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AMBIGUITY SURROUNDING INDIVIDUAL SEXUAL HARASSMENT LIABILITY ON THE FEDERAL AND STATE LEVEL IN MASSACHUSETTS

I. INTRODUCTION

Whether a court will hold a defendant individually liable for sexual harassment is a highly contested area in employment litigation.¹ On the federal level, the circuit courts differ as to whether and to what extent, Title VII of the Civil Rights Act of 1964 ("Title VII") allows for recovery from an individual.² The United States Court of Appeals for the First Circuit (hereinafter "First Circuit") has not definitively decided the issue, while federal district courts in the circuit remain split.³

On the state level, Massachusetts General Laws Chapter 151B (hereinafter "Chapter 151B") prohibits sexual harassment or discrimination by an employer, by himself, or through his agent.⁴ In addition to the

¹ Robert Lukens, Comment, *Workplace Sexual Harassment and Individual Liability*, 69 TEMP. L. REV. 303, 303 (1996). See also Davida H. Isaacs, "Its Nothing Personal" — But Should It Be?: Finding Agent Liability for Violations of the Federal Employment Discrimination Statutes, 22 N.Y.U. REV. L. & Soc. Change 505, 508 (1996) (noting the issue's prevalence as evidenced by the number of recent articles on the topic).

² See, e.g., *Dici v. Commonwealth of Pennsylvania*, 91 F.3d 542, 552 (3d Cir. 1996) (finding an agent cannot be sued for damages in his individual capacity under Title VII); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1312 (2d Cir. 1995) (holding that individuals are not liable under the Title VII definition of employer); *Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1994) (imposing Title VII individual liability due to individual's exercising significant control over the plaintiff's employment conditions). Much of the controversy surrounding whether individuals may be held liable under Title VII regards the statutory definition of "employer." Robert Cavallaro, Note, *Corporate Buyer Beware: Deficiencies in Directors' and Officers' Insurance For Employment Practices Liability*, 26 HOFSTRA L. REV. 217, 231 (1997). 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." 42 U.S.C. § 2000e(b) (1994).

³ See, e.g., *Contreras-Bordallo v. Banco Bilbao Vizcaya De Puerto Rico*, 952 F. Supp. 72, 73 (D.P.R. 1997) (holding that supervisory employees may not be held liable under Title VII); *Iacampo v. Hasbro, Inc.*, 929 F. Supp. 562, 571-72 (D.R.I. 1996) (finding that supervisory employees may be individually liable under Title VII); *Ruffino v. State St. Bank & Trust Co.*, 908 F. Supp. 1019, 1047-48 (D. Mass. 1995) (stating that individuals may be subject to personal liability);

⁴ MASS. GEN. LAWS ch. 151B § 4(1)(1996). The statute provides in pertinent part that it is an unlawful employment practice:

statute's general employer liability, Chapter 151B also provides individual liability for aiding or abetting sexual harassment.⁵ The statute provides no guidance as to what conduct rises to the level of aiding and abetting harassment, nor has the Supreme Judicial Court of Massachusetts (hereinafter "SJC") addressed the issue. This lack of meaning afforded to the aiding and abetting statute left the United States District Court for the District of Massachusetts to interpret the state law through its supplemental jurisdiction in two recent cases.⁶

The current case law in Massachusetts regarding individual liability under both Title VII and Chapter 151B § 4(5) create unpredictability and unreliability for practitioners bringing and defending such claims. Part One of this article discusses the importance of the individual liability question and its practical implications. Part Two calls for the First Circuit to reach a decision regarding Title VII individual liability. This section examines the current Title VII case law in other circuits and opines that the First Circuit should fall in line with the majority of courts negating individual liability. Part Three explains the need for the SJC or the Massachusetts legislature to define the parameters of individual liability for aiding and abetting sexual harassment. This section addresses the recent Chapter 151B § 4(5) case law handed down by the United States District Court for the District of Massachusetts and outlines the court's seemingly faulty reasoning. Finally, Part Four concludes by suggesting that the ambiguity surrounding individual liability and the issue's importance to attorneys in the field, requires the First Circuit and the SJC to clarify the federal and state anti-discrimination statutes.

For an employer, by himself or through his agent, because of . . . sex . . . to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation, or in terms, conditions or privileges of employment, unless based on a bona fide occupational qualification. *Id.*

⁵ See MASS. GEN. LAWS ch. 151B § 4(5) (1996). This section provides that "it is unlawful for any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter or to attempt to do so." *Id.*

⁶ See *Chapin v. University of Mass.*, 977 F. Supp. 72, 79 (D. Mass. 1997) (deciding that mere inaction or failure to investigate, may rise to the level of aiding and abetting under the statute); *Morehouse v. Berkshire Gas Co.*, 989 F. Supp. 54, 61-62 (D. Mass. 1997) (finding that two factors must be present for inaction to give rise to liability). The *Morehouse* court implied from the *Chapin* decision that for liability to attach, an individual defendant must be "required to act under the circumstances" and must be "in a position to discipline the harassers and stop the conduct." *Morehouse*, 989 F. Supp. at 62.

II. PRACTICAL EFFECTS AND IMPLICATIONS

Several practical nuances surround the theory of individual liability for sexual harassment which reveal the importance to practitioners, for the SJC and the First Circuit to more clearly define the parameters of liability on the state and federal level.

A. Potential Conflict of Interest Between Employer and Individual

Whenever multiple parties are represented by one attorney or firm, the possibility of conflict arising exists.⁷ Although an employer usually prefers a united defense in such a case, conflicts are known to arise when the employer discovers that its employee was acting outside the scope of his employment.⁸ At this point, the employer will typically wish to assert that it is not liable for the employee's acts, thereby creating a conflict.⁹ Often these circumstances require that an attorney or firm withdraw due to discordant interests, making adequate representation of either party impossible.¹⁰ In this sense, clarity in the law regarding individual liability is required in order for attorneys defending discrimination claims to plan and strategize accordingly to avoid such conflicts.

B. Strategic Implications of Allowing Individual Liability

Plaintiffs often are well advised to name individual defendants in a sex discrimination suit to insure against a judgement-proof employer.¹¹ Small companies are sometimes likely to go bankrupt or defunct either voluntarily or involuntarily in order to make themselves judgement proof

⁷ Alan M. Koral & Walter Lucas, *Defending The Individual Management Party Under State Law*, in *LITIGATING EMPLOYMENT DISCRIMINATION CASES 1997*, at 235, 271 (PLI Lit. & Admin. Practice Course Handbook Series No. H4-5256 1997).

⁸ *Id.*

⁹ *Id.* Koral et al. note that *O'Reilly v. Executone of Albany, Inc.*, 522 N.Y.S.2d 724 (3d Dep't 1987) is representative of conflicts that arise in the representation of both employer and individual defendant in a sex discrimination case. *Id.* The law firm perceived a conflict because it learned that the employer intended to aver that even if its employee did discriminate, the employer possessed no prior knowledge of, nor did it acquiesce in the conduct. *Id.* at 275. The firm advised the individual to obtain separate counsel, but eventually was forced to seek a court order permitting withdrawal. *Id.* The court allowed this withdrawal, stating that the firm would not have afforded either client adequate representation because of the "discordant interests at trial." *Id.* (citing *O'Reilly* 522 N.Y.S. at 724).

¹⁰ See *Id.* (discussing practical conflict of interest problems) (citing *O'Reilly*, at 724).

¹¹ *Id.* at 280.

against a successful employment discrimination case.¹² In these cases, naming an individual defendant may be the easiest, or the only possible source of monetary damages.¹³

In addition, if individual liability is allowed, plaintiffs may use the naming of individuals in a complaint as a means of destroying federal diversity jurisdiction.¹⁴ The addition of non-diverse defendants will prevent an employer defendant from removing the case to federal court.¹⁵ In this practical sense, allowing individual liability may provide a useful tactic, as plaintiffs often favor state courts to federal courts in discrimination suits.¹⁶

Individual liability also may provide plaintiffs another litigation advantage in the form of a "fear factor."¹⁷ Individual defendants may be fearful about the cost of litigation and attorney's fees, the prospect of paying any damage award imposed on them, as well as an adverse judgement's effect on their career paths.¹⁸ This fear potentially may cause a defendant to influence an early settlement with all parties.¹⁹

Finally, the potential for individual liability in the employment context triggers a need for employers and individuals to invest in insurance policies covering acts of employment.²⁰ Some individual suits are covered under defendants' homeowners' insurance policies.²¹ Corporate Directors and Officers policies often cover employers and provide defense and indemnification for an employer in the case of an individual's negligent acts.²² To provide coverage against the more often alleged, intentional

¹² Alan M. Koral & Walter Lucas, *Defending The Individual Management Party Under State Law*, in *LITIGATING EMPLOYMENT DISCRIMINATION CASES 1997*, at 235, 280 (PLI Lit. & Admin. Practice Course Handbook Series No. H4-5256 1997).

¹³ *Id.*

¹⁴ *See Id.* (discussing forum shopping in the context of individual liability).

¹⁵ *Id.*

¹⁶ *Id.* Plaintiffs prefer state court because of the less stringent summary judgement practice, allowing more cases to proceed to trial. *Id.* In addition, state law is often more favorable to plaintiffs, elected judges may be more sympathetic to plaintiffs, and federal judges are sometimes more restrictive in their interpretation of statutory claims. *Id.*

¹⁷ Alan M. Koral & Walter Lucas, *Defending The Individual Management Party Under State Law*, in *LITIGATING EMPLOYMENT DISCRIMINATION CASES 1997*, at 235, 283 (PLI Lit. & Admin. Practice Course Handbook Series No. H4-5256 1997).

¹⁸ *Id.*

¹⁹ *Id.* at 284.

²⁰ *Id.*

²¹ *Id.*

²² Alan M. Koral & Walter Lucas, *Defending The Individual Management Party*

acts, more employers are purchasing Employment Practices Liability policies, which cover employers and employees against liability for negligent and intentional acts as well as other liabilities.²³

III. INDIVIDUAL LIABILITY UNDER TITLE VII

Neither Title VII nor its 1991 amendments explicitly address individual liability.²⁴ The debate revolves around the issue whether an individual fits the statutory definition of "employer" within Title VII, due to the statute's "and any agent" phraseology.²⁵ The federal courts adopt different approaches to answer the statutory question.²⁶ Some courts state that individual liability may attach, given the plain meaning of the statute.²⁷ Other federal courts interpret the "and any agent" provision to simply attach common law respondeat superior liability to the employer for the wrongful acts of its employees.²⁸ This issue, couched in the disparity noted above, as well as other statutory and policy arguments, once presented a clear circuit split.²⁹ More recently, many circuit courts previously

Under State Law, in *LITIGATING EMPLOYMENT DISCRIMINATION CASES* 1997, at 235, 285 (PLI Lit. & Admin. Practice Course Handbook Series No. H4-5256 1997).

²³ *Id.* See generally, Robert Cavallaro, Note, Corporate Buyer Beware: Deficiencies in Directors' and Officers' Insurance Policies for Employment Practices Liability, 26 *HOFSTRA L. REV.* 217, 231 (1997).

²⁴ 42 U.S.C. § 2000e 1 - 17(1994).

²⁵ See Cavallaro, *supra* Note 23, at 231. See also 42 U.S.C. § 2000e(1)a (1994) (setting out Title VII's statutory meaning of "employer"). The statute provides in pertinent part: "The term employer means a person engaged in an industry affecting trade or commerce who has fifteen or more employees . . . and agent of such a person." 42 U.S.C. § 2000e(1)a (1994).

²⁶ Cheryl L. Feutz, Note, *Statutory Construction and Judicial Policy-Making Impact Whether Title VII's Definition Of "Employer" Imposes Individual Liability on an Agent*, 62 *MO. L. REV.* 153, 155 (1997). Feutz notes that these approaches include analyzing the statute's plain language, the legislative purpose, and the resulting policy consequences in allowing or rejecting individual liability. *Id.*

²⁷ See *Ruffino v. State St. Bank & Trust Co.*, 908 F. Supp. 1019, 1047-48 (D. Mass. 1995) (deciding that foreclosing the possibility of agent liability reduces the "employer" definition to mere verbal surplusage). Courts which find individual liability from the plain meaning of the statute reason that the "and any agent" provision subjects both the employer and the individuals participating in the discrimination, to liability. Cavallaro, *supra* note 23, at 231.

²⁸ Cavallaro, *supra* note 23, at 231.

²⁹ See Scott B. Goldberg, Comment, *Discrimination By Managers and Supervisors: Recognizing Agent Liability Under Title VII*, 143 *U. PA. L. REV.* 571, 571 (1994) (noting

in favor of individual liability or inconsistent in its rulings regarding individual liability, overwhelmingly rejected Title VII individual liability claims.³⁰

the then-current circuit split).

³⁰ See Gregory M.P. Davis, Comment, *More Than a Supervisor Bargains For: Individual Liability Under the Americans with Disabilities Act and Other Employment Discrimination Statutes*, 1997 WIS. L. REV. 321, 321 (1997). Currently, ten of the eleven circuits which have addressed the issue have rejected imposing individual liability under Title VII. *Chatman v. Gentle Dental Ctr. of Waltham*, 973 F. Supp. 228, 236 (1997). The Second Circuit ruled that supervisors are not individually liable under the Title VII definition of "employer." *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir. 1995). The Third Circuit held that an agent cannot be sued for damages in his individual capacity based on the great weight of authority from other jurisdictions. *Sheridan v. DuPont de Nemours & Co.*, 100 F.3d 1061, 1077-78 (3rd Cir. 1996). The Fifth Circuit also established the rule of no individual liability under Title VII. *Grant v. Lone Star Co.*, 21 F.3d 649, 652 (5th Cir. 1994), cert. denied, — U.S. —, 115 S.Ct. 574. The Sixth Circuit found that an employee may not be held individually liable for sex harassment claims under Title VII. *Wathen v. General Electric Co.* 115 F.3d 400, 405 (6th Cir. 1997). The Seventh Circuit, in analyzing a Title VII claim, held that "a supervisor does not, in his individual capacity, fall within Title VII's definition of employer." *Williams v. Banning*, 72 F.3d 552, 555 (7th Cir. 1995). Although the precise issue was not before the court, after reviewing numerous federal decisions, The Eighth Circuit indicated that "whatever the law of the jurisdictions may have been at one time, the more recent cases reflect a clear consensus on the issue before us: supervisors and other employees cannot be held liable under Title VII in their individual capacities." *Lenhardt v. Basis Inst. of Tech.*, 55 F.3d 377, 381 (8th Cir. 1995). The Ninth Circuit was one of the first circuits to hold that there is no individual liability under the federal anti-discrimination statutes. *Cavallaro*, *supra* note 23, at 233-34. The Ninth Circuit stated that individuals cannot be held liable for damages under Title VII. *Miller v. Maxwell's International, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993). The Tenth Circuit held that personal capacity suits against individual supervisors are inappropriate under Title VII. *Haynes v. Williams*, 88 F.2d 898, 900-01 (10th Cir. 1996). The Tenth Circuit also held that in a sexual harassment case, an individual in a supervisory position, with sufficient control over the employee, acts as the alter ego of the employer and it is the employer who is liable for the employment practices of the individual. *Sauers v. Salt Lake Cty.*, 1 F.3d 1122, 1125 (10th Cir. 1993). The Eleventh Circuit found that the relief granted under Title VII is against the employer, not the individual employee whose actions would constitute a violation of the act. *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991). The District of Columbia Circuit held that an agent cannot be sued for damages in his individual capacity. *Gary v. Long*, 59 F.3d 1391, 1399 (D.C. Cir. 1995). Potential individual liability under Title VII remains in the Fourth Circuit. The Fourth Circuit held in 1989, that "an individual qualifies as an 'employer' . . . if . . . she serves in a supervisory position and

The First Circuit has not clearly addressed the issue and remains the only federal circuit without a ruling.³¹ As noted above, federal district courts within the circuit are divided on the issue.³² The most recent district court cases, however, follow the majority of circuits in holding that individuals are not liable for discriminatory acts under Title VII.³³ Still, ambiguity persists, leaving practitioners without guidance during the initial strategic stages of litigation.³⁴ The First Circuit Court of Appeals, therefore, should resolve the conflict and follow the analysis employed in other circuits as well as that emerging within the federal district courts in the first circuit.

A. Arguments for Rejecting Title VII Individual Liability

1. Congress Intended "Agent" Provision to Incorporate Respondeat Superior Liability

The starting point in statutory interpretation is the language of the statute.³⁵ The plain meaning of a statute is controlling, "except in the rare

exercises significant control over the plaintiff's hiring, firing, or conditions of employment". *Paroline v. Unysis Corp.*, 879 F.2d 100, 104 (4th Cir. 1989). More recently though, the court held that an individual could not be sued as an "employer" under the similarly worded Age Discrimination in Employment Act (ADEA), but did not rule out the possibility of individual liability in other contexts. *See Birbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 513 (4th Cir. 1994).

³¹ *See Morrison v. Carleton Woolen Mills, Inc.*, 108 F.3d 429 (1st Cir. 1997) (declining to answer the question of Title VII individual liability).

³² *See, e.g., Contreras-Bordallo v. Banco Bilbao Vizcaya De Puerto Rico*, 952 F. Supp. 72, 73 (D.P.R. 1997) (holding that supervisory employees may not be held liable under Title VII); *Iacampo v. Hasbro, Inc.*, 929 F. Supp. 562, 571-72 (D.R.I. 1996) (finding that supervisory employees may be individually liable under Title VII); *Ruffino v. State St. Bank & Trust Co.*, 908 F. Supp. 1019, 1047-48 (D. Mass. 1995) (stating that individuals may be subject to personal liability under Title VII).

³³ *See Herrera v. Boyd Coating Co.*, 983 F. Supp. 49, 51 (D. Mass. 1997) (holding that individuals are not subject to liability in their personal capacity); *Danio v. Emerson College*, 963 F. Supp. 61, (D. Mass. 1997) (reasoning that imposing liability upon employees in their individual capacities would contradict congressional intent); *Chatman v. Gentle Dental Ctr. of Waltham*, 973 F. Supp. 228, 239 (D. Mass. 1997) (finding that an employee who does not otherwise qualify as an employer, cannot be held liable under Title VII). *But see Martin v. Tennford Weaving Co. Inc.*, Civil No. 96-328-P-C, 1997 WL 50469, *1 (D. Maine Jan. 28, 1997) (finding individual liability under Title VII).

³⁴ *See infra* Part I.

³⁵ *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2nd Cir. 1995) (citing *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985)).

cases [in which] the literal application of a statute will produce a result clearly at odds with the intentions of the drafters."³⁶ While some circuit courts interpreted Title VII's language to allow individual liability, most courts rule that the "and any agent" provision is a simple expression of respondeat superior liability.³⁷ These courts reason that Title VII is a rare case in which broader consideration of the statute is required.³⁸ While Title VII's plain meaning implies that an employer's agent is a statutory employee, further interpretation indicates that the statutory language does not comport with Congress' clearly expressed statutory intent.³⁹

2. Individual Liability Runs Contrary to Title VII's Statutory Scheme

The agent clause is part of a sentence in Title VII limiting liability to employers with fifteen or more employees.⁴⁰ This limitation represents Congress' intent to "strike a balance between the goal of eliminating discrimination in the workplace and protecting smaller employers."⁴¹ The United States Court of Appeals for the Ninth Circuit noted in *Miller v. Maxwell's Int'l, Inc.*⁴² that Congress limited Title VII so as not to burden small entities with the costs associated with litigating discrimination

³⁶ *Id.* (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

³⁷ *See, e.g.*, *Wathen v. General Electric Co.* 115 F.3d 400, 405 (6th Cir. 1997) (noting the obvious purpose of the "agent" provision was to impose respondeat superior liability); *Grant v. Lone Star*, 21 F.3d 649, 652 (5th Cir. 1994) (discussing the "agent" provision as incorporating respondeat superior liability into Title VII); *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993) (rejecting individual liability under Title VII). *But see* *Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1994) (holding that employees may be personally liable if exercising significant control).

³⁸ *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995).

³⁹ *Id.* The *Tomka* court found that individual liability was contrary to congressional intent as expressed by Title VII's statutory scheme and remedial provisions. *Id.* Specifically, the Second Circuit stated that Congress intended to limit Title VII liability to employer-entities with fifteen or more employees and that agent liability would create a result not contemplated by Congress. *Id.* *See Tomka*, 66 F.3d at 1314 (explaining Title VII's congressional intent). *See also infra* note 45 and accompanying text (examining congressional intent regarding individual liability under Title VII).

⁴⁰ *Id.* Title VII provides that: "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees . . ." 42 U.S.C. § 2000e (b) (1994).

⁴¹ David J. Hanus, Note, *Individual Supervisor Liability Under Title VII and the ADEA*, 45 DRAKE L. REV. 999, 1014 (1997) (citing *E.E.O.C. v. AIC Sec. Investigations Ltd.*, 55 F.3d 1276, 1281 (7th Cir. 1995)).

⁴² 991 F.2d 583, 588 (9th Cir. 1993).

claims.⁴³ In *Tomka v. Seiler Corp.*,⁴⁴ the court stated that it is "inconceivable" that Congress, concerned with protecting such small entities, would simultaneously allow civil liability to run against individual employees."⁴⁵ According to the same analysis, courts have stated that "incongruous results would occur if business owners employing, for example, ten employees are statutorily immune from suit, while a person who supervises the same number of people, in a company employing twenty or more persons, would be liable."⁴⁶

3. *Individual Liability Contradicts to Title VII's Remedial Provisions*

Prior to the Civil Rights Acts of 1991, Title VII recovery was limited to injunctive relief such as reinstatement and damages in the form of backpay.⁴⁷ These remedies are equitable and are most appropriately provided by employers, defined in the traditional sense of the word.⁴⁸ Thus, the recovery provisions in place at Title VII's inception imply that Congress did not contemplate individual liability when drafting Title VII.⁴⁹

The Civil Rights Act of 1991 adds compensatory and punitive damages to the remedies available to a victim of intentional discrimination.⁵⁰ Unlike reinstatement and backpay, money damages are the type normally

⁴³ *Id.* at 587.

⁴⁴ 66 F.3d 1295, 1314 (2d Cir. (1995)).

⁴⁵ *Id.* at 1314 (citing *Miller*, 991 F.2d at 587). The *Tomka* court also points out that the congressional floor debates on Title VII expressed that the cost of defending discrimination claims was a factor in deciding to include a minimum employee threshold, while there was a noticeable absence of mention of agent liability, implying that Congress did not contemplate individual agent liability under the statute. *Id.* (citing 110 CONG. REC. 10, 13092 (1964) (remarks of Sen. Cotton); 110 CONG. REC. 10, 13088 1964 (remarks of Sen. Humphrey); 110 CONG. REC. 10, 13092-93 (1964) (remarks of Sen. Morse)).

⁴⁶ Hanus, *supra* note 41, (citing *Birbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510 (4th Cir. 1994)).

⁴⁷ 42 U.S.C. § 2000e-5(g)(1) (1994)

⁴⁸ *Tomka*, 66 F.3d at 1314 (citing *Padway v. Palches*, 665 F.2d 965 (9th Cir. 1982)). *Tomka* goes on to note that one may argue, as the *Tomka* dissent did, that a supervisory employee with the power to hire and fire should be treated as an employer due to this power to reinstate and correct employment records. *Id.* at 1315. However, it is unlikely that Congress intended to subject agents to liability for reinstatement and backpay because Title VII speaks only of "agents," therefore, providing no basis for a distinction between agents with, versus agents without, the power to hire and fire. *Id.*

⁴⁹ Davis, *supra* note 30, at 336 (citing *E.E.O.C. v. AIC Sec. Investigations Ltd.*, 55 F.3d 1276, 1281 (7th Cir. 1995)).

⁵⁰ *Id.* See 42 U.S.C. § 1981a (b)3 (expanding the allowable damages under Title VII).

borne by individuals.⁵¹ Congress, however, calibrated the maximum allowable damage award according to the size of the employer without lifting the Title VII exemption for employers with less than fifteen employees.⁵² Given this limitation of damages, Congress apparently intended that only employer-entities could be liable for compensatory and punitive damages.⁵³ "If Congress envisioned individual liability . . . it would have included individuals in [the] litany of limitations and discontinued the exemption for small employers."⁵⁴

B. Arguments Raised in Favor of Individual Liability

While the arguments explained above represent the opinion held in the majority of circuits, it is appropriate to note the arguments in favor of a contrary result.

1. The Plain Meaning of Title VII Prohibits Interpreting the "Agent" Provision as Providing for Respondeat Superior

The dissenting opinion in *Tomka* found that "the express language of the statute permits individual liability under Title VII and sound jurisprudence counsels giving that statutory language its full effect."⁵⁵ Judge Parker stated that a reading of the "and any agent" provision as incorporating respondeat superior liability violates two independent canons of statutory construction.⁵⁶ First, Judge Parker wrote that such a reading re-

⁵¹ Davis, *supra* note 30, at 336.

⁵² *Id.* 42 U.S.C. 1981 § 1981a(b)(3) limitations provide:

The sum of the amount of compensatory damages awarded under this section . . . and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees . . . \$50,000; (B) in the case of a respondent who has more than 100 and fewer than 201 employees . . . \$100,000; (C) in the case of a respondent who has more than 200 and fewer than 501 employees . . . \$200,000; (D) in the case of a respondent who has more than 500 employees . . . \$300,000.

42 U.S.C. § 1981a (b) 3 (1994).

⁵³ *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995) (citing *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 588 (9th Cir. 1993)).

⁵⁴ *Id.* (quoting *Miller*, 991 F.2d at 588).

⁵⁵ *Tomka*, 66 F.3d at 1318 (Parker, J., dissenting).

⁵⁶ *Id.* at 1318. *But see id.* at 1316-17 (responding to Judge Parker's dissent). The majority pointed out that the U.S. Supreme Court implied that the "agent" clause does serve an independent purpose regarding the "scope of an employer's vicarious liability for the acts of its agents: namely, that an employer's liability should be based on common law agency principles." *Id.* (citing *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986)). The

duces the agent clause to mere surplusage because, in his view, the common law principle would apply to the act regardless of any express statutory inclusion.⁵⁷ Second, the *Tomka* dissent pointed out that the language of the statute must be the beginning point in a statutory construction case and that Title VII "speaks with such clarity, that there is no need to look beyond the statute."⁵⁸

2. *The Original and Amended Remedial Provisions of Title VII Imply Congressional Intent to Include Individual Liability*

As mentioned above, the original design of damage awards under Title VII limited plaintiffs' relief to backpay and other equitable relief such as reinstatement.⁵⁹ Proponents of individual liability argue that by changing the damages allowable under Title VII, through the passage of the Civil Rights Act of 1991, Congress intended to open the door to individual liability.⁶⁰

3. *Individual Liability's Necessity to Deter Employee Discrimination*

Some argue that since the primary goal of Title VII is to eliminate discrimination, individual liability is necessary to dissuade supervisors and other individuals from violating the act.⁶¹ In *AIC Security*, the Equal Em-

Tomka majority also reasoned its statutory analysis within the canons of statutory construction. See *supra* note 39 and accompanying text (discussing statutory intent).

⁵⁷ *Tomka*, 66 F.3d at 1319 (Parker, J., dissenting).

⁵⁸ *Id.* (Parker, J., dissenting). But see *supra* notes 39-40 and accompanying text (explaining the statute's plain meaning and congressional intent).

⁵⁹ See *supra* Part II.A.3 (explaining the difference in damage awards, both prior to and subsequent to the Civil Rights Act of 1991).

⁶⁰ See Davis, *supra* note 30, at 337 (discussing Title VII and its damages scheme's effect on individual liability). In *E.E.O.C. v. AIC Security*, the E.E.O.C. argued that the Civil Rights Act of 1991 negates the conclusion that Congress did not contemplate individual liability when it passed the anti-discrimination laws because compensatory and punitive damages are typical damages obtainable from individuals. *E.E.O.C. v. Aid Security*, 55 F.3d 1276, 1281 (7th Cir. 1995). The court, however, held that the Civil Rights Act of 1991 further shows Congressional intent to exclude individual liability under Title VII. *Id.* The *Miller* court similarly suggested that if Congress intended individual liability, it would have included some provision for such in the "employer" definition or in the Civil Rights Act of 1991. *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 588 n.3 (9th Cir. 1993).

⁶¹ See *U.S. Equal Employment Opportunity Commission v. AIC Security*, 55 F.3d 1276, 1282 (7th Cir. 1995) (discussing plaintiffs' urging for individual liability under the

ployment Opportunity Commission (hereinafter "E.E.O.C.") claimed that "through the loophole of no individual liability will pour a flood of unpunished and undeterrable discrimination."⁶² Further, an opportunity to name a victim's tormentor on the face of a public document, the complaint, gives a victim a personal method of recrimination which may encourage more claims than would otherwise be raised.⁶³ It is unclear, however, whether the imposition of individual liability under Title VII will necessarily deter discrimination.⁶⁴ In addition, a "Title VII shield from personal liability is not a license to sexually harass with impunity, because private employees are still subject to state common law tort and contract claims."⁶⁵

4. *Individual Liability's Necessity to Provide Full Compensation to Victims of Sexual Harassment*

Americans with Disabilities Act (ADA)). Although *AIC Security* dealt specifically with the ADA and not Title VII, the court recognized that "Title VII, the ADA, and the Age Discrimination in Employment Act (ADEA) use virtually the same definition of 'employer,' and that [c]ourts routinely apply arguments regarding individual liability to all three statutes interchangeably." *Id.* See also *Miller*, 991 F.2d at 587 (noting the similarities between the statutes).

⁶² *AIC Security*, 55 F.3d at 1282. The court, however, labeled these arguments "part of the short parade of horrors" to make up for the fact that the E.E.O.C. lacked the support of structured arguments. *Id.* The court eventually conceded that increasing the number of defendants would increase deterrence, but such a liberal interpretation of the statute as to allow for individual liability "cannot trump the narrow, focused conclusion we draw from the . . . statutes." *Id.*

⁶³ See Davida H. Isaacs, "Its Nothing Personal" — But Should It Be?: Finding Agent Liability for Violations of the Federal Employment Discrimination Statutes, 22 N.Y.U. REV. L. & Soc. Change 505, 531 (1996) (citing *AIC Security*, 55 F.3d at 1282). However, it is unclear whether the imposition of individual liability under Title VII will further Title VII's goals.

⁶⁴ Marianne C. Delpo, Essay, *Individual Liability Under Title VII: What Did Congress Mean by Employer?*, 75 NEB. L. REV. 278, 287 (1996). Delpo notes that the threat of losing one's job or severely damaging one's career is as effective as the threat of personal liability for most employees. *Id.* An employer that has incurred civil liability due to an employee's belief that he can violate Title VII with impunity will quickly correct that employee's erroneous belief. *Id.* (citing *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 588 (9th Cir. 1993)).

⁶⁵ *Id.* (citing *Williams v. Banning*, 72 F.3d 552, 555 (7th Cir. 1995); *Grant v. Lone Star Co.*, 21 F.3d 649, 651 n.3 (5th Cir. 1994), cert. denied, 115 S. Ct. 574 (1994) (mem.); *Paroline v. Unisys Corp.*, 879 F.2d 100, 113 (4th Cir. 1989)).

Proponents of individual liability also argue that it will help plaintiffs realize full compensation in cases where an employer declares bankruptcy, settles, or is only capable of partial satisfaction of adverse judgements.⁶⁶ However, "in the vast majority of cases an individual will not have the financial resources of the employer, nor will s/he have the foresight to create a contingency fund to lessen the impact of discrimination suit damages."⁶⁷ More importantly, as opposed to employer liability, in which damage caps are outlined via the Civil Rights Act of 1991, courts will have no guidance from Congress to determine the limits of individual liability.⁶⁸

C. A Call For First Circuit Review and Decision

Given the overwhelming rejection of individual liability in the circuit courts, the compelling arguments against individual liability above, and the flaws noted with the arguments in favor of such liability, the First Circuit should reject Title VII personal liability. The court should weigh the goal of ending discrimination and the principle of personal accountability, against Congress' intent and the hardship that would result from individual liability.⁶⁹ The weighing of these options touches on the core of the democratic process in that courts carefully tread on the separation of powers.⁷⁰ The First Circuit should align itself with the other circuits in leaving individual liability under Title VII in the legislature's hands.⁷¹ The court must not mask its perception of the greater good under the veil of "plain language" and must resist the temptation to ascribe its own values to Title VII, while instead, entrusting Congress with the task of responding to public concerns.⁷²

⁶⁶ *Isaacs*, *supra* note 63, at 519.

⁶⁷ *See Davis*, *supra* note 30, at 335-337.

⁶⁸ *See id.* As the *Tomka* court noted, in such a situation, the agent's liability would have to depend on the number of persons the employer/entity employs which would necessarily create anomalous results, not contemplated by Congress. *Tomka*, 66 F.3d at 1315-16. *See also supra* Part II.A.2-3.

⁶⁹ *Id.* at 343.

⁷⁰ *Id.*

⁷¹ Gregory M.P. Davis, Comment, *More Than A Supervisor Bargains For: Individual Liability Under The Americans With Disabilities Act And Other Employment Discrimination Statutes*, 1997 Wis. L. Rev. 321, 337 (1997).

⁷² *Id.*

IV. INDIVIDUAL LIABILITY UNDER MASSACHUSETTS' AIDING AND ABETTING CLAUSE

While individual liability's existence on the federal level is unclear in the first circuit, Massachusetts General Laws Chapter 151B §4(5) expressly provides for individual liability.⁷³ The statute provides that "it is unlawful for any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter or to attempt to do so."⁷⁴ Unfortunately, neither the legislature, nor the Supreme Judicial Court has set out what type of action or inaction by an employee may rise to the level of "aiding and abetting" sexual harassment or discrimination.⁷⁵ Again practitioners are left without a clear indication from the legislature or the courts, which leads to unpredictability regarding individual liability in the sexual harassment context.

In two recent rulings, The United States District Court for the District of Massachusetts interpreted Chapter 151B § 4(5) and attempted to lend guidance concerning the statute.⁷⁶ The following section will analyze these rulings and their impact on the law regarding individual liability for sexual harassment in Massachusetts.

A. Chapin v. University of Massachusetts

The court in *Chapin v. Univ. of Mass.* expanded state level sexual harassment liability to include non-action by individual supervisors.⁷⁷ Ruling on a motion to dismiss, the *Chapin* court found that a supervisor may be individually liable for mere non-action, or failure to investigate complaints of sexual harassment.⁷⁸ Interpreting Massachusetts law, the

⁷³ See MASS. GEN. LAWS ch. 151B § 4(5) (1996) (allowing individual liability for "aiding and abetting" sexual harassment). *Id.*

⁷⁴ MASS. GEN. LAWS ch. 151B § 4(5). In *Ruffino v. State St. Bank & Trust Co.*, the court noted that this chapter applies "not only to employers acting through their principals and agents, but also to any person who aids or abets discrimination or retaliatory conduct prohibited under [the statute]." 908 F. Supp. 1019, 1048 (D. Mass. 1995).

⁷⁵ See *Chapin v. University of Mass.*, 977 F. Supp. 72, 78 (D. Mass. 1997) (stating that no reported case of the SJC addresses whether an individual may be liable for failure to investigate a sexual harassment complaint).

⁷⁶ See *id.* (deciding that mere inaction or failure to investigate, may rise to the level of aiding and abetting under the statute); *Morehouse v. Berkshire Gas Co.*, 989 F. Supp. 54, 62 (D. Mass. 1997) (finding that two factors must be present for inaction to give rise to liability).

⁷⁷ *Chapin*, 977 F. Supp. at 80 (D. Mass. 1997).

⁷⁸ *Id.*

Chapin court concluded the Massachusetts Supreme Judicial Court would follow the same course if faced with the issue.⁷⁹ The court reasoned that such non-feasance, when a supervisor knew or should have known that sexual harassment existed in the workplace, may constitute actionable "aiding and abetting" in violation of Chapter 151B § 4(5).⁸⁰

Madonna Rand Chapin, a former University of Massachusetts at Lowell (hereinafter "UML") police officer brought suit against UML and others including James Rowe, the UML police chief.⁸¹ Chapin alleged discrimination under Title VII of the 1964 Civil Rights Act against UML and aiding and abetting discrimination under Chapter 151B against Rowe individually.⁸² On Rowe's motion to dismiss, the court viewed all allegations in Chapin's complaint as true and drew all reasonable inferences therefrom in Chapin's favor.⁸³

Chapin alleged that prior to her employment at UML, female officers at the university experienced sexual discrimination in the form of harassment and that Rowe knew or should have known of this conduct, but failed to act to remedy or prevent its occurrence.⁸⁴ Chapin was employed by UML from February 1993 until May 1993, during which time she alleges UML officers Theokas and Parent, among others, sexually harassed her.⁸⁵ Chapin claimed this harassment included: threats to her physical and mental well being; statements disparaging Chapin as well as women in general, made in Chapin's presence; sexual gestures; solicitation of com-

⁷⁹ *Chapin*, 977 F. Supp. at 80.

⁸⁰ *Id.* The statute provides in pertinent part that it is an unlawful practice for an employer to discriminate against any individual because of one's sex in the terms, conditions, or privileges of employment. MASS. GEN. LAWS ch. 151B § 4(1) (1996). Further, the statute notes that sexual harassment constitutes discrimination under the act. MASS. GEN. LAWS ch. 151B § 4(16) (1996). The applicable "aiding and abetting" clause provides that "it is unlawful for any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter or to attempt to do so." MASS. GEN. LAWS ch. 151B § 4(5)(1996).

⁸¹ *Chapin v. University of Mass.*, 977 F. Supp. 72, 75 (D. Mass. 1997).

⁸² *Id.* Chapin's full complaint also alleged aiding and abetting discrimination, as well as sexual harassment, civil rights violations, assault and battery, and intentional infliction of emotional distress against George Theokas (police sergeant) and Paul Parent (acting shift supervisor). *Id.* These claims are outside the scope of this article in that they do not address a supervisor's individual liability for inaction in the face of sexual harassment complaints.

⁸³ *Id.* (citing *Kiely v. Raytheon Co.*, 105 F.3d 734, 735 (1st Cir. 1997)).

⁸⁴ *Chapin*, 977 F. Supp. at 75.

⁸⁵ *Id.* at 75-76

plaints regarding Chapin's performance; and false accusations about her performance.⁸⁶ Chapin allegedly complained about the harassment, but Rowe and UML failed to investigate her claims until one year after her period of employment.⁸⁷ Chapin claimed she was constructively discharged from her position and suffered severe emotional distress rendering her unable to work.⁸⁸

Regarding the allegations against Rowe, the *Chapin* court found that individuals, including supervisory or co-employees, may be held liable for violations of the aiding and abetting statute.⁸⁹ More importantly, the court addressed the issue whether the failure of a supervisory employee to investigate, correct, or prevent sexual harassment, after it is reported, amounts to aiding and abetting.⁹⁰ The court ultimately found that such forbearance by a supervisory employee may constitute a violation of Massachusetts law.⁹¹ The *Chapin* court buttressed its conclusion on several grounds. The court premised its holding on Chapter 151B's mandate that, as a whole, the statute is to be construed liberally so that its purposes may be achieved.⁹² Judge Lindsay noted that the Massachusetts Supreme Judicial Court accords deference to the interpretations of the Massachusetts Commission Against Discrimination (hereinafter "M.C.A.D.") regarding Chapter 151B § 4(5).⁹³ The holding then relied on such M.C.A.D. analyses of the aiding and abetting language in Chapter 151B § 4(5).⁹⁴ Finally, the court drew from parallel decisions in which courts interpreted supervi-

⁸⁶ *Id.* at 76.

⁸⁷ *Chapin v. Univ. of Mass.*, 977 F.Supp. 72, 76 (D. Mass. 1997).

⁸⁸ *Id.*

⁸⁹ *Id.* at 78 (citing *Ruffino v. State St. Bank & Trust Co.*, 908 F. Supp. 1019, 1048 (D. Mass. 1995)).

⁹⁰ *Chapin*, 977 F. Supp. at 78. The court noted that although no reported case of the Supreme Judicial Court dealt with the issue in question, the court was not without guidance. *Id.* at 78.

⁹¹ *Chapin*, 977 F. Supp. at 80.

⁹² *Id.* See MASS. GEN. LAWS ch. 151B § 9 (1996). (outlining the statute's mandate of liberal interpretation).

⁹³ *Chapin v. Univ. of Mass.*, 977 F.Supp. 72, 78 (D. Mass. 1997) (citing *College-Town v. M.C.A.D.*, 400 Mass. 156, 165, 508 N.E.2d 587, 593 (Mass. 1987)).

⁹⁴ *Chapin*, 977 F.Supp. at 78 (citing *Jorge v. Silver City Dodge*, 15 M.D.L.R. 1518, 1531 (1993); *Przybycien v. Aid Maintenance Co.*, 13 M.D.L.R. 1266, 1283 (1991); *Hope v. San Ran, Inc.*, 8 M.D.L.R. 1195, 1211 (1986).

sors' failure to act under federal laws as well as other states' similar aiding and abetting clauses.⁹⁵

1. Analysis

a. Individual Liability for Supervisors Under Chapter 151B

As noted above, while employees are not generally individually liable for sexual harassment or discrimination under Chapter 151B, individuals may be liable under the aiding and abetting clause of that act.⁹⁶ The *Chapin* court correctly points out that the district court in *Ruffino v. State Street Bank and Trust Co.*⁹⁷ also noted this distinction.⁹⁸ The state law's general provision (Chapter 151B § 4(1)) applies to "an employer, by himself or his agent," therefore, precluding individual liability, while Chapter 151B § 4(5) (aiding and abetting provision) specifically applies to "any person whether an employer or employee or not."⁹⁹ Without guidance from Massachusetts courts or the First Circuit, the *Chapin* court soundly based this portion of its ruling on the plain wording of the statute as well as the *Ruffino* court's interpretation.¹⁰⁰

b. Supervisor's Failure to Act Creates Aiding and Abetting Liability

i. Reliance on MCAD Interpretations to Support Liability for Inaction

As a basis for relying on M.C.A.D. decisions regarding this issue, the *Chapin* court notes that the Supreme Judicial Court "accords deference to

⁹⁵ *Chapin*, 977 F.Supp. at 80.

⁹⁶ See MASS. GEN. LAWS ch. 151B § 4(5) (1996) (stating that this section applies to "any person whether an employer or an employee or not").

⁹⁷ 908 F. Supp. 1019 (D. Mass. 1995).

⁹⁸ *Id.* at 1048.

⁹⁹ See *id.* (explaining the difference in terminology in the two provisions of Chapter 151B as a basis for finding individual supervisor liability). The *Ruffino* court also ruled an individual may be liable for federal Title VII discrimination violations. *Id.* at 1047. Title VII's text provides that "It shall be an unlawful employment practice for an employer: (1) To fail or refuse to hire or to discharge any individual . . . because of such individual's . . . sex . . ." 42 U.S.C. § 2000e-2 (a)(1) (1994). That statute defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such person." 42 U.S.C. § 2000e(b). While the first circuit remains silent on this issue, *Ruffino* sided with the minority of courts within the circuit split on this issue. *Ruffino*, 908 F. Supp. at 1019. (citing *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178 (6th Cir. 1992)). See also *Paroline v. Unysis Corp.*, 879 F.2d 100, 104 (4th Cir. 1989); *Owens v. Rush* 636 F.2d 283, 286 (10th Cir. 1980).

¹⁰⁰ *Chapin v. University of Mass.*, 977 F. Supp. 72, 78 (D. Mass. 1997).

interpretations of Chapter 151B rendered by the M.C.A.D.”¹⁰¹ While partially true, the Supreme Judicial Court’s deference is more specific in that it accords deference to *statutory interpretations* provided by the administrative body when interpreting broadly set out legislative policy.¹⁰²

Chapin first points to the *Jorge v. Silver City Dodge, Inc.*¹⁰³ decision as a basis for its finding.¹⁰⁴ In *Silver City*, managers at an auto dealership subjected a female employee, Jorge, to lewd comments and unwanted touching over a seven month period.¹⁰⁵ Jorge complained to her supervisor until granted a meeting with the District Manager/Vice-President, who promised an investigation.¹⁰⁶ The District Manager met with the alleged harassers who denied that any incident occurred.¹⁰⁷ Within one day, Jorge stopped work due to the harassment and began medical treatment for anxiety.¹⁰⁸ The same week, the District Manager proposed that Jorge transfer to another of the corporation’s dealerships, which Jorge reluctantly agreed to do.¹⁰⁹ Jorge was humiliated and did not complete a full day’s work at the new dealership because the entire staff knew the reason for her transfer.¹¹⁰

The *Silver City* hearing officer found that “an employer is liable for failing to eradicate hostile or offensive work environments, and has an affirmative duty to investigate complaints of sexual harassment”¹¹¹ The hearing officer also explained that “failure to investigate gives tacit support to the discrimination because the absence of sanctions encourages abusive behavior.”¹¹² *Silver City* found the dealership’s investigation inadequate in that it only involved questioning the alleged perpetrators.¹¹³ Ultimately,

¹⁰¹ *Id.*

¹⁰² See *College-Town, Div. of Interco Inc. v. M.C.A.D.*, 400 Mass. 156, 166, 508 N.E.2d 587, 593 (explaining the SJC’s willingness to defer to M.C.A.D. decisions regarding statutory interpretation).

¹⁰³ 15 M.D.L.R. at 1518 (1993).

¹⁰⁴ *Chapin*, 977 F. Supp. at 78.

¹⁰⁵ *Silver City*, 15 M.D.L.R. at 1518.

¹⁰⁶ *Id.* at 1523.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1524.

¹⁰⁹ *Id.*

¹¹⁰ *Jorge v. Silver City Dodge, Inc. et al.*, 15 M.D.L.R. at 1518 (1991).

¹¹¹ *Id.* at 1531 (citing *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459 (E. D. Mich. 1977)); *Lynch v. Western Union*, 13 M.D.L.R. 1621, 1647 (1991).

¹¹² *Silver City*, 15 M.D.L.R. at 1531 (quoting *Munford*, 441 F. Supp. at 466).

¹¹³ *Silver City*, 15 M.D.L.R. at 1531.

Silver City concluded that the employer was liable under Chapter 151B § 4(16) for the harassing conduct of its employee managers and for failing to eradicate the hostile work environment which it created.¹¹⁴

Silver City confined its reasoning to an employer's liability under Chapter 151B § 4(16A). The decision does not find or discuss individual liability under chapter 151B § 4(5) which was at issue in *Chapin*.¹¹⁵ *Silver City* discusses failure to investigate as lending tacit support for harassment as mentioned above, but it does not attempt to fit such inaction within the ambit of aiding and abetting under Chapter 151B.¹¹⁶ Further, the *Chapin* court's deference to the M.C.A.D. opinion is unfounded in that the *Silver City* decision is not a *statutory interpretation* as outlined in *College-Town*.¹¹⁷

The *Chapin* court next cites *Przybycien v. Aid Maintenance Co.*,¹¹⁸ as lending support for its interpretation of the aiding and abetting statute.¹¹⁹ Again, *Chapin*'s deference to an administrative ruling is misguided. *Przybycien* involved repeated sexual harassment perpetrated on a female maintenance worker by her immediate supervisor.¹²⁰ *Przybycien* reported the harassment to Caputo, the perpetrator's supervisor, who scheduled a meeting with all parties including *Przybycien*'s witness.¹²¹ Caputo arrived late at the meeting and only interviewed the alleged harasser as a result, who simply denied the allegations.¹²² When the harassment continued, Caputo transferred *Przybycien* to another store where the harassment did not cease and caused *Przybycien* to resign.¹²³

¹¹⁴ *Id.* at 1529. Chapter 151B § 4(16A) specifically prohibits an employer from sexually harassing its employees. MASS. GEN. LAWS ch. 151B § 4(16A).

¹¹⁵ See *Jorge v. Silver City Dodge Inc. et al.*, 15 M.D.L.R. 1518, 1529 (1993). (discussing implications and potential liability for failure to investigate, without mentioning any aspect of chapter 151B § 4(5)'s aiding and abetting liability imposition).

¹¹⁶ See *id.* (stating that such actions coupled with the absence of sanctions encourages abusive behavior).

¹¹⁷ See *College-Town*, 400 Mass. at 166, 508 N.E.2d at 593 (noting that an administrative interpretation of statute will be accorded deference by the SJC, but making no mention of deference to M.C.A.D. rulings generally).

¹¹⁸ 13 M.D.L.R. at 1266 (1991).

¹¹⁹ *Chapin v. University of Mass.*, 977 F. Supp. 72, 78 (D. Mass. 1997).

¹²⁰ *Przybycien v. Aid Maintenance*, 13 M.D.L.R. 1266, 1269-70 (1991).

¹²¹ *Id.* at 1272.

¹²² *Id.* at 1274.

¹²³ *Id.* at 1275-76.

The *Przybycien* court found employer liability based on the creation of a sexually harassing or hostile work environment.¹²⁴ The *Przybycien* hearing officer analyzed Aid Maintenance's failure to investigate the claim or discipline the alleged perpetrator in the context of whether Aid Maintenance took adequate steps to remedy the situation once on notice.¹²⁵ The officer explained, as did the *Silver City* hearing officer, that a failure to investigate harassment claims or to sanction a potential harasser, may lead to tacit support and encouragement of abusive behavior.¹²⁶ The holding did not address such inaction's implications on an individual's potential liability for aiding and abetting harassment under chapter 151B §4(5). The *Przybycien* decision does not constitute an interpretation of the aiding and abetting statute at issue in *Chapin* and should not have been deferred to as such by the *Chapin* court.¹²⁷

Lastly, the *Chapin* court turns to M.C.A.D.'s decision in *Hope v. San Ran*¹²⁸ for guidance regarding the aiding and abetting statute.¹²⁹ *Hope* involved sexual harassment against a female bar tender at a hotel lounge over a fourteen month period by the bar's night supervisor, McGhee.¹³⁰ *Hope* complained about the harassment to San Ran's general manager and co-owner, Gulko.¹³¹ Gulko indicated that he would set up a meeting between himself, *Hope*, and McGhee, but never did.¹³² The harassment subsequently continued and *Hope* confronted Gulko again.¹³³ Gulko then con-

¹²⁴ *Id.* (citing *College-Town*, 400 Mass. 156, 508 N.E.2d 587).

¹²⁵ *Przybycien Aid Maintenance*, 13 M.D.L.R. 1266, 1283 (1991).

¹²⁶ *Id.* (citing *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459 (E.D. Mich. 1977)). The court also explained that an employer is duty-bound to investigate sexual harassment complaints because it is liable for failing to remedy a known hostile or offensive work environment. *Id.* (citing *Munford v. James T. Barnes & Co.*, 441 F. Supp. at 459; *Garziano v. E.I. Dupont deNemours & Co.*, 818 F.3d 380, 388 (5th Cir. 1987)).

¹²⁷ See *Chapin v. University of Massachusetts* 977 F. Supp. 72, 78 (D. Mass. 1997) (noting the Supreme Judicial Court's deference to M.C.A.D. interpretation of Chapter 151B) (citing *College-Town*, 400 Mass. 156, 166, 508 N.E.2d 587, 593 (Mass. 1987)). See *supra* notes 101-102 and accompanying text (explaining the deference outlined in *College Town*).

¹²⁸ 8 M.D.L.R. at 1195 (1991).

¹²⁹ *Chapin*, 977 F. Supp. at 78. (citing *Hope*, 8 M.D.L.R. at 1283). *Chapin* looks to *Hope* for the proposition that the M.C.A.D. has held a supervisor liable for aiding and abetting in the retaliatory firing of an employee who complained of sexual harassment. *Id.*

¹³⁰ *Hope*, 8 M.D.L.R. at 1197-02.

¹³¹ *Id.* at 1200.

¹³² *Id.*

¹³³ *Id.* at 1201.

fronted McGhee regarding Hope's complaints.¹³⁴ After their conversation, McGhee began to monitor Hope's performance and noted every incident which might be used as a pretext for Hope's termination.¹³⁵ Within one year, McGhee fired Hope for reasons such as her failure to accept pennies from customers.¹³⁶ The following day, Hope went to San Ran and told Gulko she did not understand her firing, complained again about the harassment, and indicated she planned to file a complaint with M.C.A.D.. Gulko asked Hope to work for another week to straighten the situation out and Hope agreed; but Gulko never contacted her as planned.¹³⁷

The M.C.A.D. hearing officer in *Hope* found San Ran liable under Chapter 151B because McGhee's actions amounted to the creation of a discriminatory, sexually charged atmosphere which affected the conditions of Hope's employment.¹³⁸ Additionally, the *Hope* hearing officer found McGhee and Gulko individually liable as supervisors for aiding and abetting San Ran in its discrimination, thereby violating Chapter 151B §4 (5).¹³⁹ The *Hope* decision based its determination of aiding and abetting liability on McGhee's and Gulko's acquiescence in Hope's termination when she complained of sexual harassment.¹⁴⁰

Unlike the other M.C.A.D. cases cited in *Chapin*, the *Hope* decision expressly interpreted the aiding and abetting statute at issue in *Chapin*.¹⁴¹ The *Chapin* court, therefore, properly looked to this administrative ruling for guidance in determining the issue.¹⁴² The *Hope* decision, though, is significantly distinguishable. The *Chapin* court erroneously bases Rowe's individual liability on the finding of individual aiding and abetting liability in *Hope*. The *Hope* case addressed individuals' outright *acts* in that each *sought*, and then *acquiesced* in, the complainant employee's improper

¹³⁴ *Hope v. San-Ran, Inc.*, 8 M.D.L.R. 1195, 1201 (1986).

¹³⁵ *Id.*

¹³⁶ *Id.* at 1201-02.

¹³⁷ *Id.*

¹³⁸ *Id.* at 1209.

¹³⁹ *Hope v. San-Ran, Inc.*, 8 M.D.L.R. 1195, 1211 (1986).

¹⁴⁰ *Id.*

¹⁴¹ See *Chapin v. University of Mass.*, 977 F. Supp. 72, 78 (D. Mass. 1997) (explaining the issue for the court's determination). The *Chapin* court noted that the issue is whether a supervisory employee's failure to investigate, correct, or prevent sexual harassment, after it has been reported, amounts to aiding and abetting the harassment). *Id.*

¹⁴² See *supra* notes 101-102 and accompanying text (explaining the deference outlined in *College Town*).

termination.¹⁴³ In this sense, each supervisor in *Hope* took action toward aiding and abetting the sexual harassment. In *Chapin*, the plaintiff alleged mere inaction by a supervisory employee.¹⁴⁴ In *Hope*, the same inaction of the character alleged in *Chapin* was present in that Gulko twice failed even to investigate the victim's claim.¹⁴⁵ Despite this inaction through a failure to investigate, the *Hope* court analyzed aiding and abetting liability in terms of the individuals' action.¹⁴⁶ *Hope* did not go so far as to say that the individual defendant's inaction violated the aiding and abetting statute.¹⁴⁷ The *Chapin* court improperly draws aiding and abetting liability for inaction from a case which was faced with the same type of inaction, yet declined to mention it as a form of aiding and abetting with the meaning of Chapter 151B § 4(5).

ii. *Analysis of Other Courts' Findings Regarding "Inaction" as Aiding and Abetting*

The *Chapin* court also looks to other federal courts' statutory interpretations of aiding and abetting discrimination.¹⁴⁸ The *Chapin* court notes the United States Court of Appeals for the Third Circuit's interpretation of Pennsylvania's aiding and abetting discrimination statute.¹⁴⁹ In *Dici v. Commonwealth of Pennsylvania*,¹⁵⁰ The Third Circuit held that a supervisor's failure to take action to prevent known harassment gave rise to an aiding and abetting claim.¹⁵¹ Additionally, the *Chapin* court cited to *Bonner v. Guccione*,¹⁵² which interpreted New York's aiding and abetting statute and concluded that *Guccione* could be held liable even absent a finding of active participation.¹⁵³

¹⁴³ *Hope*, 8 M.D.L.R. at 1211.

¹⁴⁴ *Chapin*, 977 F. Supp. at 79.

¹⁴⁵ *Hope v. San-Ran, Inc.*, 8 M.D.L.R. 1195, 1200-02 (1986).

¹⁴⁶ *Id.* at 1211.

¹⁴⁷ *Id.*

¹⁴⁸ *Chapin v. University of Mass.*, 977 F. Supp. 72, 78 (D. Mass. 1997).

¹⁴⁹ *Id.*

¹⁵⁰ 91 F.3d at 542 (3rd Cir. 1996).

¹⁵¹ See *Id.* at 553 (discussing Pennsylvania's aiding and abetting liability provision in PA 43 CONST.STAT. ANN. § 955(e)). The *Dici* court found that the alleged facts, that the supervisor knew or should have known of the harassment perpetrated against *Dici* and repeatedly refused to take prompt action to end such harassment, if proven, would constitute aiding and abetting under the state statute. *Id.*

¹⁵² No. 94 CIV. 7735, 1997 WL 362311 *14(S.D.N.Y. July 1, 1997).

¹⁵³ *Id.* at *14. The *Guccione* court did not expressly state that inaction amounts to liability under the statute. *Id.* Rather, the *Guccione* court merely gave deference to another

Despite the *Chapin* court's reliance on the opinions noted above, the court points out that other courts came to the opposite conclusion when faced with a supervisor's inaction in the context of an aiding and abetting discrimination situation.¹⁵⁴

iii. *Analysis of "Inaction" in Other Contexts by Federal Courts*

Lastly, the *Chapin* court looked to federal courts regarding liability for inaction.¹⁵⁵ The court noted that on the federal level, the "failure of a supervisor to respond to complaints of harassment can actively contribute to the creation of a hostile work environment."¹⁵⁶ The *Chapin* court next pointed out that the second circuit in yet another context, found that failure of a supervisor to respond to complaints of harassment can be sufficient for liability, once the supervisor is put on notice of the harassment.¹⁵⁷

district court's dicta, which noted that a plaintiff could allege an aiding and abetting claim without alleging active participation. *See id.* (explaining individual liability as discussed in *Abdullajeva v. Club Quarters, Inc.*, No. 96 CIV. 0383 (LMM) 1996 WL 497029 (S.D.N.Y. Nov. 15, 1996)). The *Guccione* court found that an individual may be liable for inaction based on two alternative theories. *Id.* The court notes the aiding and abetting statute as one theory due to the dicta in *Abdullajeva*, as well as, liability under the general provisions of the New York anti-discrimination statute due to a party's ownership interest. *Id.* The *Guccione* court concentrated its analysis on this second theory which is based on the statute's definition of "employer" including individuals with an ownership interest in the employing entity. *Id.* at 13. Chapter 151B limits liability under its general provisions to employers and does not allow for individual liability in this context, absent a showing of aiding and abetting discrimination under Chapter 151B § 4(5). MASS. GEN. LAWS ch. 151B § 4(5)(1996).

¹⁵⁴ *See Chapin v. University of Mass.*, 977 F. Supp. 72, 79 (D. Mass. 1997) (explaining that federal courts in other jurisdictions have reached opposite results interpreting state "aiding and abetting" liability). Specifically, the *Chapin* court points to *Tyson v. CIGNA Corp.* 918 F.Supp. 836, 841 (D. N.J. 1996) (refusing to find aiding and abetting for a failure to act where the defendant knew of the existence of sexual harassment).

¹⁵⁵ *Chapin*, 977 F. Supp. at 79 (referring to other courts' interpretation of inaction in contexts other than an "aiding and abetting" statute).

¹⁵⁶ *Id.* (citing *Saad v. Stanley St. Treatment & Resources, Inc.*, Civ. A. No. 92-11434-DPW, 1994 WL 846911 *10 (D. Mass. May 20, 1994). The *Saad* court stated that "no doubt an inadequate response to a sexual harassment complaint could itself foster a hostile environment and so give rise to liability therefor[sic]." *Saad*, 1994 WL 846911 at *10. *Saad* dealt with an employer's hostile work environment liability and not individual liability under an aiding abetting statute or even Title VII. *See id.* at *1.

¹⁵⁷ *See Chapin*, 977 F. Supp. at 78 (citing *Jemmott v. Coughlin*, 85 F.3d 61, 67-68 (2d Cir. 1996)). The *Jemmott* court found liability under 42 U.S.C. § 1983. *Jemmott*, 85 F.3d

The *Chapin* court next looked to *Lipsett v. University of Puerto Rico*,¹⁵⁸ which noted that failure to act regarding sexual harassment can occur through mere inattention or through deliberate indifference, a conscious act of the will.¹⁵⁹ The *Chapin* court asserted that the latter form of non-feasance is a designed willful act of forbearance in a situation requiring action.¹⁶⁰ From this assertion, the *Chapin* court looked to the fact that Rowe had notice of the harassment and failed to act.¹⁶¹ The court then drew an ostensibly reasonable inference that Rowe was deliberately indifferent toward the harassment and affirmatively condoned it.¹⁶² The court stated that "inaction on the part of a high official may be an affirmative link to conduct which violates [Chapter 151B § 4(5)]."¹⁶³

Chapin's reasoning is unsound in that it relies on these three opinions which do not attempt to define state level "aiding and abetting" liability which was at issue in the case. The court merely discusses instances in which inaction may lead to liability under other laws.¹⁶⁴ For example, the court relies on its "affirmative link" rationale, which comes from *Lipsett*.¹⁶⁵ *Lipsett* dealt with inaction leading to individual liability for a constitutional violation, not whether inaction may lead to "aiding and abetting" in any context.¹⁶⁶ Again, the *Chapin* court failed to analyze whether or to what extent inaction leads specifically to aiding and abetting liability under Chapter 151B § 4(5).

2. Conclusions Regarding the Chapin Decision

Absent any clear guidance from the state courts, *Chapin* found that inaction regarding, or failure to investigate, sexual harassment claims amounts to "aiding and abetting" sexual harassment.¹⁶⁷ The court's tenu-

at 67-68.

¹⁵⁸ 864 F.2d 881 (1st Cir. 1988).

¹⁵⁹ *Id.* at 902.

¹⁶⁰ *Chapin v. University of Mass.*, 977 F. Supp. 72, 79 (D. Mass. 1997).

¹⁶¹ *Id.*

¹⁶² *See id.* (citing *Lipsett*, 864 F.2d at 902). The court also noted that a deaf ear from management may contribute to and encourage the hostility of the workplace, creating an impression that employees may discriminate with impunity. *Id.*

¹⁶³ *Id.*

¹⁶⁴ *See id.*

¹⁶⁵ *See Lipsett*, 864 F.2d at 902 (discussing inaction amounting to supervisory encouragement of depriving citizens of their constitutionally protected rights).

¹⁶⁶ *See id.* (analyzing whether inaction provides a sufficient causal link to a constitutional violation).

¹⁶⁷ *See Chapin v. University of Mass.*, 977 F. Supp. 72, 80 (D. Mass. 1997)

ous reasoning did not clear up the ambiguity left by the legislature regarding Chapter 151B § 4(5). Rather, the court opened the door to further clouded reasoning, making greater, the need for a firm statutory interpretation from the Supreme Judicial Court.

B. Chapin's Aftermath

The United States District Court for the District of Massachusetts recently had an opportunity to again interpret Chapter 151B §4(5) in *Morehouse v. Berkshire Gas Co.*¹⁶⁸ Again ruling on a motion to dismiss an individual liability claim, the court limited the breadth of the *Chapin* decision.¹⁶⁹ *Morehouse* involved a group of employee defendants who allegedly posted obscenely defaced pictures of Morehouse, their co-worker, at a company-sponsored golf tournament.¹⁷⁰ The court ruled on the defendant, Wendling's, motion for summary judgment.¹⁷¹ Wendling did not actively participate in the wrongdoing, but failed to remove the pictures, openly laughed about the pictures at the tournament, and later lied about all of the defendants' involvement.¹⁷² As the defendant in *Chapin* argued, Wendling averred that his nonfeasance fell short of that required to find liability.¹⁷³

The *Morehouse* court distinguished the facts of the case before it, from the circumstances in *Chapin*.¹⁷⁴ The court inferred from the *Chapin* analysis that the police chief "1) was required to act under the circumstances, and 2) was in a position (as chief) to discipline the harassers (who were the chiefs subordinates) and stop the misconduct."¹⁷⁵ The court stated that although Wendling's conduct amounted to "deliberate indifference" toward the wrongdoing, as was the case in *Chapin*, Wendling was not acting in a situation where action was required or arguably even expected of him.¹⁷⁶ Wendling's position as a supervisor of Morehouse's husband did not give rise to any duty to stop the disparagement.¹⁷⁷ Fur-

(concluding that the Supreme Judicial Court would follow the *Chapin* court's reasoning given the requirement that Chapter 151B be construed liberally).

¹⁶⁸ *Morehouse v. Berkshire Gas Co.*, 989 F.Supp. 54 (D. Mass. 1997).

¹⁶⁹ See *id.* at 62 (distinguishing the *Chapin* decision).

¹⁷⁰ *Id.* at 58-60.

¹⁷¹ *Id.* at 60-62.

¹⁷² *Id.* at 62.

¹⁷³ See *Morehouse v. Berkshire Gas Co.*, 989 F. Supp. 54, 61 (D. Mass. 1997) (noting the similarity between Wendling's argument and that raised in *Chapin*).

¹⁷⁴ *Id.* at 62.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

ther, Wendling was not in a position to stop the wrongdoing because the two perpetrators were higher-ranking employees, not his subordinates.¹⁷⁸ The court noted that while stopping the other defendants' actions would have been a "more laudable course of action," his failure to do so did not amount to the type of nonfeasance found to "aid and abet" sexual harassment in *Chapin*.¹⁷⁹

The *Morehouse* decision lends some guidance as to how practitioners should proceed in a Chapter 151B § 4(5) suit in that it sets out a two prong test inferred from *Chapin*.¹⁸⁰ This test is sound because it limits the scope of individual liability for sexual harassment to situations where an employee has a supervisory duty to act.¹⁸¹ However, the test, still fails to establish how meeting this test for inaction specifically amounts to "aiding and abetting" sexual harassment, within the terms of the statute.¹⁸²

C. A Better Result?

The Supreme Court of Tennessee recently decided in *Carr v. United Parcel Service*,¹⁸³ whether an individual's failure to act gives rise to individual liability for "aiding and abetting" sexual harassment under a statute almost identical to Massachusetts Chapter 151B § 4(5).¹⁸⁴ Like the federal courts in Massachusetts, the Tennessee court was faced with a statute that did not provide a definition of "aiding and abetting."¹⁸⁵ Unlike these courts, the *Carr* court chose to analyze the term "aiding and abetting" according to its common usage as creating accomplice liability.¹⁸⁶ In inter-

¹⁷⁸ *Morehouse v. Berkshire Gas Co.*, 989 F. Supp. 54, 62 (D. Mass. 1997).

¹⁷⁹ *Id.*

¹⁸⁰ See *id.* (noting the inference drawn from *Chapin*).

¹⁸¹ See *id.* (recognizing the prerequisite that employee have a supervisory duty to act).

¹⁸² See *id.* (relying on *Chapin*). The court did not delve into what constitutes "aiding and abetting" liability. *Id.* The court merely accepted as true, the reasoning of the *Chapin* court by simply reading into that decision, a limitation to fit the less egregious facts before the court. *Id.*

¹⁸³ 955 S.W.2d 832 (Tenn. 1997).

¹⁸⁴ See TENN. CODE ANN. § 4-21-301(2) (1991 Repl.) (providing for individual aiding and abetting liability for sexual harassment). The statute states in pertinent part that: "[it] is a discriminatory practice for a person or two (2) or more persons to: . . . (2) [a]id, abet, incite, compel or command a person to engage in any of the acts or practices declared discriminatory under this chapter" *Id.* A person is defined under the statute as "one (1) or more individuals . . ." *Id.*

¹⁸⁵ See *Carr*, 955 S.W.2d. at 836 (noting the statutory ambiguity).

¹⁸⁶ See *id.* (finding that the statute in question established accomplice liability but failed to supply a definition of "aiding and abetting").

preting the statute, the court looked to the common law civil liability theory of aiding and abetting and determined that liability requires "affirmative conduct."¹⁸⁷ The *Carr* court went on to state that "a failure to act . . . is insufficient for accomplice liability."¹⁸⁸ The *Carr* court applied the traditional meaning to the words "aiding and abetting" contained in the statute. The federal district courts in Massachusetts, perhaps, should have applied similar logic to avoid the present, persistent ambiguity surrounding inaction leading to individual liability under Chapter 151B § 4(5)

V. CONCLUSION

Individual liability is an important issue in sexual harassment litigation for both plaintiff's and defendant's practitioners. For plaintiff's attorneys, for instance, such liability can be a practical asset to destroy federal jurisdiction or secure relief in the case of an insolvent employer. For defendant's attorneys, the prospect of individual liability creates the need to make important strategic decisions in litigation to avoid conflicting interests and to develop adequate defenses for both the individual and the employer. The current ambiguity regarding individual liability under Title VII and Chapter 151B's aiding and abetting clause causes unpredictability in the law. This ambiguity, in turn, results in practical and strategic difficulty for lawyers bringing and defending sexual harassment claims.

The United States Court of Appeals for the First Circuit should, therefore, decide whether individual liability for sexual harassment exists under Title VII. Specifically, the court should join the overwhelming majority of circuits in negating such individual liability for the reasons set forth above. On the state level, the Supreme Judicial Court of Massachusetts should more clearly define potential individual liability under Chapter 151B by setting out the parameters of "aiding and abetting" sexual harassment. In doing so, the court should look to the plain meaning of the statutory language. Such an analysis should lead the court to the same conclusion as that reached under the Tennessee "aiding and abetting" statute: that the words aiding and abetting, in their traditional common law context, require some affirmative action beyond misfeasance to find individual liability. These decisions would alleviate the ambiguity in the law currently affecting practitioners. In addition, these decisions would allow supervisory employees to better carryout their functions in the workplace without the fear of damaging personal litigation. Employers would have a further incentive, if not an obligation, to vigorously enforce its written sexual har-

¹⁸⁷ *Carr v. United Parcel Service*, 955 S.W.2d. 832, 836 (Tenn. 1997).

¹⁸⁸ *Id.*

assment policies, thereby weeding sexual harassment from the workplace along with its actual perpetrators.

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