages a plaintiff could be awarded.²⁵⁶ These limitations are based on the number of employees employed by the defendant.²⁵⁷ For example, employers employing between fourteen and one hundred and one employees can be liable to each plaintiff for a maximum amount of \$50,000 in compensatory and punitive damages.²⁵⁸ A defendant-employer employing more than 500 employees could be liable for a maximum of \$300,000.²⁵⁹ The 1991 Civil Rights Act does not address employers who employ less than fifteen employees because they are not subject to Title VII.²⁶⁰ Nor does the 1991 Civil Rights Act address explicitly the liability of individual employees for conduct that constitutes actionable employment discrimination.²⁶¹ This sliding scale of liability does not stipulate

²⁵⁰ See *Miller*, 991 F.2d at 587-88 & n. 2; *Horney*, 95 F. Supp. 2d at 32-36; McGrath, *supra* note 7, at 137-38.

²⁵¹ See 42 U.S.C. § 1981a(b).

²⁵² See *id.*

²⁵³ See *Horney*, 95 F. Supp. 2d at 32-36; McGrath, *supra* note 7, at 136-38.

²⁵⁴ See *Horney*, 95 F. Supp. 2d at 34-35; McGrath, *supra* note 7, at 137-38.

²⁵⁵ 42 U.S.C. § 1981a(b).

²⁵⁶ See *id.*; *Horney*, 95 F. Supp. 2d at 34-35; McGrath, *supra* note 7, at 137-38.

²⁵⁷ See *id.*; *Horney*, 95 F. Supp. 2d at 34-35; McGrath, *supra* note 7, at 137-38.

²⁵⁸ See *id.*; *Horney*, 95 F. Supp. 2d at 34-35; McGrath, *supra* note 7, at 137-38.

²⁵⁹ See 42 U.S.C. § 1981a(b).

²⁶⁰ See *Miller*, 991 F.2d at 587-88 & n. 2.

²⁶¹ See *id.*

an amount in cases where a plaintiff seeks to hold an individual supervisor liable.²⁶²

The enacted version of Title VII represents a compromise between competing—and compelling—interests.²⁶³ On the one hand, is the employers' prerogative to control their businesses and workplaces free from the interference of the courts acting as a super human resources department.²⁶⁴ On the other hand, of course, is the interest of equal opportunity in the workplace.²⁶⁵ Moreover, Title VII represents Congress's limited commitment of federal judicial resources to eliminate—to the greatest extent possible—discrimination in the workplace.²⁶⁶ The courts should respect Congress's limited commitment of federal judicial resources.²⁶⁷ Even if the current circumstances in the workplace demand otherwise, which they do not currently, Congress, not the courts, is the proper body empowered to address changed circumstances through statutory amendments.²⁶⁸

Congress could have made all employers, regardless of size, responsible for discriminatory workplace practices.²⁶⁹ Similarly, Congress could have made any "person" legally responsible for discriminatory workplace practices.²⁷⁰ Yet, Congress did not incorporate these more sweeping measures into the language of Title VII as it was enacted even though these measures would have been more effective in

²⁶² See *id.*

²⁶³ See Posner, *supra* note 15, at 819; see also *Association of Mexican-American Educators v. California*, 231 F.3d 572, 601 (9th Cir. 2000) (Kleinfeld, J., concurring in part and dissenting in part) ("Congress adopted [Title VII] after one of the great legislative battles of our time. [] The country suffered from massive direct and intentional race discrimination at that time. Considering the political challenge that [Title VII] posed for its advocates, and the skill and consumption of political capital it required . . . , we cannot assume that Congress would have gone any further than it did. Reading statutes as if they said what they do not say, in order to go further than the legislature did, vitiates careful legislative compromises.").

²⁶⁴ See *Keyes v. Secretary of the Navy*, 853 F.2d 1016, 1025 (1st Cir. 1988) (citing *Gray v. New England Telephone and Telegraph Co.*, 792 F.2d 251, 255 (1st Cir. 1986)) ("It is not enough [to recover under Title VII] for the plaintiff to show that the employer made an unwise business decision, or an unnecessary personnel move . . . or that the employer acted arbitrarily or with ill will.").

²⁶⁵ See, e.g., *Oncala v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 78(1998).

²⁶⁶ See 42 U.S.C. § 2000e et seq. (1994); *Association of Mexican-American Educators*, 231 F.3d at 601 ("Those who only got half a loaf from Congress frequently come to the federal courts for the other half, but their mail ought to be forwarded to Capitol Hill.").

²⁶⁷ See 42 U.S.C. § 2000e et seq.; *Association of Mexican-American Educators*, 231 F.3d at 601; Posner, *supra* note 15, at 819–22.

²⁶⁸ See, e.g., McGrath, *supra* note 7, at 141.

²⁶⁹ See 42 U.S.C. § 2000e et seq.

²⁷⁰ See *id.*

furthering the purpose of eliminating discriminatory workplace practices.²⁷¹ Instead, Congress immunized employers who employ less than fifteen employees in order to achieve a political compromise.²⁷² Through this compromise, Congress cut a wide swath through the ranks of employers who had either actively promoted or passively tolerated overtly discriminatory workplace practices.²⁷³ Congress did not, however, ensure the complete eradication of discrimination in employment because some workplaces were intentionally left uncovered by the statute.²⁷⁴

In *Meritor*, *Harris* and *Faragher*, the United States Supreme Court furthered Congress's purpose by interpreting Title VII to prohibit sexually hostile work environments.²⁷⁵ Certainly, pockets of sex-based discrimination still exist in workplaces throughout the country; however, unlike the situation before Title VII, it is the rare employer today who does not have and enforce workplace procedures designed to prevent and correct sexual harassment.²⁷⁶ Indeed, only employers who implement policies to detect and eliminate sexual harassment may successfully invoke the affirmative defense provided by the United States Supreme Court in *Ellerth* and *Faragher*.²⁷⁷ Employers who employ less than fifteen employees and are, therefore, not answerable under Title VII are deterred similarly, though perhaps not to the same degree, by state anti-discrimination and tort laws.²⁷⁸ We have paid for the benefit of less employment discrimination through the operation of Title VII in increased litigation in the federal courts and administrative filings with state anti-discrimination agencies and the EEOC.²⁷⁹ Today, employment discrimination litigation comprises almost ten percent of the federal court docket.²⁸⁰

²⁷¹ See *id.*

²⁷² See *id.*; *Association of Mexican-American Educators*, 231 F.3d at 601 ("If we do not respect the compromises legislators make, how shall they be induced to make them?"); Posner, *supra* note 15, at 819-22.

²⁷³ See 42 U.S.C. § 2000e et seq; *Faragher v. City of Boca Raton*, 524 U.S. 775, 790 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 17 (1993); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 62-70 (1986).

²⁷⁴ See 42 U.S.C. § 2000e(b).

²⁷⁵ See *Faragher*, 524 U.S. at 790; *Harris*, 510 U.S. 17; *Meritor*, 477 U.S. at 65.

²⁷⁶ See *Faragher*, 524 U.S. at 807; *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998).

²⁷⁷ See *Faragher*, 524 U.S. at 807; *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998).

²⁷⁸ See, e.g., MASS. GEN. LAWS ch. 151B § 4(5) (1996).

²⁷⁹ See Kohler, *supra* note 40, at 106.

²⁸⁰ See *id.*

The return on Congress's investment—harassment-free workplaces for the majority of employees—has been worth the expense. Allowing supervisors to be sued individually in the federal courts for violations of Title VII, however, would mean a significantly increased expense in terms of federal judicial resources.²⁸¹ Congress did not contemplate this level of commitment in 1965 when Title VII was enacted.²⁸² Moreover, in enacting Title VII, Congress did not intend to create a freestanding federal tort whereby individuals could be held liable directly.²⁸³ In fact, the Supreme Court has recognized that Congress intended a limited statutory scheme and did not intend to enact a "general civility code."²⁸⁴ Thus, allowing plaintiffs to sue workplace supervisors in their individual capacities represents an expansion of the field of sex discrimination litigation that Congress did not intend.²⁸⁵ Apparently, some courts have found that circumstances have changed significantly since 1965, warranting a expansion in the commitment of federal judicial resources to eradication sexual harassment of workers by supervisors.²⁸⁶ Even if this were an accurate description of the current environment, Congress and not individual federal district courts are the legislative body properly empowered to make this further commitment of limited resources.²⁸⁷ Limiting liability under Title VII to employers conserves scarce judicial resources and preserves the balance of power between the legislative and judicial branch.²⁸⁸

²⁸¹ See *id.*

²⁸² See, e.g., 42 U.S.C. § 2000e(b) (1994); *Association of Mexican-American Educators*, 231 F.3d at 601.

²⁸³ See, e.g., *Tomka*, 66 F.3d at 1316.

²⁸⁴ See, e.g., *Oncala*, 523 U.S. at 80.

²⁸⁵ See *id.*

²⁸⁶ See *Wyss*, 24 F. Supp. 2d at 204; *Ruffino*, 908 F. Supp. at 1019; *Weeks*, 871 F. Supp. at 515; see also *Llewellyn*, *supra* note 16, at 397 (noting that "the sense of the situation as seen by the court"—here the prevalence of sexual harassment in the workplace—affects the court's choice of techniques for interpreting statutes).

²⁸⁷ See *McGrath*, *supra* note 7, at 141; *Posner*, *supra* note 15, at 810.

²⁸⁸ See *McGrath*, *supra* note 7, at 141; *Posner*, *supra* note 15, at 810; see also *AIC Sec. Investigations, Ltd.*, 55 F.3d at 1282 ("The employment discrimination statutes have broad remedial purposes and should be interpreted liberally, but that cannot trump the narrow, focused conclusion we draw from the structure and logic of the statutes. . . . Congress has struck a balance between deterrence and societal cost, and we will not upset that balance.").

CONCLUSION

Court opinions interpreting the "and any agent" clause in Title VII's definition of "employer" rely excessively on the rules of statutory construction. Observers and practitioners may be mislead into thinking that applying the rules of construction is sufficient to resolve the dispute over individual liability of supervisors under Title VII. Instead, courts should emphasize Congress's purpose in enacting Title VII as evidenced by the entire statute's language and structure. Using this approach, the better reasoned view is that, in enacting Title VII, Congress's purpose was to eliminate discriminatory employment practices to the greatest extent possible using a limited commitment of federal judicial resources. The better reasoned view is that Congress and the United States Supreme Court in *Ellerth* and *Faragher* chose to use the employer to police its supervisors rather than hold supervisors individually liable. As a result, employers—not supervisors in their individual capacities—are the proper defendants in Title VII lawsuits.

SCOTT J. CONNOLLY