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Individual Liability of Supervisors for Sexual Harrassment Under Title VII: Courts' Reliance on the Rules of Statutory Construction

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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.

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-


\(^6\) 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).

bly ambiguous definition of the term "employer." 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 . . . ." It is this "and any agent clause" that has caused courts to disagree about whether supervisors can be sued in their individual capacities. Some courts interpret the "and any agent" as unambiguously providing for individual liability of supervisors. Supervisors are common law agents of the employer after all, they reason. 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. In other words, the clause ensures that employers will be held liable for the conduct of all of their agents, including supervisors.

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. 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

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_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.


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

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. This reliance has brought to light again the rules' primary limitation. For every rule, there is an equally valid but opposing rule which, when applied, will yield an opposite conclusion. "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. 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.

The United States Supreme Court has not considered the issue of individual liability under Title VII. There is, however, almost complete consensus on this issue among the federal circuit courts of appeal. 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. 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.


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., Tomka, 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. Indeed, the First Circuit Court of Appeals is the only federal appeals court that has refused to rule explicitly on the issue. Federal district courts within the First Circuit have disagreed on the question of individual liability for supervisors. Several district courts in the First Circuit allow supervisors to be sued in their individual capacities under Title VII. Other courts, however, have rejected such lawsuits.

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. 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. Simply stated, supervisors cannot be sued as individuals under Title VII. 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. Part I provides background for the reader concerning the history of sexual harassment. 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. 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

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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).
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; Bushy, 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. 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. Application of the rules of statutory construction provides more than one “right” answer. Moreover, the legislative history concerning sexual harassment in general and Title VII’s “and any agent clause,” in particular, is completely lacking. 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. I conclude that expanding Title VII’s reach to include liability for individual supervisors is unwarranted.

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. 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.
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 Merito, 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. 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 . . . ." 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. More recently, however, federal courts have interpreted Title VII to prohibit sexual harassment in the workplace.

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. In its decisions, the United States Supreme Court has recognized two categories of sexual harassment: *quid pro quo* and hostile work environment. *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. 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. In contrast, hostile work environment sexual harassment occurs when employees are subjected to abusive behavior in the workplace "because of" their sex. 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).
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).
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.
52 See *Meritor,* 477 U.S. at 64-68.
sufficiently severe or pervasive to alter the terms and conditions of employment.\textsuperscript{53}

To prevail in a \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{56}

In contrast, hostile work environment claims involve no tangible adverse employment action.\textsuperscript{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.\textsuperscript{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.\textsuperscript{59} Whether conduct is unwelcome is determined by subjective factors.\textsuperscript{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.\textsuperscript{61} Further, whether harassment is sufficiently severe or pervasive is determined by looking at the totality of the circumstances.\textsuperscript{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.\textsuperscript{63} Finally, the discriminating conduct

\textsuperscript{54} See Ellerth, 524 U.S. at 752; Meritor, 477 U.S. at 64–68.
\textsuperscript{55} See Faragher, 524 U.S. at 802–03.
\textsuperscript{56} See id.
\textsuperscript{57} See id. at 786.
\textsuperscript{58} See Harris, 510 U.S. at 21–23.
\textsuperscript{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.
\textsuperscript{60} See Meritor, 477 U.S. at 68.
\textsuperscript{61} See id.
\textsuperscript{62} See Harris, 510 U.S. at 22.
\textsuperscript{63} See id. at 23.
must be "because of" sex. Courts have found gender-specific harassment, unwelcome conduct of a sexual nature and conduct motivated by sexual desire to be "because of" sex.

In 1986, the Supreme Court first recognized hostile work environment sexual harassment in Meritor Savings Bank v. Vinson. 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.

The Court rejected explicitly the contention that, to prevail, plaintiffs must show a tangible economic effect on their employment condition. The Court reasoned that the language of Title VII is not limited to "economic" or "tangible" discrimination. 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. 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.

The Supreme Court in Meritor did not address what conduct is sufficiently "severe" or "pervasive" to transform the workplace into a hostile work environment. 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 id. at 64.
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.\textsuperscript{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.\textsuperscript{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 \textit{Meritor}, \textit{Harris} and \textit{Faragher}.\textsuperscript{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.\textsuperscript{85} As a result, Title VII's objective of eliminating sexually discriminatory employment practices has been furthered substantially.\textsuperscript{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.\textsuperscript{87}

\section*{II. \textbf{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.\textsuperscript{88} He also explained the primary limitation of their use in interpreting statutes.\textsuperscript{89} His thesis was that, in any situation requiring the interpretation of a statute,

\begin{itemize}
\item \textsuperscript{82} See \textit{Faragher}, 524 U.S. at 806-07.
\item \textsuperscript{83} See \textit{id.}
\item \textsuperscript{84} See \textit{Faragher}, 524 U.S. at 775; \textit{Harris}, 510 U.S. at 17; \textit{Meritor}, 477 U.S. at 72.
\item \textsuperscript{85} See \textit{Faragher}, 524 U.S. at 775; \textit{Harris}, 510 U.S. at 17; \textit{Meritor}, 477 U.S. at 72.
\item \textsuperscript{86} See \textit{Faragher}, 524 U.S. at 775; \textit{Harris}, 510 U.S. at 17; \textit{Meritor}, 477 U.S. at 72.
\item \textsuperscript{88} See \textit{Llewellyn, supra} note 16, at 401-06.
\item \textsuperscript{89} See \textit{id.} at 401.
there are at least two opposing rules. When applied, the rules lead
to different conclusions and there will always be at least two “correct”
interpretations.

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. Furthermore, the United
States Supreme Court has never considered the question of personal
liability of supervisors under Title VII. Because Title VII’s prohibi-
tions 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.

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.” 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.” Unfortunately, Title VII’s drafters did not define further the term “agent,”
or explain the meaning and purpose of the “and any agent” clause.
Thus, courts have been forced to interpret the meaning of the “and
any agent” clause. All courts that have addressed this issue have re-
lied 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.
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(c)(b); compare, e.g., Iacampo v. Hasbro, Inc., 929 F. Supp. 562,
Cir. of Waltham, 973 F. Supp. 228, 236 (D. Mass. 1997).
95 See 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—including 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.


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, 991 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. 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. In other words, Title VII's plain language excludes individuals from liability unless they employ a certain number of employees. 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. This indicates that Congress never contemplated individual liability because employers typically have provided these remedies. 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. These caps also signal that Congress did not intend to provide for individual liability. 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. 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.

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

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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 Id.; 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 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.
115 See 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].

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? 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.

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. The Ninth Circuit stated summarily: "[t]he obvious purpose of this [agent] provision was to incorporate respondeat superior liability into the statute." 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. Here, the Ninth Circuit relied heavily on the rules of statutory construction to support its assertion. 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. From this finding, the Ninth Circuit con-

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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

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125 See *Miller*, 991 F.2d at 587.
126 See *Tomka*, 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. 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. 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. That omission, the Court reasoned, implied that Congress did not consider individuals liable. Congress provided damage caps to avoid burdening small entities with litigation costs. 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.

**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. 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. Some courts have held that supervisors can be sued in their individual capacities

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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. at 899-901.

140 See id. at 900.

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); Mera, 27 F. Supp. 2d at 288 (same); Chatman, 973 F. Supp. at 228 (same); Incampo, 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. According to these courts, Congress intended the “and any agent” clause in Title VII to reach supervisors in their individual capacities. 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.” As a result, they may be held jointly and severally liable for conduct that violates Title VII. Generally, courts provide three reasons for interpreting Title VII to impose personal liability on supervisors for sexual harassment. 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. 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. Third, a narrow reading of the “and any agent” clause reduces it to mere surplusage. This violates the longstanding rule of statutory construction that every word and clause of a statute must be given effect.

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

- To effect its purpose a statute may be implemented beyond its text;
- the language of remedial statutes will be liberally construed; and

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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 ef-
fact.154

For example, in 1994, in Weeks v. Maine, the United States District Court for the District of Maine held that supervisors could be person-
ally 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 super-
visors 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 individ-
ual 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: “eradicat-
ing 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 li-
ability 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-

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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." The dissent based its argument on the rules of statutory interpretation. Specifically, it found that the rules required a literal reading of the statutory language. 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. 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. 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. Again, the dissent relied upon the rules of statutory interpretation and construction to support its conclusion.

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. In that case, a corporate manager sued her employer and five supervisors alleging hostile work environment sexual harassment and retaliation. The supervisors filed motions for summary judgment with the court, arguing that they could not be sued in their individual capacities under Title VII. The court denied their motions for summary judgment. 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. 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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{178}

More recently, in 1998, in \textit{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.\textsuperscript{179} In \textit{Wyss}, the plaintiff sued her employer and her two immediate supervisors alleging sex discrimination and retaliation in violation of Title VII.\textsuperscript{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.\textsuperscript{181} Denying their motions, the court held that the employee-supervisors were subject to personal liability under Title VII.\textsuperscript{182} Referring to the dissent in \textit{Tontka} 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.\textsuperscript{183} Applying the rules of statutory interpretation, the court stated that it had to look first to Title VII's plain language.\textsuperscript{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.\textsuperscript{185} According to the court, to do so would amount to judicial usurpation of legislative power.\textsuperscript{186} Looking to Title VII's definition of employer,

\begin{itemize}
\item \textsuperscript{176} See Ruffino, 908 F. Supp. at 1048.
\item \textsuperscript{177} See id. at 1047–48.
\item \textsuperscript{178} See id.
\item \textsuperscript{179} See 24 F. Supp. 2d at 205.
\item \textsuperscript{180} See id. at 203.
\item \textsuperscript{181} See id.
\item \textsuperscript{182} See id. at 205.
\item \textsuperscript{183} See id.
\item \textsuperscript{184} Wyss, 24 F. Supp. 2d at 205–06.
\item \textsuperscript{185} See id.
\item \textsuperscript{186} See id.
\end{itemize}
the court found that the "and any agent" clause was an unambiguous statement providing joint and several liability for violations of Title VII. Furthermore, the court found no internal conflict within Title VII's language that would require another interpretation. In addition, the court reasoned that this interpretation best served Title VII's broad remedial purpose of discouraging discrimination. Here, implicitly, the court applied the rule of statutory interpretation that remedial statutes should be interpreted broadly to effect their purpose.

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. The Court found it logical, even likely, that Congress would protect small companies without providing caps on damages for individual violators of Title VII. Thus, the court found that individual supervisors are liable under Title VII. 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. 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. 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.

By contrast, other federal district courts within the First Circuit have rejected individual Title VII liability of supervisors for sexual harassment. 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.
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. 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. 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.

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. 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.

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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.CIV.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.
Some opinions seem to suggest that the straightforward application of one or more rules of construction will lead unavoidably to the "right" conclusion. This implication depends on at least two assumptions—each of which may mislead practitioners and observers. The first assumption is that, in interpreting the meaning of statutory language, courts apply only the rules of statutory construction. The second assumption is that applying one or more of the rules leads mechanically to one "right" answer. 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. 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. 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. For every rule or canon of statutory construction, there is another equally venerable but contradictory rule. 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." There is never only one "right" way to interpret statutory language using the rules of statutory construction, there are always at least two. 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

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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.
the language of remedial statutes will be liberally construed.\textsuperscript{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."\textsuperscript{215} The doctrine of respondeat superior, they argued, would be applied under common law principles even absent the "and any agent" clause.\textsuperscript{216} As a result, the courts in Ruffino, Wyss and Weeks found this interpretation of the "and any agent" clause redundant and meaningless.\textsuperscript{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.\textsuperscript{218}

Further, the courts in Ruffino and Wyss found that the "and any agent" clause is unambiguous.\textsuperscript{219} Thus, reference to anything other than the plain language of the "and any agent" clause is unnecessary.\textsuperscript{220} For these courts, there simply is no question that Congress meant supervisors, as agents with hiring and firing authority, to be liable.\textsuperscript{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.\textsuperscript{222} This rule of statutory interpreta-

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

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

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

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

\textsuperscript{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.

\textsuperscript{219} See Wyss, 24 F. Supp. 2d at 204; Ruffino, 908 F. Supp. at 1047.

\textsuperscript{220} See Wyss, 24 F. Supp. 2d at 204; Ruffino, 908 F. Supp. at 1047.

\textsuperscript{221} See Wyss, 24 F. Supp. 2d at 204; Ruffino, 908 F. Supp. at 1047.

\textsuperscript{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
tation 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. Apparently, some courts would not look at anything beyond the words “and any agent” to determine the meaning of this clause. 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. Observers may be misled into thinking that supervisors are liable under Title VII because the rules of statutory construction demand this result.

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. These courts, however, rely in most cases on conflicting rules. For example, in Miller and Tonka, 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.

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. Vandevelde, Thinking Like a Lawyer, An Introduction to Legal Reasoning, Westview 72 (Westview) (1996) (quoting Hamilton v. Rathbone, 175 U.S. 414, 420-21 (1899)).

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.”).

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

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.


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.

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).

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.\textsuperscript{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.\textsuperscript{231} Observers may be misled into thinking that the rules of statutory construction demand this result.\textsuperscript{232} They should be aware of the limitations of the rules of statutory construction.\textsuperscript{233} To avoid confusing practitioners and observers, Courts should rely less on the rules of statutory construction.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{238} Viewed in this way, it is not

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

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

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

\textsuperscript{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; *Wess*, 24 F. Supp. 2d at 204; *Ruffino*, 908 F. Supp. at 1019; *Works*, 871 F. Supp. at 515; Llewellyn, supra note 16, at 399–401; Posner, supra note 15, at 805–07.


\textsuperscript{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.


\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{241}

As the courts said in \textit{Miller, Tomka} and \textit{Wathen}, the language and structure of Title VII, as originally enacted, indicate that Congress did not contemplate individual liability of supervisors for sexual harassment.\textsuperscript{242} The prohibitive sections of Title VII are addressed to “employers.”\textsuperscript{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.”\textsuperscript{244} Further, Title VII defines employer as “a person engaged in an industry affecting commerce who has fifteen or more employees . . . .”\textsuperscript{245} Seemingly, Congress limited Title VII liability to employers with 15 or more employees because employers have the most control over the workplace.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{249} If Congress had contemplated individual

\textsuperscript{239} See 42 U.S.C. § 2000e(b).
\textsuperscript{240} See, e.g., \textit{Horney}, 95 F. Supp. 2d at 32–36; McGrath, \textit{supra} note 7, at 129–41.
\textsuperscript{241} See, e.g., \textit{Horney}, 95 F. Supp. 2d at 32–36; McGrath, \textit{supra} note 7, at 129–41.
\textsuperscript{242} See \textit{Wathen}, 115 F.3d at 400; \textit{Tomka}, 66 F.3d at 1313; \textit{Miller}, 991 F.2d at 587;
\textsuperscript{244} \textit{Id.}
\textsuperscript{245} \textit{Id.} at § 2000e(b).
\textsuperscript{246} See \textit{id}.
\textsuperscript{247} See \textit{id}.
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. Congress enacted the 1991 Civil Rights Act in part because it found that additional remedies were needed to deter employment discrimination. To effect this purpose, Congress made compensatory and punitive damages available as additional remedies for violations of Title VII. 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. Compensatory damages could include amounts for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish and loss of enjoyment of life. 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." Importantly, though, Congress provided for limitations on the amounts of compensatory and punitive damages a plaintiff could be awarded. These limitations are based on the number of employees employed by the defendant. 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. A defendant-employer employing more than 500 employees could be liable for a maximum of $300,000. The 1991 Civil Rights Act does not address employers who employ less than fifteen employees because they are not subject to Title VII. Nor does the 1991 Civil Rights Act address explicitly the liability of individual employees for conduct that constitutes actionable employment discrimination. 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.
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.
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.
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.\textsuperscript{262}

The enacted version of Title VII represents a compromise between competing—and compelling—interests.\textsuperscript{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.\textsuperscript{264} On the other hand, of course, is the interest of equal opportunity in the workplace.\textsuperscript{265} Moreover, Title VII represents Congress's limited commitment of federal judicial resources to eliminate—to the greatest extent possible—discrimination in the workplace.\textsuperscript{266} The courts should respect Congress's limited commitment of federal judicial resources.\textsuperscript{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.\textsuperscript{268}

Congress could have made all employers, regardless of size, responsible for discriminatory workplace practices.\textsuperscript{269} Similarly, Congress could have made any "person" legally responsible for discriminatory workplace practices.\textsuperscript{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

\textsuperscript{262} See id.

\textsuperscript{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.").

\textsuperscript{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.").


\textsuperscript{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.").

\textsuperscript{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.

\textsuperscript{268} See, e.g., McGrath, supra note 7, at 141.

\textsuperscript{269} See 42 U.S.C. § 2000e et seq.

\textsuperscript{270} See id.
furthering the purpose of eliminating discriminatory workplace practices.\textsuperscript{271} Instead, Congress immunized employers who employ less than fifteen employees in order to achieve a political compromise.\textsuperscript{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.\textsuperscript{273} Congress did not, however, ensure the complete eradication of discrimination in employment because some workplaces were intentionally left uncovered by the statute.\textsuperscript{274}

In \textit{Meritor, Harris and Faragher}, the United States Supreme Court furthered Congress's purpose by interpreting Title VII to prohibit sexually hostile work environments.\textsuperscript{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.\textsuperscript{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 \textit{Ellerth} and \textit{Faragher}.\textsuperscript{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.\textsuperscript{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.\textsuperscript{279} Today, employment discrimination litigation comprises almost ten percent of the federal court docket.\textsuperscript{280}

\textsuperscript{271} See \textit{id.}
\textsuperscript{272} See \textit{id.}; \textit{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?"); \textit{Posner, supra} note 15, at 819–22.
\textsuperscript{274} See 42 U.S.C. § 2000e(b).
\textsuperscript{275} See \textit{Faragher}, 524 U.S. at 790; \textit{Harris}, 510 U.S. 17; \textit{Meritor}, 477 U.S. at 65.
\textsuperscript{279} See \textit{Kohler, supra} note 40, at 106.
\textsuperscript{280} See \textit{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. Congress did not contemplate this level of commitment in 1965 when Title VII was enacted. Moreover, in enacting Title VII, Congress did not intend to create a freestanding federal tort whereby individuals could be held liable directly. In fact, the Supreme Court has recognized that Congress intended a limited statutory scheme and did not intend to enact a "general civility code." 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. 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. 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. Limiting liability under Title VII to employers conserves scarce judicial resources and preserves the balance of power between the legislative and judicial branch.

281 See id.
283 See, e.g., Tomka, 66 F.3d at 1316.
284 See, e.g., Oncale, 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 misled 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