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INDIVIDUAL SUPERVISOR LIABILITY IN EMPLOYMENT DISCRIMINATION CLAIMS IN CALIFORNIA

Law cannot persuade, where it cannot punish.¹

I. INTRODUCTION

Lawsuits involving employment claims have been steadily on the rise for a number of years.² Some estimates put the increase in employment law cases at greater than 2000% for the past twenty years.³ As indicated by the media, a large portion of these cases involve discrimination or harassment, or both.⁴

Employment discrimination and harassment cases are generally personal disputes, involving an employee's livelihood, job performance, and relations with co-workers and supervisors. Consequently, it is understandable that plaintiffs claiming that they experienced discrimination or harassment on the job will want to include as a defendant the person they feel is directly responsible for the illegal activity. Often, this is the plaintiff's direct supervisor or manager who is empowered with the ability to hire, fire and promote. However, many California plaintiffs may not be able to hold a supervisor individually liable for illegal employment conduct.

While it is well settled that supervisors can be held individually liable for harassment on the job, there is a difference of opinion on whether a supervisor can be individually liable for discriminatory employment decisions.⁵ Federal courts are

³ Id.
⁴ Id.
divided on the issue, and only one California appellate court has addressed it.\textsuperscript{6}

Sexual harassment cases, such as \textit{Weeks v. Baker & McKenzie and Martin Greenstein},\textsuperscript{8} with plaintiffs claiming outrageous and unimaginable behavior by the defendants and juries awarding multi-million dollar verdicts, often gain the headlines. Claims of discrimination, while less titillating, are also quite common.\textsuperscript{9} There is a significant difference between how the two cases are evaluated in the courts.\textsuperscript{10} In \textit{Weeks}, the plaintiff claimed sexual harassment due to the egregious conduct on the part of the plaintiff's supervisor that created a hostile work environment.\textsuperscript{11} The law for harassment (whether based on gender, race, or national origin) that creates a hostile work environment is quite clear: Individual supervisors can be held personally liable for their conduct.\textsuperscript{12} Conversely, employment discrimination is generally more subtle and may not create a hostile work environment. Yet, such discrimination is no less damaging to one's career, potential income and self-esteem, than that faced by Ms. Weeks. In California, a plaintiff's ability to hold a supervisor individually liable for this type of subtle discrimination has recently become more difficult.\textsuperscript{13}

\begin{itemize}
  \item \textsuperscript{6} See Miller v. Maxwell's Int'l, Inc., 991 F.2d 583 (9th Cir. 1993) (holding that supervisors cannot be held individually liable under ADEA), \textit{cert. denied}, 114 S.Ct. 1049 (1993); Bridges v. Eastman Kodak Co., 800 F. Supp. 1172 (S.D.N.Y. 1992) (holding that supervisors should be held individually liable); \textit{Jendusa v. Cancer Treatment Ctrs. of Am., Inc.}, 868 F. Supp. 1006 (N.D. Ill. 1994) (holding individual supervisors liable).
  \item \textsuperscript{7} See \textit{Janken v. GM Hughes Elecs.}, 53 Cal. Rptr. 2d 741 (Ct. App. 1996).
  \item \textsuperscript{8} No. 943043 (Cal. Sup. Ct. filed May 20, 1992). In this highly publicized case, the plaintiff, Ms. Weeks sued her former employer, the law firm of Baker & McKenzie, and her former supervisor, Martin Greenstein. Ms. Weeks won at trial with the jury awarding over $7,000,000. The award was later reduced. \textit{Id.}
  \item \textsuperscript{9} See John J. Donohue III and Peter Siegelman, \textit{The Changing Nature of Employment Discrimination Litigation}, 43 STAN. L. REV. 983 (1991) (discussing the tremendous increase in discrimination cases and the dramatic shift from discriminatory hiring to discriminatory termination cases over the first 26 years of Title VII).
  \item \textsuperscript{10} Due to the wording of the statutes, individual supervisors can be held liable for harassment claims, such as the one brought by Rena Weeks. \textit{See Matthews v. Superior Court}, 40 Cal. Rptr. 2d 350, 354-55 (Ct. App. 1995).
  \item \textsuperscript{12} \textit{Matthews}, 40 Cal. Rptr. 2d at 354-55.
  \item \textsuperscript{13} See \textit{Janken v. GM Hughes Elecs.}, 53 Cal. Rptr. 2d 741 (Ct. App. 1996). Although, some California appellate courts have allowed awards against super-
Courts disallowing individual supervisor liability have generally relied on the doctrine of respondeat superior to hold the employer strictly liable for the actions of employees. These courts also argue that supervisors are not responsible for discriminatory hiring, firing and promoting, since these decisions are made or reviewed by the senior management in the organization. This line of reasoning suggests that a lower level manager has little motivation to circumvent corporate policies and hiring goals. While this logic may have been accurate in an economy dominated by large, bureaucratic corporate entities, the premise may now be outdated due to the significant changes that have occurred in the U.S. economy that continue to reshape the dynamics of the modern workplace.

Recent employment trends have shifted much of the workforce away from large corporate environments to smaller, more entrepreneurial companies. This reallocation of the workforce has created a situation where more and more employees are presumably working for managers with greater responsibility and authority in making employment decisions for their own departments and less training in employment related issues. The logic of these former decisions should be reevaluated due to these recent workplace trends.

In addition to plaintiff's desire and ability to seek retribution, the issue of individual supervisor liability is important for a number of reasons. First, there is a debate whether

visors in their individual capacities without argument against such awards. See generally Caldwell v. Montoya, 10 Cal. Rptr. 2d 842, 845 & n.3 (1995).
14. See discussion infra Part II.C.
15. Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 588 (9th Cir. 1993) ("There is no reason to stretch the liability of individual employees beyond the respondeat superior principle intended by Congress."); cert. denied, 114 S. Ct. 1049 (1993).
16. Id. (commenting that employers will not tolerate employees that discriminate, the Ninth Circuit stated that "[n]o employer will allow ... personnel to violate Title VII when the employer is liable for the Title VII violation.").
17. Id. (commenting that an employer will "quickly correct the employee's erroneous belief" that he can violate Title VII with impunity).
18. Vincent J. Schodolski, California Rebounds State is Recovering into Changed - Some Say Fitter - Economy, CHI. TRIB., Nov. 21, 1994, at Business 1 ("[S]tatistics show that 90 percent of Californians are employed by companies with 50 or fewer workers") [hereinafter Schodolski]; James M. Gomez, The Human Factor, L.A. DAILY TIMES, Apr. 27, 1993, at The Times 100 (Magazine), D2 [hereinafter Gomez].
19. Schodolski, supra note 18, at Business 1; Gomez, supra note 18, at D2.
20. Id.
granting individual supervisors and managers immunity from their actions may circumvent the broad purposes behind both the federal and state employment discrimination statutes.\textsuperscript{21} Some courts and authorities have argued that employees are deterred from discriminatory employment decisions due to the threat of reprisal from an employer sued for such actions.\textsuperscript{22} Other experts disagree and suggest that holding supervisors individually liable is the best way to deter the actions of the would-be discriminator.\textsuperscript{23}

Second, in many cases, allowing individual supervisor liability would thwart a defendant's ability to remove a case based on diversity jurisdiction. The ability to name a local supervisor or manager as codefendant defeats the complete diversity required in order to remove the case to federal court.\textsuperscript{24} With the federal courts becoming increasingly inhospitable toward employment discrimination plaintiffs,\textsuperscript{25} removal to federal court may be a critical issue for plaintiffs. Third, as previously mentioned, the drastic increase in discrimination claims indicates that the resolution of this issue will impact a large number of employment law cases, as well as the rights of many employees.

This comment will review the express language of both federal and California employment discrimination legislation, review the legislative intent behind the statutes, and discuss significant cases that have interpreted the existing statutes.\textsuperscript{26} This comment will also address the differing judicial interpretations of Title VII, and the few California cases interpreting the state statute.\textsuperscript{27} Finally, this comment will propose that the California Legislature clarify the statute in

\textsuperscript{21} See Miller, 991 F.2d 583 (holding that supervisors cannot be held individually liable under ADEA); Bridges v. Eastman Kodak Co., 800 F. Supp. 1172 (S.D.N.Y. 1992) (holding that supervisors should be held individually liable); Jendusa v. Cancer Treatment Ctrs. of Am., Inc., 868 F. Supp. 1006 (N.D. Ill. 1994) (holding individual supervisors liable).

\textsuperscript{22} See Miller, 991 F.2d at 583.

\textsuperscript{23} Hamilton v. Rodgers, 791 F.2d 439 (5th Cir. 1986).

\textsuperscript{24} 28 U.S.C. § 1332 (1988). In order to remove to federal court under diversity jurisdiction, there must be complete diversity between the parties. \textit{Id}.


\textsuperscript{26} See discussion \textit{infra} Part II.

\textsuperscript{27} See discussion \textit{infra} Part III.
order to avoid the inconsistent adjudication that has occurred at the federal level.\(^{28}\)

II. BACKGROUND

A. Title VII

Title VII of the 1964 Civil Rights Act prohibits discrimination on the basis of race, color, religion, sex, or national origin. Specifically, the Act states that it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment."\(^{29}\) Essentially, Title VII was enacted as remedial legislation to eliminate employment discrimination based on race, color, religion, sex or national origin and to compensate victims of such discrimination and harassment.\(^{30}\) In order to achieve its goal of eliminating employment discrimination, the statute was intended to be interpreted broadly.\(^{31}\)

Title VII defines employer as a "person" with fifteen or more employees "and any agent of that person."\(^{32}\) The controversy interpreting Title VII, and assessing liability has arisen in large part because the statute does not define "agent" or elaborate whether these agents should be held liable in their individual capacities.\(^{33}\) This void has forced the courts to interpret the statute based on its language, legislative intent and history.\(^{34}\) The differing interpretations of Title VII have left a split in the circuits with respect to the

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28. See discussion infra Part IV.
33. While Title VII does define "person," 42 U.S.C. § 2000e(a) and "employer," 42 U.S.C. § 2000e(b), the statute is silent as to the definition of "agent," leaving it to the courts to interpret the definition and potential liability of such agents. See James G. Sotos, Individuals Not Liable for Employment Bias: Court, 141 CHI. DAILY L. BULL. 107, June 1, 1995 at 6 (commenting that the language of the Title VII statute has resulted in confusion).
question of supervisor liability although there has been a consensus growing in the circuits to not allow such liability.\textsuperscript{35}

\textbf{B. The 1991 Amendment: Expanded Remedies}

Prior to 1991, the remedies available to a plaintiff under Title VII were back pay and reinstatement.\textsuperscript{36} Practically, these remedies were only enforceable against an employer, since only an employer could reinstate an employee or pay wages.\textsuperscript{37} Therefore, pre-1991 decisions that only held employers liable for employment discrimination were consistent with the available remedies.\textsuperscript{38}

However, Congress amended the Act in 1991. The amendment invigorated the debate regarding the issue of individual supervisor liability by authorizing the award of compensatory and punitive damages in Title VII lawsuits.\textsuperscript{39} With the addition of damages that can be paid by individuals, some courts began to hold defendant supervisors and managers liable in their individual capacities.\textsuperscript{40} These courts reasoned that while only employers could reinstate employees and be liable for wages, individuals could certainly be held liable for compensatory and punitive damages.\textsuperscript{41} However, a majority of courts have concluded that the additional damages authorized in the 1991 amendment have not fundamen-

\textsuperscript{35} Currently, a majority of circuits that have addressed the issue have sided with the Ninth Circuit in rejecting individual supervisor liability. Smith v. Lomax, 45 F.3d 402 (11th Cir. 1995); Birkbeck v. Marvel Lighting Corp., 30 F.3d 507 (4th Cir. 1994); Grant v. Lone Star Co., 21 F.3d 649 (5th Cir. 1994); Miller v. Maxwell's Int'l, Inc., 991 F.2d 583 (9th Cir. 1993). However, at least one circuit court and other district courts have used primarily a strict constructionist approach to allow for individual supervisor liability. Jones v. Continental Corp., 789 F.2d 1225 (6th Cir. 1986); Lamirande, 834 F. Supp. 526; Bridges v. Eastman Kodak Co., 800 F. Supp. 1172 (S.D.N.Y. 1992).


\textsuperscript{37} \textit{Id.}

\textsuperscript{38} \textit{Id.}

\textsuperscript{39} \textit{Vakharia}, 824 F. Supp. at 785 n.2 (stating that "the 1991 amendments allow for full compensatory damages - not just back pay - as well as punitive damages.").

\textsuperscript{40} \textit{Bridges}, 800 F. Supp. at 1180 (commenting that the damages argument for not holding supervisors individually liable has "been undercut by the Civil Rights Act of 1991, which authorizes the award of compensatory and punitive damages.").

\textsuperscript{41} \textit{Id.}
tally changed the statute and continue to maintain that only employers can be held liable under Title VII.42

C. Common-Law Agency and Respondeat Superior Principles

Common-law agency theory holds that a principal is liable to a third party for the torts committed by an agent of the principal.43 The doctrine of respondeat superior goes even further in holding an employer vicariously liable for the torts of both its employees, as well as, its agents.44 Under respondeat superior, an employer is liable for torts, including willful, malicious, and criminal acts committed within the scope of employment.45

These doctrines hinge on the responsibility of the employee to act in a certain fashion.46 The principle justification for respondeat superior is that an employer may spread the risk of loss as a cost of doing business.47 In addition, an employer who has been held liable under the doctrine of respondeat superior, may generally recoup his losses in an action against the employee tortfeasor.48

D. The Ninth Circuit

In 1982 in Padway v. Palches,49 the Ninth Circuit established its position that Title VII does not allow for personal liability on the part of supervisors and managers.50 The Ninth Circuit concluded that since only employers could pay

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42. Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 587-88 n.2 (9th Cir. 1993) (holding that since the 1991 amendment limits damages by the size of the employer and was silent as to individuals, Congress did not intend to allow for individual liability).
43. 3 CAL. JUR. 3D, Agency § 131 (1994).
44. Id.
45. Id. Scope of employment has been held to include anything that could be regarded as incidental to employment or that which is done in connection with employment. Tarasco v. Moyers, 185 P.2d 86, 90 (Cal. Ct. App. 1947). Additionally, even if an employee acts in excess of his authority or contrary to the employer's instructions, the actions may still be within the scope of employment. Clark Equip. Co. v. Wheat, 154 Cal. Rptr. 874, 882 (Ct. App. 1979).
46. 3 CAL. JUR. 3D, Employer and Employee § 91 (1994).
47. Id.
48. Id.
49. 665 F.2d 965 (9th Cir. 1982).
50. Id. at 968.
back wages or reinstate an employee, managers and supervisors could not be held liable.\textsuperscript{51}

The Ninth Circuit was not swayed by the addition of compensatory and punitive damages pursuant to the 1991 amendment.\textsuperscript{52} In \textit{Miller v. Maxwell's International, Inc.},\textsuperscript{53} the court reaffirmed the stance it had taken in \textit{Padway}.\textsuperscript{54} The court relied on the original statutory scheme that limited liability under Title VII to employers with less than fifteen employees to hold that Congress did not intend liability to "run against individual employees."\textsuperscript{55} The Ninth Circuit reasoned that since Congress did not want liability to run to small companies with less than fifteen employees, Congress would also not want liability to run to individuals, since the burden of litigating a claim and paying damages would be even heavier for individuals.\textsuperscript{56}

Additionally, the \textit{Miller} court relied on the fact that the 1991 amendment limited the size of the compensatory damage awards by the size of the employer, and was silent with respect to individual defendants, to support the proposition that Congress did not envision individual liability.\textsuperscript{57} The Ninth Circuit interpreted this silence as a clear rejection of individual supervisor liability on the part of Congress.\textsuperscript{58}

Additionally, the Ninth Circuit agreed with the district court that the inclusion of the word "agent" in the definition of employer indicated that respondeat superior principles should apply,\textsuperscript{59} thus precluding the availability of damages against any such "agents" in their individual capacities.\textsuperscript{60}

\textbf{E. Other Circuits}

The Ninth Circuit's decision in \textit{Miller} has sparked a debate over individual supervisor liability, with some district
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courts criticizing the approach the Ninth Circuit applied in Miller.61 In Bridges v. Eastman Kodak Co.,62 the District Court for the Southern District of New York argued that the inclusion of compensatory and punitive damages allows for the imposition of individual liability on the part of supervisors.63

In Jendusa v. Cancer Treatment Centers of America, Inc.,64 the Northern District of Illinois Court commented that Congress was fully aware of the practice of holding supervisors individually liable when it enacted the 1991 amendment.65 The Jendusa court reviewed the legislative history and explained that Congress discussed several cases where individual supervisors were held liable and was, therefore, aware of the practice.66 The court reasoned that since Congress was aware of cases in which supervisors were held individually liable, it would have articulated an opinion on the issue if it found the practice objectionable.67

In Lamirande v. Resolution Trust Corp.,68 the court rejected the Ninth Circuit's interpretation that Congress' primary intent behind the fifteen employee minimum was to shield small employers from the expense of litigation.69 Rather, the court concluded that the limitation was intended to protect family-run businesses from discriminatory hiring claims, since such small entities typically hire predominately friends and families.70

While these district courts have been critical of the Ninth Circuit, the overall trend recently has been to follow the Ninth Circuit's lead in disallowing individual supervisor liability.71 Currently, the Second, Fourth, Fifth, Seventh and Eleventh Circuits have followed the logic of the Ninth Circuit

61. See cases cited supra note 34.
63. Id. at 1180.
64. 868 F. Supp. 1006 (N.D. Ill. 1994).
65. Id. at 1016.
66. Id. (commenting that "it is fair to conclude that Congress was fully aware of the practice of finding individuals . . . liable for Title VII violations.").
67. Id. (observing that "[i]f Congress found this practice objectionable . . . it surely could have voiced an opinion directly . . . Congress' silence on the issue is fully compatible with the conclusions . . . that Congress did envision individual liability.").
69. Id. at 528.
70. Id.
71. See Armbruster v. Quinn, 711 F.2d 1332 (6th Cir. 1983).
and have held that supervisors cannot be held liable in their individual capacities.\textsuperscript{72} These courts all agree that neither the wording of the statute nor the legislative intent of Title VII do not allow for individual supervisor liability.\textsuperscript{73}

However, the Sixth Circuit has yet to be persuaded and continues to support individual supervisor liability in circumstances where the supervisor exercised control over the hiring and firing decisions or had substantial participation in the decision-making process.\textsuperscript{74}

\section*{F. California's Fair Employment and Housing Act}

The California Fair Employment and Housing Act\textsuperscript{75} ("FEHA") provides essentially the same remedial protection from employment discrimination as Title VII.\textsuperscript{76} As with Title VII, the dual purposes of eliminating employment discrimination and compensating victims initiated the enactment of FEHA.\textsuperscript{77} Also, FEHA is similar to Title VII by making it an unlawful employment practice for an employer to discriminate on the basis of race, religion, creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex.\textsuperscript{78}

However, the two statutes are written differently. The definition of "employer" under FEHA differs from that of Title VII.\textsuperscript{79} FEHA defines "employer" as "any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly,"\textsuperscript{80} while 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."\textsuperscript{81}

\begin{itemize}
\item \textsuperscript{72} EEOC v. A.I.C. Security Investigation Ltd., 55 F.3d 1276 (7th Cir. 1995); Smith v. Lomax, 45 F.3d 402 (11th Cir. 1995); Birkbeck v. Marvel Lighting Corp., 30 F.3d 507 (4th Cir. 1994); Grant v. Lone Star Co., 21 F.3d 649 (5th Cir. 1994).
\item \textsuperscript{73} See cases cited supra note 29.
\item \textsuperscript{74} Jones v. Continental Corp., 789 F.2d 1225, 1231 (6th Cir. 1986).
\item \textsuperscript{75} \textsc{Cal. Gov't Code} § 12940 (West 1995).
\item \textsuperscript{76} County of Alameda v. FEHC, 200 Cal. Rptr. 381 (Ct. App. 1984) (in comparing the FEHA and Title VII the court commented that "the antidiscrimination objectives and the overriding public policy purposes are identical.").
\item \textsuperscript{77} Id.
\item \textsuperscript{78} Id.
\item \textsuperscript{79} Compare \textsc{Cal. Gov't Code} § 12926(c) (West 1995) with 42 U.S.C. § 2000e(b)(1988).
\item \textsuperscript{80} \textsc{Cal. Gov't Code} § 12926(c) (West 1995).
\item \textsuperscript{81} 42 U.S.C. § 2000e(b) (1988).
\end{itemize}
The Act also contains a provision prohibiting harassment. Specifically, it is unlawful “[f]or an employer . . . or any other person . . . to harass an employee or applicant.” By allowing liability to run to “any person,” the wording of the harassment provision seems broader than that of the discrimination statute by including co-workers, as well as, employers.

G. Fair Employment and Housing Committee Decisions

A California plaintiff pursuing an employment discrimination action under FEHA must first exhaust their administrative remedies by filing a complaint with the Department of Fair Employment and Housing (“DFEH”). The DFEH may decide to allow the aggrieved party to pursue the claim in a civil action, or pursue the case itself by issuing an accusation against the accused party and prosecuting the case before the Fair Employment and Housing Commission (“FEHC”), an administrative tribunal established under FEHA to hear employment discrimination claims. If the DFEH does prosecute the claim, the FEHC ultimately renders a decision based on its interpretation of the existing law governed by the Act. The FEHC may award affirmative relief and an administrative fine in lieu of punitive damages.

While there exists only one recent California appellate decision regarding individual liability of supervisors, the FEHC has regularly addressed the issue. The FEHC has held supervisors liable in their individual capacity if they were in a position to significantly affect access to employment. Thus, both the DFEH, the body that prosecutes the FEHA claims, and the FEHC have interpreted FEHA as al-
lowing for individual liability on the part of supervisors that can hire and terminate employees.\textsuperscript{91}

The FEHC has relied on the express language of FEHA in holding supervisors liable.\textsuperscript{92} FEHA states that it is unlawful for an "employer" to discriminate against a person "in compensation or conditions or privileges of employment."\textsuperscript{93} FEHA defines employer as "any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly."\textsuperscript{94} The FEHC has interpreted the language of section 12926(c) as allowing for individual liability.\textsuperscript{95}

The FEHC has not required that the "person" in question be an employer or agent in the traditional sense.\textsuperscript{96} Rather, the FEHC has looked to the degree of control in which the "person" has over the employment decision-making process.\textsuperscript{97} The FEHC has clearly interpreted the FEHA as enabling a plaintiff to hold supervisors individually liable for their discriminatory conduct if they possessed a requisite level of employment decision-making power. In discussing the definition of employer to hold persons liable under section 12940(a) the FEHC has stated "[w]e have previously held liable as an agent/employer those persons having supervisory status who either themselves did the wrongful act or participated in the decision-making process which formed the basis of the discriminatory action."\textsuperscript{98}

H. California Appellate Cases

Recently, in \textit{Janken v. GM Hughes Electronics},\textsuperscript{99} a California appellate court finally dealt with the issue of individ-

\textsuperscript{91} See discussion supra Part II.F.
\textsuperscript{93} \textsc{cal. Gov't Code} § 12940(a) (West 1995) (This code section currently makes it unlawful to discriminate in employment based on race, religion, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex). \textit{Id.}
\textsuperscript{94} \textit{Id.} § 12926(c).
\textsuperscript{96} DFEH v. Madera County (1990) FEHC No. 90-03 at 27.
\textsuperscript{97} \textit{Id.}
\textsuperscript{98} \textit{Id.}
\textsuperscript{99} 53 Cal. Rptr. 2d 741 (Ct. App. 1996).
ual supervisor liability with respect to an employment discrimination claim. This was the first California appellate decision on the issue. Although, some prior cases, including some from the Second District, showed tolerance for allowing individual liability, the court in Janken held that supervisors could not be held individually liable for discrimination claims.

The court relied heavily on prior federal opinions, including Miller v. Maxwell's International Inc. The court also stressed the difference between harassment and discrimination, the wording of the statute, the nature of personnel management decisions, and the Legislature's differing treatment of harassment versus discrimination.

In particular, the Janken court reviewed the responsibilities of supervisors and determined that harassment of co-employees was outside the scope of employment, and conducted for "personal gratification, because of meanness or bigotry, or for other personal motives." Therefore, harassment was avoidable and supervisors could protect themselves from such claims by simply refraining from harassing other employees. Alternatively, the court reasoned that a supervisor was required to make employment decisions, and therefore, could not avoid potential claims of discrimination.

As in many other decisions that have held that supervisors cannot be personally liable for discrimination, the court looked to the explicit wording of the definition of "employer." The court agreed with the Ninth Circuit that the "agent' language" was included to ensure that employers would be held liable under the doctrine of respondeat superior for the actions of their employees.

The court, citing Miller, reasoned that the Legislature included the small employer exception in the statute to protect such employers from the burdens of litigating discrimination

100. See Caldwell v. Montoya, 42 Cal. Rptr. 2d 842, 845-46 n.3 (Ct. App. 1995) (commenting that no prior published California decision has addressed the issue).
101. Id.
102. Janken, 53 Cal. Rptr. 2d 741.
103. Id at 745.
104. Id.
105. Id. at 746.
106. Id. at 747.
107. Id. at 747-48.
claims. The court stated that it is "inconceivable" that the Legislature . . . intended to subject individual non-employers to the burdens of litigating such claims."

Finally, the court concluded by holding that personal liability would chill effective management, while providing little additional benefit to victims of discrimination. The court opined that the specter of personal liability for personnel decisions would "severely impair" a supervisor's judgment by placing the supervisor in a position of making personnel decisions that would be the least likely to lead to discrimination claims. The court argued that this scenario placed the supervisor in an insidious conflict with his employer when making employment decisions.

Prior to Janken, the Second District Court of Appeal had taken the lead in supplying dicta on the issue of personal liability of supervisors for discriminatory employment actions. Such dicta seemed to indicate that the Second District, as well as other appellate courts, would allow individual supervisor liability.

In Jones v. Los Angeles Community College District, the Second District directly addressed the issue. In reversing the trial court's summary adjudication of the claims against the individual supervisors, the court held that there existed a triable issue of fact—whether the individuals were acting as agents for the school district. Additionally, in response to the argument that individual defendants should not be held liable because an employer would pay any awards, the court stated that "it does not logically flow from [this argument] that [the individual defendants] cannot be sued and be liable for any judgments against them . . . only that under certain circumstances, the public entity is obligated to pay a judgment against the employee." Ultimately, the court allowed

108. Janken, 53 Cal. Rptr. 2d at 751.
109. Id.
110. Id.
111. Id.
112. Id. at 752-53.
114. Jones, 244 Cal. Rptr. at 37.
115. Id. at 48.
116. Id.
the claims to proceed against the individual defendants that could be proven to be agents of the employer.

In Valdez v. City of Los Angeles, the Second District Court of Appeal once again showed no aversion to allowing a claim against an individual defendant to proceed if the proper administrative procedures were followed. The court affirmed the summary judgment motion on behalf of the individual defendants because the plaintiff failed to name the individuals in the administrative complaint. However, the court was quite clear that they would have allowed such claims if the individual defendants were named in the complaint. The court held that "failure to name [the individual defendants] in the administrative complaint is fatal to the right to bring an action against them in the trial court.”

Associate Justice Johnson went even further in dissenting with the majority's holding that the plaintiff's failure to name the individual defendants was fatal to claims against them. Justice Johnson believed that not allowing the plaintiff to go forward would be inconsistent with the rules of liberal construction required for FEHA cases.

The following year, in Saavedra v. Orange County Consolidated Transportation Service Agency, the Fourth District Court of Appeal opted not to follow the Second District's decision in Valdez. The court held that a plaintiff could bring a suit against individual defendants that went unnamed in DFEH complaints.

In its decision, the court noted that the broad purpose of the FEHA was to protect the rights of all employees from discrimination in the workplace. To that end, the court held that "Saavedra cannot be barred from suing [the individual defendant] because she did not file an administrative com-

117. Valdez, 282 Cal. Rptr. at 726.
118. Id.
119. Id. at 737.
120. Id.
121. Id.
122. Id. at 737-39.
123. Valdez, 282 Cal. Rptr. at 739 (commenting that the FEHA should be liberally construed to allow the plaintiff to bring his cause of action against the three individual defendants).
125. Id. at 284-85.
126. Id. at 285.
127. Id.
plaint against him.”128 While the main issue decided on appeal was whether unnamed defendants could be sued, the court was obviously quite willing to allow liability on the part of individual defendants. The court was silent with respect to any statutory construction arguments against individual liability.129

In 1994, the Second District, once again, addressed the issue of individual supervisor liability in Carr v. Barnabey’s Hotel Corporation.130 The court upheld a jury award against both the corporate employer and the individual supervisor in a sex and pregnancy discrimination suit.131 While the main issue of the appeal was regarding the punitive damages that were awarded, the court voiced no reservations to sustaining the award against the individual defendant.132 Once again, the court supplied no dicta questioning the appropriateness of individual supervisor liability.

I. Harassment versus Discrimination in California

As indicated above, under the FEHA the wording of the harassment provisions is broader than that of the discrimination portions.133 In Page v. Superior Court134 and Matthews v. Superior Court,135 two sexual harassment cases, the Third and Second Districts elaborated on the different wording used in the discrimination and harassment sections of FEHA. In both cases, while discussing the issue of individual supervisor liability for harassment, the courts commented that the harassment statutes were intended to be broader than the discrimination statutes.136 These holdings relied on the express wording of the harassment portion of FEHA that speci-
fies that a "person," and not just an "employer," can be held liable for such actions.\(^{137}\)

III. ANALYSIS

A. The Ninth Circuit's Reasoning in Miller has been Questioned

The reasoning used by the Ninth Circuit in Miller has been criticized by some federal courts.\(^{138}\) One area of criticism deals with the Ninth Circuit's approach to statutory interpretation.

The plain language of a statute is the generally accepted starting point of statutory interpretation.\(^{139}\) Despite this rule, the Ninth Circuit in Miller launched directly into a discussion of the legislative intent,\(^{140}\) disregarding use of the words "any agent" by Congress. The Ninth Circuit agreed with the district court that "the obvious purpose of this provision was to incorporate respondeat superior liability into the statute."\(^{141}\) However, it is questionable whether the respondeat superior explanation for including the term "any agent of an employer" is as obvious as the Ninth Circuit would suggest.

In Meritor Savings Bank v. Vinson,\(^{142}\) the U.S. Supreme Court suggested a different result:

\[\text{[W]e do agree with the EEOC that Congress wanted Courts to look to agency principles for guidance in this area . . . . Congress' decision to define 'employer' to include any 'agent' of an employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.}\(^{143}\)

The Court went on to hold that, "[a]s to employer liability, we conclude the Court of Appeals was wrong to entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the cir-

\(^{137}\) CAL. GOV'T CODE \S 12940(h) (West 1995).
\(^{138}\) Armbruster v. Quinn, 711 F.2d 1332, 1336 (6th Cir. 1983).
\(^{139}\) U.S. v. Ron Pair Enters., Inc., 489 U.S. 235 (1989); In re Sanderfoot, 899 F.2d 598 (7th Cir. 1990).
\(^{140}\) Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 587 (9th Cir. 1993).
\(^{141}\) Id.
\(^{142}\) 477 U.S. 57 (1986).
\(^{143}\) Id. at 72.
It appears that the Ninth Circuit's strict reliance on respondeat superior principles to preclude individual supervisor liability is the type of reasoning the Supreme Court denounced in *Meritor*.

Additionally, the common-law principles of respondeat superior allow for employers to recoup damages that they are required to pay because of the actions of employees. However, the many courts disallowing individual liability, including the Ninth Circuit, have eliminated an employer's ability to subrogate such damages altogether. Therefore, an employer is held solely liable for the illegal actions of its supervisory personnel, while the supervisor incurs no liability.

Some courts, critical of the Ninth Circuit, have interpreted the plain language of the definition of "employers" within Title VII as clearly subjecting a supervisor, acting as an agent of the company, to be found individually liable for his actions. "By incorporating 'agents' within the definition of 'employers', the plain language of the statute appears to subject individuals to liability for engaging in unlawful employment discrimination."

The U.S. District Court for the District of New Hampshire has interpreted the plain language of Title VII as imposing individual liability on supervisors. "In light of the foregoing, the court gives effect to the plain language of sections 2000 e(b) and 2000-2(a)(1), which clearly impose individual liability upon 'any agent of an 'employer.'" Even the Ninth Circuit conceded that "the statutory construction argument is not without merit." In actuality, a very strong argument exists that the plain language of the statute calls for individual liability.

144. *Id.* at 73.
145. 3 Cal. Jur. 3d, Employer and Employee § 91 (1994).
149. Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993).
B. The 1991 Amendment

The debate regarding the legislative intent behind Title VII intensified after the 1991 amendment that allowed for compensatory and punitive damages, in addition to the traditional damages of back pay and reinstatement. Some argue that these additional damages indicated a congressional willingness to broaden the remedies available to plaintiffs. Since the pre-1991 Title VII damages were practically only enforceable against an employer, the pre-1991 Title VII decisions that consistently did not hold supervisors individually liable were not surprising. However, the addition of compensatory damages to the 1991 amendment greatly enhanced a plaintiff's ability to collect damages from an individual defendant supervisor.

The 1991 amendment influenced some district courts to abandon the pre-1991 logic of the Ninth Circuit as espoused in Padway v. Palches. These courts generally concluded that the pre-1991 reasoning was outdated due to the new damages available in the 1991 amendment. The argument that the availability of these new damages also indicates a congressional intent to allow for individual supervisor liability is compelling, due to the overall expansion of plaintiff's remedies, and should be followed.

The legislative history behind the 1991 amendment reveals that Congress was aware of the practice of holding supervisors individually liable in employment discrimination

151. Id.

[The rationale for adopting such a reading of Title VII has been undercut by the Civil Rights Act of 1991, which authorizes the award of compensatory and punitive damages . . . . Since such damages are of the type that an individual can be expected to pay, there appears little reason to adopt the reading of Title VII urged by defendants. Cases adopting the limited reading of Title VII were decided under the former version of the Act and their reasoning is inapposite here.]

Id.
155. Id.
claims.\textsuperscript{156} During the legislative debate prior to the enactment of the amendment, Congress discussed several cases that held individual supervisors liable.\textsuperscript{157}

The court in \textit{Jendusa v. Cancer Treatment Centers of America, Inc.},\textsuperscript{158} reviewed the legislative history of the 1991 amendment.\textsuperscript{159} The \textit{Jendusa} court concluded that Congress was fully aware of these previous instances of finding individuals liable for Title VII violations.\textsuperscript{160} The court commented that "[i]f Congress found this practice objectionable or otherwise inconsistent with Congressional intent it surely could have voiced that opinion directly somewhere in the comprehensive reports accompanying the 1991 Act."\textsuperscript{161} Consequently, the Ninth Circuit's reliance on the respondeat superior holding that it made in \textit{Padway v. Palches}\textsuperscript{162} in 1982 is questionable and apparently inconsistent with the legislative intent behind the expansive 1991 amendment.

\textbf{C. The Small Employer Exemption to Title VII}

The Title VII definition of employer allows for an exemption for employers with less than fifteen employees.\textsuperscript{163} The Ninth Circuit in \textit{Miller} theorized that the congressional intent behind this small employer exemption was to protect small entities with limited financial resources from potentially high litigation costs and damage awards.\textsuperscript{164} The court then went on to apply this reasoning to individuals. "If Congress decided to protect small entities with limited resources from liability, it is inconceivable that Congress intended to allow civil liability to run to individual employees."\textsuperscript{165} Unfortunately, the Ninth Circuit does not cite any legislative debate or other authority in reaching this position. This is inconsistent with the known legislative history that reveals Congress' knowledge and acceptance of individual supervisor

\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} Id. at 1016.
\textsuperscript{162} See discussion supra Part III.A.
\textsuperscript{164} Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 587 (9th Cir. 1993).
\textsuperscript{165} Id.
liability in previously decided Title VII discrimination claims.\textsuperscript{166} Additionally, other district courts have found fault with the \textit{Miller} rationale—that Congress' primary intent in establishing the small employer exception to Title VII discrimination claims was to shield employers with fewer than fifteen employees from the expenses of litigation and potentially burdensome damages.\textsuperscript{167} The district court in \textit{Lamirande v. Resolution Trust Corp.},\textsuperscript{168} believed that Congress intended to shield small, family-run business from discriminatory hiring claims, enabling these “Mom and Pop” operations to continue to hire only friends and family without the threat of litigation.\textsuperscript{169}

Similarly, the \textit{Jendusa} court was skeptical of the Ninth Circuit's analysis in \textit{Miller} regarding the protection of small employers and individuals as the reason behind the small employer exemption.\textsuperscript{170} The court stated that after reviewing the legislative history of Title VII, it seemed “conceivable” that other reasons besides protection of small employers from the financial burden of litigating Title VII claims existed.\textsuperscript{171} Further, it seems quite arbitrary to choose fifteen as the minimum number of employees if the primary reason was to offer protection from the tremendous costs of litigation. The costs associated with litigating a protracted discrimination case and paying the damages would be tremendously burdensome for firms even larger than fifteen employees.

\begin{itemize}
  \item \textsuperscript{166} Jendusa v. Cancer Treatment Ctrs. of Am., 868 F. Supp. 1006, 1014-15 (N.D. Ill. 1994).
  \item \textsuperscript{167} \textit{Id.}
  \item \textsuperscript{168} 834 F. Supp. 526 (D.N.H. 1993).
  \item \textsuperscript{169} \textit{Id.} at 528. “[T]his court respectfully notes that it is ‘conceivable,’ and much more likely, that the size of the restriction contained in section 2000e(b) was intended to protect small family-run businesses from discriminatory hiring claims based on their preference for hiring friends and relatives.” \textit{Id.}
  \item \textsuperscript{170} \textit{Id.}
  \item \textsuperscript{171} \textit{Id.}
\end{itemize}

\textsuperscript{[T]his court cannot conclude that the desire to protect small businesses from the costs of defending against a charge of discrimination was of paramount importance in defining the term ‘employer’ and hence the Ninth Circuit's reliance on that factor in refusing to recognize personal liability strikes this court as the tail wagging the dog. Once it is recognized that other factors were as, if not more, important in arriving at Title VII's definition of ‘employer,’ the Ninth Circuit's argument loses much of its force.}

\textit{Id.}
While, as stated above, it would seem illogical that protecting small employers from the costs of litigation would have been the only reason for creating the small employer exemption, it is agreed that this was one of Congress' purposes for limiting the size of employers liable under Title VII.\textsuperscript{172} However, this one factor should not be overemphasized in order to shield individuals from liability for their discriminatory acts.

Furthermore, this immunity for individual employees seems inconsistent with the overall purposes of Title VII to eliminate and deter employment discrimination.\textsuperscript{173} As delineated with harassment cases, holding individuals liable for their egregious conduct would be an effective way to deter such conduct.\textsuperscript{174} The \textit{Jendusa} court did not agree with the Ninth Circuit's conclusion that the protection afforded small employers should be extended to all employees.\textsuperscript{175} The court felt that the Ninth Circuit "works a slight of hand" by describing the small employer exemption as a desire to protect small entities with limited resources and then mysteriously extending this desire to protect individuals.\textsuperscript{176} Overall, the court was not in favor of granting immunity to the perpetrators of the illegal conduct because small employers were granted exemptions.

Additionally, even if Congress intended to protect small employers from the costs of litigation, why protect supervisors and managers of larger companies? First, high level

\textsuperscript{172} Id.
\textsuperscript{173} Strzelecki v. Schwarz Paper Co., 824 F. Supp. 821 (N.D. Ill. 1993). \textit{Miller} seems to be inconsistent both with Seventh Circuit law and, more generally, with the broad purposes of the [Age Discrimination in Employment Act]. The ADEA is designed . . . to deter potential discriminators, and the latter goal is undermined when people who make discriminatory decisions do not have to pay for them. \textit{Id.} at 829 n.3.

\textsuperscript{174} Page v. Superior Court (3NET Systems, Inc.), 37 Cal. Rptr. 2d 529, 534 (Ct. App. 1995) (concluding that "the policy of deterring and eliminating harassment and retaliation in employment is served by holding a supervisor liable for his own acts which are violative of FEHA in accordance with the plain language of FEHA."). (emphasis added).


\textsuperscript{176} Id. (commenting on the extension of the small employer exemption to individuals, the court stated "[w]e do not find Title VII's or the ADA's limitation on the size of covered employers to provide a sound basis for concluding that Congress did not intend for personal liability to attach to individual decisionmakers who otherwise qualify as 'employers' under these Acts.").
managers of larger organizations control the employment decisions of far more than fifteen employees. Second, quite often an employer will be required to defend or indemnify a supervisor for the costs of defending a suit. Therefore, the only real cost supervisors would face are the damages awarded against them for discriminatory conduct. This seems like an illogical extension of the small employer exemption, and the claim that the exemption was created solely as a protection against the costs of litigating claims loses much of its force when viewed from this perspective.177

D. California Law

1. Differing Legislative Intent

As discussed above, there has been much debate regarding the legislative history surrounding the 1991 amendment and the small employer exemption included in Title VII.178 However, even assuming that the Ninth Circuit’s holding in Miller is sound and consistent with congressional intent, it is undoubtedly inconsistent with the history and legislative intent of the FEHA and need not be followed by California courts.

Once again, the Ninth Circuit states that the principal congressional reason for setting a minimum number of employees required to be employed before an employer could be held liable for a Title VII violation was to protect small employers, and ultimately individuals, from the costs of defending discrimination claims.179 While employers with less than five employees are protected from defending a FEHA claim,180 the California Legislature did not evince a similar desire to protect small employers from the costs of litigating a discrimination claim.181 Rather, the main reason behind the

177. Id. "Congress’ desire to avoid destabilizing such an important sector of the national economy is clearly justified. However, it simply does not follow that Congress would, or should, have the same concern for protecting individual actors in the workplace." Id.
178. See supra Parts III.B. and C.
179. Miller v. Maxwell’s Int’l Inc., 991 F.2d 583, 587 (9th Cir. 1993).
180. CAL. GOV’T CODE § 12926(c) (West 1995).
181. Robinson v. FEHC, 5 Cal. Rptr. 2d 782, 789 (1992) (discussing the reasons behind the small employer exemption) "The commentators uniformly explain the reasons for the exemptions as relieving the administrative body the burden of enforcement where few job opportunities are available, and as keep-
exemption in California's FEHA was to protect the state against the tremendous administrative burden that might result from investigating claims against every employer, no matter how small.  

Additionally, the California Legislature was particularly concerned with the personal nature of the hiring decisions at these very small companies (less than five employees). This is consistent with one of the proffered congressional concerns of allowing small employers the freedom of hiring predominately friends and family members. In Jennings v. Marralle, the California Supreme Court reviewed the history of FEHA and the legislative intent behind the regulation without ever mentioning the desire to shield small employers from the costs of defending an employment discrimination claim. The supreme court cited Justice Tobriner's historical account of the exception that stated a significant reason for establishing the California small employer exception was the Legislature's desire to allow small business the ability to hire family and friends without having to defend employment discrimination claims. Therefore, with respect to the small employer exception, the intent of the California Legislature clearly differs from that of Congress as expressed in Miller.

2. State Courts Should Not Follow Federal Decisions Based On Differing Legislative Intent

While FEHA and Title VII are similarly worded, as discussed above, the intent behind the small employer exceptions clearly differ. Traditionally, California courts view federal decisions as instructional for interpreting state statutes that are worded similar to federal statutes. However,
for the issue of individual liability for supervisors, this method of interpreting the statute should not be employed.\textsuperscript{190}

While as a general rule California courts have looked to federal decisions under Title VII for assistance in interpreting FEHA "where appropriate," . . . it is not appropriate to follow federal decisions where the distinct language of FEHA evidences a legislative intent different from that of Congress . . . . \textit{Miller} thus provides no guidance on the question of the personal liability of supervisors under FEHA.\textsuperscript{191}

3. \textit{DFEH and FEHC Interpretations of FEHA}

It is generally accepted that courts should give great weight to the FEHC in interpreting the FEHA.\textsuperscript{192} As discussed above, the FEHC has regularly held individually supervisors liable.\textsuperscript{193} The FEHC's interpretation of its governing statute is illuminating and should be followed by California courts. Its decisions are based on the plain language of the FEHA's definition of "employer."\textsuperscript{194} Once again, courts should defer to this FEHC determination that when supervisors have sufficient control over employment decisions, they can be held individually liable.

4. \textit{Broad Construction Required}

Within the FEHA itself, the California Legislature directed that "[t]he provisions of this part shall be construed liberally for the accomplishment of the purposes thereof."\textsuperscript{195} The California Supreme Court agreed that courts "must construe the FEHA broadly" in order to effectuate the goal of eliminating employment discrimination.\textsuperscript{196} The arguments against individual supervisor liability are at odds with the California Legislature's clear mandate to construe the statute broadly in order to accomplish the goals of this "remedial leg-

\textsuperscript{190.} \textit{Id. at} 535-36.
\textsuperscript{191.} \textit{Id.}
\textsuperscript{192.} \textit{Id. at} 534 (commenting that while the issue is one of law, California courts should give great weight to FEHC's interpretations of the statutes that it regulates).
\textsuperscript{193.} \textit{See discussion supra} Part II.G.
\textsuperscript{194.} \textit{See discussion supra} Part II.G.
\textsuperscript{195.} \textit{CAL. GOV'T CODE} § 12993(a) (West 1995).
\textsuperscript{196.} Robinson v. FEHC, 5 Cal. Rptr. 2d 782, 791-92 (1992).
islation.” Most arguments against individual supervisor liability attempt to narrow the meaning of the definition of employer as given in section 12926(c). However, a broad interpretation of section 12926(c) clearly calls for holding any person acting as an agent liable for discriminatory employment practices.

Additionally, to argue against individual supervisor liability under FEHA would require an interpretation of section 12926(c) that renders the words “any person acting as,” preceding the words “an agent of an employer, directly or indirectly,” surplusage. If the legislative intent were to only hold the actual employer, in the traditional sense, liable, then the Legislature could easily have done so without the addition of the words “any person.” The California Supreme Court has held that statutory constructions that create surplusages are to be avoided. Therefore, California courts should not restrict the meaning of the words “any person” in the definition of employer, but rather should construe the statute broadly.

5. California Appellate Courts

Janken v. GM Hughes Electronics is the only California appellate court to squarely address the issue of individual supervisor liability. In holding that individual supervisors could not be held liable under FEHA for their discriminatory actions, the court relied heavily on the difference between harassment and discrimination and the fact that many federal courts, including the Ninth Circuit, have disallowed such liability. Interestingly, the court never mentions the remedial purposes of the statute, the legislative mandate to broadly interpret the language of the statute, the differing language between Title VII and FEHA, or the FEHC interpretations that allow for individual liability.

The court began its analysis by detailing the difference between harassment and discrimination. The court con-
cluded that while harassment is outside the scope of employment and, thus, avoidable, a supervisor cannot avoid making personnel decisions that might be interpreted as discriminatory.204 However, discrimination in hiring, firing, or promoting is no more a part of the job than harassment of co-workers. Supervisors that discriminate should not be protected from liability because they are required to make personnel decisions any more than harassers should be protected because they must regularly communicate and interact with employees.

It also follows that if supervisors can refrain from harassing co-workers, they can also refrain from discriminating against subordinates. Ultimately, if the supervisor follows corporate policies and makes non-discriminatory decisions, no liability should accrue.

The court also reasons that the broader wording of the harassment statute indicates a legislative intent to preclude individual liability for discrimination claims.205 This is similar to the dicta of Page206 and Matthews207 indicating that the Legislature intended to “cast a broader net” with the harassment portion of FEHA than with the discrimination portion of the statute.208 However, it is arguable that this intent to broaden the scope of liability for harassment should not be seen as disallowing individual supervisor liability. The harassment statute expressly allows for “persons” to be liable.209

However, the fact that the language of the harassment statute is broader than the discrimination statute is not inconsistent with holding individual supervisors liable for discrimination. Any co-worker has the ability to harass a fellow employee on the basis of race, color, religion, age or any other protected classification. The authority to hire, fire, or promote the co-worker is not needed to participate in such egregious and unlawful conduct. Conversely, to be able to discriminate in the hiring, firing, and promotion of employees, a supervisor must possess some control over such decisions. Thus, only those persons with such control should be held lia-

204. Id.
205. Id. at 745.
206. See supra note 108 and accompanying text.
207. See supra note 109 and accompanying text.
208. See discussion supra Part II.H.
209. CAL. GOV'T CODE § 12940(h) (West 1995).
ble for discrimination.\textsuperscript{210} Therefore, it is entirely consistent with the remedial nature of FEHA to hold any persons that harass co-workers liable, while also limiting liability for discriminatory actions to those employees that possess the authority to affect employment decisions. This broader net created for harassment claims should not be used to establish immunity for supervisors making discriminatory employment decisions.

Other cases, prior to \textit{Janken}, tangentially dealt with the issue of individual supervisor liability, and exhibited a tolerance for such liability.\textsuperscript{211} \textit{Jones v. Los Angeles Community College District}\textsuperscript{212} is such a case. While overturning a summary judgment, the Second District determined that a supervisor can be sued and held liable for his actions, even though the public entity may ultimately be responsible for paying the claim.\textsuperscript{213} While this was a 1988 case, and prior to both \textit{Janken} and \textit{Miller}, the interpretation of the court is instructive. The court provided an analysis of the common-law agency principles that the supreme court stated should be followed in employment discrimination cases.\textsuperscript{214} Additionally, the court held that the ultimate responsibility for paying the damages is irrelevant with respect to the aggrieved party's right to pursue a claim against the actual wrongdoer.\textsuperscript{215} The employer and the supervisor can resolve the question of ultimate responsibility at a later date, if necessary.\textsuperscript{216}

The decisions in \textit{Valdez}\textsuperscript{217} and \textit{Saavedra}\textsuperscript{218} are also illuminating and illustrate how the opinions of various judges differ on this issue. While these two cases addressed the ability of plaintiffs to bring actions against parties not named in the original DFEH complaint, both courts referred to the plaintiff's "right" to bring a claim against the individual de-

\begin{itemize}
\item \textsuperscript{210} Id. § 12926(c).
\item \textsuperscript{211} Carr v. Barnabey's Hotel Corp., 28 Cal. Rptr. 2d 127 (Ct. App. 1994); Valdez v. City of Los Angeles, 282 Cal. Rptr. 2d 726 (Ct. App. 1991); Jones v. Los Angeles Community College Dist., 244 Cal. Rptr. 2d 37 (Ct. App. 1988).
\item \textsuperscript{212} Jones, 244 Cal. Rptr. 2d at 37.
\item \textsuperscript{213} Id.
\item \textsuperscript{214} Id.
\item \textsuperscript{215} Id.
\item \textsuperscript{216} Id.
\item \textsuperscript{217} Valdez v. City of Los Angeles, 282 Cal. Rptr. 2d 726 (Ct. App. 1991).
\end{itemize}
fendants.\textsuperscript{219} Since FEHA was enacted as civil rights legislation to eliminate discrimination in the workplace, these opinions pronounce an accurate interpretation of the remedial nature of the act. These courts were clear that, because of the origins and purposes of FEHA, aggrieved persons have a right to pursue claims against those who discriminate against them, including supervisors.

IV. PROPOSAL

The California Legislature should amend the FEHA to clearly establish liability on the part of individual supervisors that discriminate in the workplace. Such an amendment is the most efficient way to achieve the remedial goals of eliminating workplace discrimination envisioned by the Act. Without such legislative action it is likely that courts in the varying districts will interpret the statute differently, thus, leading to a similar split that has developed in the federal court system regarding this issue.\textsuperscript{220} The obvious consequence of such a split in authority within California would be years of inconsistent adjudication of claims of this civil right. The Legislature should avoid the inevitable judicial confusion, and probable forum shopping, that will result from the current language of the statute and clearly amend the statute to include liability for any employer, or any supervisor with sufficient power to hire or promote.

V. CONCLUSION

While the federal circuits are forming a consensus in disallowing individual supervisor liability, California courts should not follow this lead. Although the stated goals of both Title VII and FEHA are identical, a clear disparity exists between the legislative history and intent behind the two statutes. The California Legislature, as well as the courts, should recognize these differences, and the important variation in the express wording of the laws, and should conform with the mandate supplied by FEHA to interpret the statute broadly in order to achieve its remedial purposes.

The need for a broad interpretation is ever-increasing due to the fundamental economic and social changes occurr-

\textsuperscript{219} See discussion supra Part II.H.
\textsuperscript{220} See discussion supra Part II.E.
ring in California. In an era of increased workplace diversity, corporate downsizing, growth of entrepreneurial start-up firms, and a decline in affirmative action, the courts should be vigilant in the protection of the right to be free from discrimination in employment. A broad interpretation of FEHA, including individual supervisor liability, is the best way to deter discriminatory conduct in the workplace. The perpetrators of such illegal conduct should be held personally responsible. This will not only benefit employees typically subject to discrimination, but ultimately employers would also gain from having to defend fewer discrimination claims and from creating a more harmonious workplace.

Thomas J. Gray