Personal Liability for Sexual Harassment under the Washington Law Against Discrimination

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Abstract: Personal liability for sexual harassment stands at the forefront of employment law and the American political conscience. Title VII of the Civil Rights Act and the Washington Law Against Discrimination both enjoin employers from engaging in sexual harassment. The federal circuit courts have uniformly held that individual employees are exempt from personal liability for sexual harassment under Title VII because they do not fit the statutory definition of "employer." Washington courts have yet to address the issue under state law. This Comment argues that the correct interpretation of the Washington Law Against Discrimination bars individuals from personal liability for sexual harassment. Interpretations of analogous federal and state statutes coupled with Washington case law and statutory structure compel the conclusion that only employing entities, not individuals, may be liable for sexual harassment under the Washington Law Against Discrimination.

Thanks in large part to Anita Hill, Clarence Thomas, President Clinton, and Paula Jones, sexual harassment has received more mainstream press in the past decade than any other issue in employment law. What many, indeed most, people probably do not realize, however, is that neither Clarence Thomas nor Bill Clinton, nor any other individual sued under federal law, can be personally liable for sexual harassment, regardless of whether they engaged in harassing conduct. Title VII of the Civil Rights Act, which governs sexual harassment under federal law, imposes liability for harassment only on employers.1 For thirty years federal courts disagreed over whether an individual could fit the Title VII definition of "employer" and thus be personally liable for harassment.2 Within the past five years, the federal circuit courts have come to the consensus that an individual may not be personally liable for harassment under Title VII.3 In the federal system, the story ends there.

Personal liability under state law remains unclear. A few states, such as California, have statutory provisions specifically providing that

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2. See Phillip L. Lamberson, Comment, Personal Liability for Violations of Title VII: Thirty Years of Indecision, 46 Baylor L. Rev. 419 (1994) (noting history of disagreement among courts over personal liability under Title VII and arguing that correct interpretation of Title VII allows for personal liability).
3. See infra note 16.
individuals may be liable for harassment. But, the language in most state anti-discrimination statutes is not so clear or specific. Under Washington law, an "employer" may be liable for sexual harassment. No court, however, has resolved whether an individual can qualify as an employer and thus be personally liable for sexual harassment. This Comment argues that individuals should not be held personally liable as employers under the Washington Law Against Discrimination (WLAD), the law prohibiting sexual harassment in Washington. Part I examines the federal circuit courts' reasoning for concluding that Title VII does not permit personal liability. Federal case law informs the interpretation of the WLAD because the WLAD substantially parallels Title VII and the Washington courts have not conclusively addressed personal liability under the WLAD. Part II traces the legislative history and case law interpreting the WLAD. Part III argues that individuals should not be liable as employers under the current WLAD.

I. PERSONAL LIABILITY UNDER FEDERAL LAW

Although Washington state courts have yet to address personal liability under the WLAD, they have held repeatedly that the WLAD
substantially parallels Title VII. Thus, federal interpretations of Title VII are persuasive when examining the WLAD. In addition, the sex discrimination chapter of the Washington Administrative Code specifically states:

In the interest of consistency and to avoid confusion on the part of persons governed by both the state and federal sex discrimination laws, the [Washington Human Rights C]ommission will generally follow the interpretations of the sex discrimination provisions of Title VII of the United States Civil Rights Act of 1964, 42 USC § 2000e and following, where the federal act is comparable to the state act.

The federal courts have examined extensively personal liability for sexual harassment under Title VII and have come to the consensus that there is no personal liability.

Title VII prohibits sexual harassment by forbidding an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's... sex." For purposes of Title VII, "employer" is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." Initially, federal courts disagreed over whether individuals could fit within this definition of "employer" and thus be held personally liable for violations of Title VII. Although the U.S.
Supreme Court has never addressed the issue,\textsuperscript{15} the federal circuits now agree that individuals do not fit the Title VII definition of "employer" and therefore cannot be personally liable for sexual harassment under Title VII.\textsuperscript{16}


15. The U.S. Supreme Court has repeatedly denied certiorari where personal liability was directly at issue. See, e.g., Miller v. Maxwell’s Int’l Inc., 991 F.2d 583 (9th Cir. 1993), \textit{cert. denied sub nom.} Miller v. La Rosa, 510 U.S. 1109 (1994); Grant v. Lone Star Co., 21 F.3d 649 (5th Cir. 1994), \textit{cert. denied}, 513 U.S. 1015 (1994); Birkbeck v. Marvel Lighting Corp., 30 F.3d 507 (4th Cir. 1994), \textit{cert. denied}, 513 U.S. 1058 (1994). In \textit{Miller}, the question presented was: “Can [an] agent of [an] employer be held personally liable for his or her discriminatory conduct in violation of Title VII or [the] ADEA?” Miller v. La Rosa, 62 U.S.L.W. 3398 (U.S. Dec. 7, 1993) (No. 93-659). The questions presented in \textit{Grant} included: “In [a] Title VII gender discrimination suit based upon sexual harassment, is judgment for back pay against [an] individual employee/agent of [a] corporate employer consistent with [the] intent of Congress?” and, “Should this court resolve [the] conflict in decisions by courts of appeals on [the] question of whether [an] individual employee/agent can be held responsible for back pay as [a] remedy in [a] Title VII case?” 63 U.S.L.W. 3301 (U.S. Oct. 11, 1994) (No. 94-365). The questions presented in \textit{Birkbeck} included: “When [a] jury finds that [a] high-level corporate officer (and shareholder) intentionally discriminated against older workers by firing them because of their age, may that officer be held individually liable for damages under ADEA?” 63 U.S.L.W. 3427 (U.S. Nov. 29, 1994) (No. 94-719). The Supreme Court has ruled, however, that Title VII does not allow an employer against whom damages have been assessed to seek contribution from the individual employee responsible for the harassment. Northwest Airlines, Inc. v. Transport Workers Union of Am., 451 U.S. 77, 94–95 (1981). Because liability on the same claim or injury is fundamental to a right of contribution, the Court’s refusal to allow contribution against an individual under Title VII could imply that the Court agrees that an individual cannot be liable under Title VII.

16. The cases that circuit courts of appeals have decided dealing with this issue are, in numerical order, as follows: Tomka v. Seiler Corp., 66 F.3d 1295 (2d Cir. 1995); Kachmar v. Sungard Data Sys., Inc., 109 F.3d 173 (3d Cir. 1997); Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061 (3d Cir. 1996); Lissau v. Southern Food Serv., Inc., 159 F.3d 177 (4th Cir. 1998); Birkbeck, 30 F.3d 507; Indest v. Freeman Decorating, Inc., 164 F.3d 258 (5th Cir. 1999); \textit{Grant}, 21 F.3d 649; Wathen v. General Elec. Co., 115 F.3d 400 (6th Cir. 1997); Gastineau v. Fleet Mortgage Corp., 137 F.3d 490
Several arguments recur in the federal circuit court decisions finding no personal liability under Title VII. In *Miller v. Maxwell's International Inc.*, the Ninth Circuit concluded that it would be incongruous to hold individuals liable for sexual harassment when employers with fewer than fifteen employees are not liable. The court reasoned that Congress exempted small businesses because it did not want to impose on them the burden of the costs of litigation. The court further declared it “inconceivable” that Congress intended to exempt small entities from this burden while at the same time imposing it upon individuals. This small business exemption argument has been cited heavily by other circuit courts.

In *Miller*, the Ninth Circuit also held that the “any agent” language in the Title VII definition of “employer” is simply an expression of respondeat superior liability, not an inclusion of liability for the agent personally. The Third, Fourth, Fifth, Sixth, Seventh, and D.C. Circuits have all utilized this argument. Using a different rationale, the Eleventh Circuit has also declared that the relief granted under Title VII is against the employer, not against an individual.

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(7th Cir. 1998); Williams v. Banning, 72 F.3d 552 (7th Cir. 1995); Spencer v. Ripley County State Bank, 123 F.3d 690 (8th Cir. 1997); Bonomolo-Hagen v. Clay Central-Every Community Sch. Dist., 121 F.3d 446 (8th Cir. 1997); Pink v. Modoc Indian Health Project, Inc., 157 F.3d 1185 (9th Cir. 1998); Miller, 991 F.2d 583; Haynes v. Williams, 88 F.3d 898 (10th Cir. 1996); Sauers v. Salt Lake County, 1 F.3d 1122 (10th Cir. 1993); Cross v. Alabama, 49 F.3d 1490 (11th Cir. 1995); Gary v. Long, 59 F.3d 1391 (D.C. Cir. 1995). Only the First Circuit has yet to join its sister circuits in finding no liability for individuals under Title VII. See Serapion v. Martinez, 119 F.3d 982, 992 (1st Cir. 1997) (explicitly declining to address personal liability under Title VII).

17. Miller, 991 F.2d at 587.
18. Id.
19. Id.
20. Indest, 164 F.3d at 262; Lissau, 159 F.3d at 180; Wathen, 115 F.3d at 406; Sheridan, 100 F.3d at 1077–78; Haynes, 88 F.3d at 901; Tomka, 66 F.3d at 1314; Grant, 21 F.3d at 652.
22. Miller, 991 F.2d at 587.
23. Lissau, 159 F.3d at 180; Gastineau v. Fleet Mortgage Corp., 137 F.3d 490, 494 (7th Cir. 1998); Wathen, 115 F.3d at 405–06; Gary v. Long, 59 F.3d 1391, 1399 (D.C. Cir. 1995); Grant, 21 F.3d at 652.
24. Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991). Although *Busby* is a racial harassment case, the court’s interpretation of Title VII applies to the sexual harassment context as evidenced by the circuit courts that have relied upon the *Busby* rationale in sexual harassment cases. See, e.g., Haynes, 88 F.3d at 901; Gary, 59 F.3d at 1399; Cross v. Alabama, 49 F.3d 1490, 1504 (11th Cir. 1995); Grant, 21 F.3d at 652; see also infra note 94 and accompanying text.
Courts have further concluded that the absence of any reference to personal liability both in the legislative process leading to the enactment of Title VII and in the text of the statute itself illustrate that Title VII does not impose personal liability. The Second and Sixth Circuits have reasoned that the lack of any discussion of personal liability in the floor debates over Title VII shows that such liability was never intended. In addition, courts have noted the absence of explicit language in Title VII proscribing conduct by individuals, contrasted with the use of such language in other statutes, as evidence that Congress knows how to impose personal liability when it wishes, but that it chose not to do so when enacting or amending Title VII.

Many federal circuit courts have cited aspects of the remedial scheme of Title VII as proof that individuals may not be personally liable. First, courts have noted that when Congress adopted the Title VII definition of "employer," the only remedies the Act provided were reinstatement and back pay—remedies traditionally available only from an employing entity, not an individual. Although Congress added compensatory and punitive damages through the 1991 Civil Rights Act, these damages are mandatorily calibrated and capped based on how many employees work for the defendant employer. Courts have inferred from this damages scheme that despite the personal nature of the added damages, Congress intended for these damages to be imposed only on employers, not individuals. Second, numerous courts have also reasoned that the absence of any language in the 1991 amendment addressing personal liability or the damages assessable against an individual further illustrates that Congress did not intend to add personal liability when it amended

25. See Wathen, 115 F.3d at 406; Tomka, 66 F.3d at 1314; Grant, 21 F.3d at 653.
26. Wathen, 115 F.3d at 406; Tomka, 66 F.3d at 1314.
28. Grant, 21 F.3d at 653.
29. See, e.g., Lissau, 159 F.3d at 181; Wathen, 115 F.3d at 406; Tomka, 66 F.3d at 1314–16.
30. Lissau, 159 F.3d at 180–81; Wathen, 115 F.3d at 406; Tomka, 66 F.3d at 1314 (citing Padway v. Patchex, 665 F.2d 965 (9th Cir. 1982)); Grant, 21 F.3d at 653.
31. The 1991 damages provision creates a sliding scale ranging from up to $50,000 for an employer with between 14 and 101 employees, to up to $300,000 for employers with more than 500 employees. 42 U.S.C. § 1981a(b)(3) (1994).
32. Wathen, 115 F.3d at 406; Haynes v. Williams, 88 F.3d 898, 901 (10th Cir. 1996); Tomka, 66 F.3d at 1315.
Title VII. Finally, the Second, Sixth, Seventh, Ninth, and Tenth Circuits have concluded that Congress would not have added personal liability through the 1991 remedy provisions of Title VII, while not even mentioning such liability in the substantive provisions of the law.

Despite the unified response of the federal circuit courts, personal liability under Title VII is still not resolved beyond all doubt. The Individual Liability for Discrimination Act of 1997, which calls for an amendment to Title VII clarifying that individuals may be personally liable for discrimination, went before the U.S. Congress on June 26, 1997.

Although there has been no action on the bill since it was introduced and sent to the House Committee on Education and the Workforce, its mere existence shows that the controversy surrounding personal liability continues.

In addition, several arguments for personal liability occasionally resurface in federal district court opinions criticizing the circuit courts and imposing personal liability. The most common argument for personal liability is that the plain meaning of the Title VII definition of

33. Lissau, 159 F.3d at 181; Wathen, 115 F.3d at 406; Sheridan v. E.I. Dupont de Nemours & Co., 100 F.3d 1061, 1077 (3d Cir. 1996); Haynes, 88 F.3d at 901; Tomka, 66 F.3d at 1315; Miller v. Maxwell’s Int’l Inc., 991 F.2d 583, 588 n.2 (9th Cir. 1993).

34. Wathen, 115 F.3d at 406; Haynes, 88 F.3d at 901; Tomka, 66 F.3d at 1315; Miller, 991 F.2d at 588 n.2.

35. H.R. 2078, 105th Cong. (1997). The bill reads in part:

Congress has always intended that individuals who discriminate in employment within the meaning of [T]itle VII of the Civil Rights Act of 1964 may be held individually liable for their actions, whether or not any other entity or individual is also liable. Courts have in general faithfully carried out this mandate. Recently, in sexual harassment cases in particular, some courts have failed to hold individuals liable for their discriminatory conduct that is otherwise clearly covered by [T]itle VII, on grounds that individuals cannot be held liable under it. This Act will prevent this misreading. . . . Section 706 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) is amended by adding at the end the following: “(1) Individuals are individually liable for acts of discrimination committed by them in employment, when the acts are otherwise covered by this title, whether or not any other party is also liable for their acts.”

H.R. 2078, §§ 2–3.


37. Wyss v. General Dynamics Corp., 24 F. Supp. 2d 202 (D.R.I. 1998) (holding that individuals may be liable under Title VII and Rhode Island state law); Speight v. Albano Cleaners, Inc., 21 F. Supp. 2d 560 (E.D. Va. 1998) (holding that individual may be liable as employer under Title VII if he has significant control over plaintiff and harassment is not plainly delegable decision); Ostrach v. Regents of the Univ. of Cal., 957 F. Supp. 196 (E.D. Cal. 1997) (criticizing Miller but following holding because bound by it); Isacampo v. Hasbro, Inc., 929 F. Supp. 562 (D.R.I. 1996) (holding that individuals may be liable under Title VII based on analysis in Tomka dissent); see also supra note 14 (listing scholarly commentators arguing for personal liability).
“employer” imposes liability upon agents individually. A few courts have held that limiting the “agent” language to an incorporation of respondeat superior renders the phrase superfluous, thus violating the canon of statutory construction that every phrase must be given meaning. Another recurring argument is that the 1991 addition of damages of the type traditionally available against an individual illustrates the congressional intent to permit personal liability. Some courts have championed personal liability as necessary to deter future misconduct and appropriate because it places blame on the party at fault. Other courts have held that individuals who have sufficient employer-like authority, such as the power to hire or fire employees, should be treated as employers. Finally, some have argued that in order to accomplish the broad remedial purpose of Title VII, courts should interpret the statute liberally to include personal liability. Although these arguments favoring personal liability have some merit, all but one federal circuit court agree that the correct interpretation of Title VII bars individuals from personal liability as employers.

II. THE WASHINGTON LAW AGAINST DISCRIMINATION

A. The WLAD and the Definition of “Employer”

In 1949, the Washington Legislature adopted the Washington Law Against Discrimination (WLAD) to prevent and eliminate discrimination in employment in Washington. As enacted, the WLAD declared that it

38. Tomka, 66 F.3d at 1319–20 (Parker, J., dissenting); Wyss, 24 F. Supp. 2d at 205–07; Ostrach, 957 F. Supp. at 198; Howard, supra note 14, at 678.
39. Tomka, 66 F.3d at 1319 (Parker, J., dissenting); Wyss, 24 F. Supp. 2d at 208; Ostrach, 957 F. Supp. at 199; Howard, supra note 14, at 679; see also 2A Norman J. Singer, Sutherland Statutory Construction § 46.06, at 104 (4th ed. 1984).
40. Wyss, 24 F. Supp. 2d at 209; Ostrach, 957 F. Supp. at 199.
42. Wyss, 24 F. Supp. 2d at 208; White, supra note 14, at 548–49.
43. Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989). The Second Circuit in Tomka responded to this argument by explaining that this interpretation would force courts to draw a distinction between supervisors with hire/fire power and those without it, a distinction with no basis in the language of Title VII. 66 F.3d at 1314–15.
44. Tomka, 66 F.3d at 1320 (Parker, J., dissenting); Howard, supra note 14, at 678–79.
45. See supra note 16.
46. The current WLAD also bars discrimination against members of the protected classes in credit and insurance transactions, in places of public resort, amusement, or accommodation, and in real property transactions. Wash. Rev. Code §§ 49.60.176, .178, .215, .222, & .223 (1998).
was an unfair employment practice for an employer to “discriminate against any person in compensation or in other terms or conditions of employment because of such person’s race, creed, color or national origin.” In 1971, the legislature added sex as a protected class.

Under the original WLAD, complaints alleging violation of the law were handled by the Washington Human Rights Commission (WHRC), the administrative agency responsible for enforcing the law. The remedies available were limited to “conference, conciliation and persuasion,” an order from the Commission requiring the respondent to cease and desist from the unfair employment practice, a restraining order from the court, or other appropriate temporary relief. The 1973 amendment to the law created a civil cause of action for anyone injured by a violation of the law and added the remedies of actual damages, attorneys’ fees, and any other remedy authorized by the federal Civil Rights Act of 1964.

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48. Law Against Discrimination, ch. 81, § 3(3), 1971 Wash. Laws, 1st Ex. Sess. 549, 551. The law also declares that the opportunity to obtain and hold employment free from discrimination is a civil right. Wash. Rev. Code § 49.60.010(1) (1998). However, the fallout of this provision has rarely been examined by the courts. But see Griffin v. Eller, 130 Wash. 2d 58, 922 P.2d 788 (1996) (Talmadge, J., dissenting) (arguing that civil right to be free from discrimination creates cause of action distinct from unfair employment practices provision); Jonathan A. Moskowitz, Comment, Permitting Employers to Violate Employees’ Civil Rights: The Griffin v. Eller Exemption from Washington’s Law Against Discrimination, 7 J.L. & Pol’y 121 (1998) (discussing implications of WLAD civil right to be free from discrimination). Even though freedom from discrimination is a civil right, there is generally no common law cause of action for sexual harassment per se. Barbara Lindemann & David D. Kadue, Sexual Harassment in Employment Law 128 (Supp. 1997). But see Roberts v. Dudley, 92 Wash. App. 652, 966 P.2d 377 (1998) (creating common law cause of action for gender discrimination). Yet, neither the Supreme Court of Washington nor the Washington Court of Appeals has agreed with or validated Roberts.
50. § 8, 1949 Wash. Laws at 513–14. This phrase generally describes the procedure undertaken by the Washington Human Rights Commission (WHRC) to eliminate an unfair practice as set out in a complaint. The procedure includes meeting with the respondent to discuss the situation and explain the law. If unable to eliminate the unfair practice, the WHRC appoints a hearing tribunal with the power to make findings of fact and issue and serve a cease and desist order. If the cease and desist order is disobeyed, the WHRC may seek enforcement through an order of the court or by criminal proceedings if necessary. Frank P. Helsell, The Law Against Discrimination in Employment, 25 Wash. L. Rev. 225, 226–28 (1950).
52. § 9, 1949 Wash. Laws at 515.
53. Ch. 141, § 3(2), 1973 Wash. Laws 418, 420. Prior to the 1991 Civil Rights Act, the remedies available under Title VII were limited to back pay and reinstatement. See supra note 30.
The WLAD bars employers from engaging in unfair employment practices;\(^54\) thus, to impose liability, courts must first find that the defendant fits the statutory definition of "employer."\(^55\) The WLAD defines "employer" as "any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit."\(^56\) The WLAD's legislative history contains no discussion of the meaning of "employer" at the time the law was enacted or at any later date, and the original bill was adopted word for word as it was proposed.\(^57\) Although the legislature has amended or modified other provisions of the WLAD numerous times, the definition of "employer" has remained essentially the same since 1949.\(^58\)

An employer may avoid WLAD liability by invoking either of the two statutory exemptions in the definition of "employer": having fewer than eight employees, or being a "religious or sectarian organization not organized for profit."\(^59\) In *Griffin v. Eller*, the Supreme Court of Washington reaffirmed the validity of these exemptions and held that a sole practitioner with fewer than eight employees was statutorily exempt from sexual harassment liability under the WLAD.\(^60\) In arriving at its holding, the court first noted the absence of any legislative history indicating that the 1973 addition of the statutory private remedy was

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56. Wash. Rev. Code § 49.60.040(3) (1998). The WLAD defines "person" to include "one or more individuals, partnerships, associations, organizations, corporations, cooperatives, legal representatives, trustees and receivers, or any group of persons; it includes any owner, lessee, proprietor, manager, agent, employee, whether one or more natural persons." Wash. Rev. Code § 49.60.040(1) (1998).
58. See Wash. Rev. Code § 49.60.040(3); § 3(b), 1949 Wash. Laws at 507. Although the definition has never been amended, bills to change it have been proposed but have not passed. See, e.g., S. 5130, 56th Leg., 1st Reg. Sess. (Wash. 1999) (proposing that WLAD definition of "employer" be amended to include employers with one or more employees).
59. Wash. Rev. Code § 49.60.040(3).
60. *Griffin*, 130 Wash. 2d 58, 922 P.2d 788. Justice Talmadge, however, vigorously dissented, arguing that the eight-employee threshold applies only to unfair practices and the jurisdiction of the WHRC, not to the civil right to be free of discrimination enforced by a private action in court as set out in RCW 49.60.030. Id. at 72–97, 922 P.2d at 794–806 (Talmadge, J., dissenting); see also Moskowitz, *supra* note 48 (criticizing court's holding in *Griffin* and arguing that eight-employee threshold applies only to jurisdiction of WHRC).
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intended to allow a statutory cause of action against small, otherwise exempt employers.\textsuperscript{61} The court then cited \textit{Bennett v. Hardy}, where the Supreme Court of Washington noted in dicta that small employers are per se exempt from statutory liability.\textsuperscript{62} To further bolster its statutory exemption holding, the court discussed \textit{Farnam v. CRISTA Ministries}, in which it previously had used the WLAD exception for religious organizations to excuse CRISTA Ministries from liability.\textsuperscript{63} The \textit{Griffin} holding that a sole practitioner cannot be liable for sexual harassment illustrates that individual employees should not be liable as employers under the WLAD.

In \textit{Anaya v. Graham}, the Washington Court of Appeals clarified another aspect of the WLAD definition of "employer" by adopting the payroll method as the proper method for counting employees for purposes of the eight-employee threshold.\textsuperscript{64} Under this method, an employee may be counted for purposes of the eight-employee threshold if the individual's name is on the employer's payroll for the period covering the dates on which the alleged harassment occurred.\textsuperscript{65} \textit{Anaya} implies that to be an employer, one must maintain a payroll, an activity traditionally reserved for employing entities, not individuals.

Although Washington courts have examined and applied the WLAD small business exemption, the legislative history of the WLAD provides no insight as to the reasons behind this exemption.\textsuperscript{66} The only guidance available comes from WHRC regulations promulgated in 1982, thirty-three years after the legislature created the exemption.\textsuperscript{67} The regulations state that the reasons for the exemption are "[t]o relieve small businesses

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\item Id. at 63, 922 P.2d at 790.
\item Id. at 64, 922 P.2d at 790 (citing Bennett v. Hardy, 113 Wash. 2d 912, 915, 784 P.2d 1258, 1259 (1990)).
\item Id. (citing Farnam v. CRISTA Ministries, 116 Wash. 2d 659, 673, 678, 807 P.2d 830, 837, 840 (1991)).
\item 89 Wash. App. 588, 593, 950 P.2d 16, 19 (1998) (citing Walters v. Metropolitan Educ. Enters., Inc., 519 U.S. 202 (1997), where Supreme Court embraced this method). The \textit{Anaya} court also noted that adopting the payroll method "would serve the objective of making interpretations of RCW 49.60 consistent with federal antidiscrimination law." \textit{Id.}
\item Id.
\item Bennett, 113 Wash. 2d at 928, 784 P.2d at 1265. The \textit{Griffin} court hypothesized that the legislature may have included the small business exemption to conserve state resources or to protect small businesses from the regulatory burden and expense of litigation. \textit{Griffin}, 130 Wash. 2d at 66–67, 922 P.2d at 791. For an extensive, although slanted, discussion of the history of the WLAD and the small business exemption, see \textit{id.} at 81–87, 922 P.2d at 799–801 (Talmadge, J., dissenting).
\end{enumerate}
of a regulatory burden" and "[i]n the interest of cost effectiveness, to confine public agency enforcement of the law to employers whose practices affect a substantial number of persons." It should be noted, however, that the stated purpose of these regulations was to establish standards for determining who may be counted as an employee for purposes of the eight-employee threshold, not to explain the small business exemption.

B. Sexual Harassment Under the WLAD

Washington courts have interpreted the WLAD unfair employment practices provision as protecting workers from sexual harassment in the workplace. Courts have distinguished two categories of sexual harassment: hostile work environment harassment and quid pro quo harassment. Hostile work environment harassment occurs when offensive and unwelcome conduct is sufficiently severe or pervasive to create a work environment that is hostile or abusive. In Glasgow v. Georgia-Pacific Corp., the Supreme Court of Washington set out the four elements necessary to establish a prima facie case of hostile work environment sexual harassment. A plaintiff must prove that (1) the conduct was unwelcome, (2) the harassment was because of sex, (3) the harassment affected the terms and conditions of employment, and (4) the

69. Wash. Admin. Code § 162-16-160(1) (1997); Wash. St. Reg. 82-08-070, 82-16-082. The Anaya opinion was necessary to supplement the WAC regulations and resolve whether an employee actually had to work on the day in question to qualify as being "employed." Anaya, 89 Wash. App. at 592, 950 P.2d at 18.
71. Glasgow, 103 Wash. 2d at 405, 693 P.2d at 711; Schonauer, 79 Wash. App. at 819, 905 P.2d at 399; Thompson v. Berta Enter., Inc., 72 Wash. App. 531, 536, 864 P.2d 983, 986 (1994). In June 1998, the U.S. Supreme Court abandoned the legal distinction in Title VII cases between quid pro quo harassment and hostile work environment harassment and 15 years of federal case law built on this distinction. Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2264-65 (1998). However, the Supreme Court of Washington has not abandoned this distinction or addressed the issue under Washington law since the Ellerth opinion was issued.
72. Glasgow, 103 Wash. 2d at 406-07, 693 P.2d at 711-12.
73. Id. As a preliminary matter, the plaintiff must identify and prove the alleged offensive conduct. Schonauer, 79 Wash. App. at 820, 905 P.2d at 399.
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harassment can be imputed to the employer. To satisfy the fourth element, a plaintiff must prove that the employer:

(a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action. This may be shown by proving (a) that complaints were made to the employer through higher managerial or supervisory personnel or by proving such pervasiveness of sexual harassment at the workplace as to create an inference of the employer’s knowledge or constructive knowledge of it and (b) that the employer’s remedial action was not of such nature as to have been reasonably calculated to end the harassment.

The Glasgow court explained:

[T]he essential purpose of the cause of action, which we herein recognize, [is] to be preventive in nature. As the fourth element of the cause of action makes clear, an employer may ordinarily avoid liability by taking prompt and adequate corrective action when it learns that an employee is being sexually harassed.

Quid pro quo harassment is the extortion of sexual favors or tolerance of sexual harassment in exchange for job benefits or protection against adverse employment actions. Necessary to a claim of this type is that someone who has actual or apparent authority over the victim commit harassment such that the threat of adverse employment action is realistic. In these types of cases, the fact that a supervisor engaged in the misconduct is sufficient to impute the harassment to the employer and the employer is therefore strictly liable. In Thompson v. Berta Enterprises, Inc., the Washington Court of Appeals explained that

74. Glasgow, 103 Wash. 2d at 406–07, 693 P.2d at 711–12.
75. Id. at 407, 693 P.2d at 712.
77. DeWater v. State, 130 Wash. 2d 128, 134, 921 P.2d 1059, 1062 (1996); Glasgow, 103 Wash. 2d at 405, 693 P.2d at 711; Schonauer, 79 Wash. App. at 823, 905 P.2d at 401. The plaintiff must also prove that the conduct was unwelcome and was based on gender. Schonauer, 79 Wash. App. at 823, 905 P.2d at 401.
imposing strict liability on employers for quid pro quo harassment is sound public policy because it requires employers to be responsible for ensuring that the people to whom they give authority do not abuse that authority.\textsuperscript{80} The court further explained that “[strict liability] places the burden for preventing quid pro quo sexual harassment on those best situated to prevent it.”\textsuperscript{81}

There is a theoretical distinction between vicarious liability for quid pro quo harassment and direct liability for negligent failure to remedy hostile work environment harassment. In either case, however, the WLAD imposes liability on the employer, not the individual harasser.

III. INDIVIDUALS SHOULD NOT BE PERSONALLY LIABLE FOR SEXUAL HARASSMENT UNDER THE WLAD

The WLAD definition of “employer” should preclude personal liability for several reasons. First, many of the reasons given by federal circuit courts to support holdings of no personal liability under Title VII apply by analogy to the WLAD.\textsuperscript{82} Second, the statutory language and structure of the WLAD compel the conclusion that individuals are not personally liable for sexual harassment. Third, policy reasons weigh against imposing personal liability. Finally, the interpretation given to other state statutes analogous to the WLAD supports barring personal liability in Washington.

A. Title VII Arguments Prohibiting Liability for Individuals as Employers Apply by Analogy to the WLAD

The federal courts’ interpretation of Title VII as enjoining personal liability strongly supports the conclusion that personal liability should not be injected into the WLAD unfair employment practices provision. The Title VII holdings are compelling because Washington courts consistently have held that federal court interpretations of Title VII are persuasive when interpreting the WLAD.\textsuperscript{83} Furthermore, the WHRC

\textsuperscript{80} Thompson, 72 Wash. App. at 537–38, 864 P.2d at 987.
\textsuperscript{81} Id. at 538, 864 P.2d at 987.
\textsuperscript{82} See supra note 8 and accompanying text.
\textsuperscript{83} See supra note 8 and accompanying text.
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regulations state that where analogous, Washington law should be interpreted consistently with federal law.84

1. The WLAD Small Business Exemption Precludes Liability for Individuals as Employers

The inclusion of the small business exemption in the WLAD definition of "employer" confirms that individuals should not be statutorily liable as employers. In Miller v. Maxwell's International Inc., the Ninth Circuit reasoned that Congress created the Title VII small business exemption because it "did not want to burden small entities with the costs associated with litigating discrimination claims."85 The court declared, "If Congress decided to protect small entities with limited resources from liability, it is inconceivable that Congress intended to allow civil liability to run against individual employees."86 In Griffin v. Eller, the Supreme Court of Washington hypothesized that the reasons for the analogous WLAD small business exemption may include conserving state resources and protecting small businesses from a regulatory burden and the expense of private litigation.87 In light of the similar reasons behind the Title VII and WLAD small business exemptions given by the Miller and Griffin courts, the Miller holding that the small business exemption supports no personal liability applies equally well to the WLAD.

The facts and holding of Griffin also illustrate the incongruity of personal liability under the WLAD. In Griffin, the Supreme Court of Washington refused even to reach the merits of Ms. Griffin's hostile work environment claim because Mr. Eller, a sole practitioner, did not have eight employees and was therefore statutorily exempt.88 The court's application of the small business exemption in Griffin highlights the inconsistency of suggesting that the WLAD imposes personal liability on

85. Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993).
86. Id.
87. Griffin v. Eller, 130 Wash. 2d 58, 66-67, 922 P.2d 788, 791 (1996). The court also proffered as reasons for the WLAD small business exemption that "the State has a substantial interest in the well-being of small business with regard to the state economy, tax base, and opportunities for employment." Id. at 68, 922 P.2d at 792; see also supra notes 66-68 and accompanying text.
88. Griffin, 130 Wash. 2d at 64, 922 P.2d at 790.
an individual employee while exempting a sole practitioner through the small business exemption. To be consistent with Griffin, individuals, whether or not they own their own businesses, should not be liable as employers under the WLAD.

Furthermore, the Washington Court of Appeal’s adoption of the payroll method for counting employees in Anaya v. Graham indicates that the WLAD small business exemption protects individuals from liability as employers. Because only an employing entity, not an individual employee, has a payroll and thus can reach the eight-employee threshold, Anaya supports the conclusion that individuals may not be personally liable as employers under the WLAD.

2. WLAD Relief for Sexual Harassment Is Only Against an “Employer”

Another argument borrowed from the Title VII analysis originates in the language of the WLAD imposing liability for sexual harassment on an “employer.” In the federal context, the Eleventh Circuit declared that “[t]he relief granted under Title VII is against the employer, not individual employees.” The court explained that “the proper method for a plaintiff to recover under Title VII is by suing the employer, either by naming the supervisory employees as agents of the employer or by naming the employer directly.” These statements apply with equal force to the relief granted under the WLAD because the WLAD specifically targets its unfair employment practices provision at employers.

89. Under the payroll method, an employee may be counted for purposes of the eight-employee threshold if the individual’s name is on the employer’s payroll for the period covering the pertinent dates. See supra note 64.


91. The court’s requirement that an employer have a payroll also rebuts the argument that supervisors who have sufficient employer-like authority may be held liable as employers per se rather than as employers via the “person acting in the interest” language. See supra note 43 and accompanying text.


94. Id.

Personal Liability for Sexual Harassment

a. **U.S. Supreme Court Interpretation of Title VII Verifies that “Employer’s” Conduct Is the Focus of Sexual Harassment Laws**

The U.S. Supreme Court’s opinions in *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*, two recent supervisor sexual harassment cases, highlight that federal sexual harassment law focuses on the actions of the employer, not the individual. The Court used identical language in both cases to hold that where a supervisor has engaged in harassment, but not taken any tangible employment action, an employer may raise an affirmative defense to liability or damages if it can show “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” Although the U.S. Supreme Court has not explicitly addressed personal liability, the holdings in *Faragher* and *Ellerth* illustrate that the actions of the employer and the avoidance of harm by the plaintiff are at the heart of Title VII liability, not the actions of WLAD.

The title of the WLAD sexual harassment provision, “Unfair practices of employers,” and its explicit directive at “any employer” illustrate that, like Title VII, the WLAD focuses on the employer and the employment relationship. Individuals are therefore appropriately excluded from liability because, by definition, it is the employment relationship that makes the harassment possible. A non-employer individual alone has no ability to violate the statute. A construction worker who whistles and makes catcalls at a particular woman on a daily basis has not violated the WLAD. However, if the woman is a co-worker, the employer may be liable because it is responsible for bringing the two individuals together.

98. “A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” *Ellerth*, 118 S. Ct. at 2268.
99. *Faragher*, 118 S. Ct. at 2293; *Ellerth*, 118 S. Ct. at 2270. When the supervisor’s harassment culminates in a tangible employment action, this affirmative defense is not available to the employer. *Faragher*, 118 S. Ct. at 2293; *Ellerth*, 118 S. Ct. at 2270.
100. See supra note 15.
101. Wash. Rev. Code § 49.60.180 (1998); see also supra note 46.
102. White, supra note 14, at 558. This argument was made in the context of Title VII, but applies with equal force to the WLAD.
103. Id. at 557.
and sustaining the environment in which the harassment is possible.\footnote{Id. at 558; see also supra note 76 and accompanying text.} Of course, supporters of personal liability may argue that an employer as an entity is only made up of individuals and thus cannot act apart from the acts of the individuals. Regardless of this distinction, however, the unfair employment practices provision of the WLAD is directed at the employer, not the individuals that make up the employer.

\textbf{b. Washington Case Law Backs WLAD Liability Only for Employers}

Washington case law also supports the conclusion that WLAD liability for sexual harassment attaches only to employers, not individuals. Beginning with \textit{Glasgow}, Washington courts have interpreted the WLAD to require that sexually harassing conduct be imputed to the employer in order for a plaintiff to make out a prima facie case of sexual harassment.\footnote{\textit{Glasgow v. Georgia-Pacific Corp.}, 103 Wash. 2d 401, 407, 693 P.2d 708, 712 (1985); \textit{Herried v. Pierce County Pub. Transp. Benefit Auth. Corp.}, 90 Wash. App. 468, 473, 957 P.2d 767, 769 (1998); \textit{Kahn v. Salerno}, 90 Wash. App. 110, 118--19, 951 P.2d 321, 326 (1998); \textit{Wilson v. Olivetti N. Am., Inc.}, 85 Wash. App. 804, 812, 934 P.2d 1231, 1236 (1997); \textit{Schonauer v. DCR Entertainment, Inc.}, 79 Wash. App. 808, 821, 824, 905 P.2d 392, 400--01 (1995).} In other words, without a link between the conduct and the employer, there can be no valid WLAD sexual harassment claim. Liability can attach to an employer either vicariously or directly.\footnote{\textit{DeWater v. State}, 130 Wash. 2d 128, 135, 921 P.2d 1059, 1062 (1996); \textit{Schonauer}, 79 Wash. App. at 824, 905 P.2d at 401.} For quid pro quo harassment, the WLAD automatically attributes the conduct of the supervisor to the employer, making the employer strictly liable.\footnote{\textit{DeWater}, 130 Wash. 2d at 135, 921 P.2d at 1063; \textit{Glasgow}, 103 Wash. 2d at 407, 693 P.2d at 712; \textit{Herried}, 90 Wash. App. at 474--75, 957 P.2d at 770--71; \textit{Kahn}, 90 Wash. App. at 127, 950 P.2d at 331.} In hostile work environment cases, liability is premised upon the employer's failure to react in the appropriate manner and is therefore direct.\footnote{\textit{DeWater}, 130 Wash. 2d at 135, 921 P.2d at 1063; \textit{Glasgow}, 103 Wash. 2d at 407, 693 P.2d at 712; \textit{Herried}, 90 Wash. App. at 474--75, 957 P.2d at 770--71; \textit{Kahn}, 90 Wash. App. at 127, 950 P.2d at 331.} To interpret the WLAD as providing for personal liability would essentially overrule fifteen years of case law built upon the \textit{Glasgow} requirement that the conduct be imputed to the employer as an element of the prima facie case.\footnote{\textit{DeWater}, 130 Wash. 2d at 135, 921 P.2d at 1063; \textit{Glasgow}, 103 Wash. 2d at 407, 693 P.2d at 712; \textit{Herried}, 90 Wash. App. at 474--75, 957 P.2d at 770--71; \textit{Kahn}, 90 Wash. App. at 127, 950 P.2d at 331.} Because Washington courts have held consistently that conduct lacking a connection to an employer simply does not constitute sexual harassment under the
WLAD, there is no reason to discard this element of the prima facie case and hold individuals liable for sexual harassment.

3. **WLAD “Any Person Acting in the Interest” Language Is an Expression of Respondeat Superior Liability**

   The common refrain in the Title VII cases that the “any agent” language in the definition of “employer” is merely an expression of respondeat superior and not an imposition of personal liability applies by analogy to the WLAD. Although the WLAD definition of “employer” uses the phrase “person acting in the interest of,” instead of “any agent,” the definitions are functionally equivalent. When the legislature enacted the WLAD, the Restatement of Agency described an agent’s duty of loyalty as “a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency.” In the comments to this section, the definition of “agent” is paraphrased as “one who acts on behalf of the principal.” Acting “on behalf of” and “in the interest of” are essentially the same thing; thus, the federal circuit courts’ holdings regarding the effect of the “agent” language in Title VII apply with equal force to the WLAD. When comparing the “agent” language in Title VII to Missouri state law that uses “acting in the interest” language, the Eighth Circuit explained that the difference in language is “a distinction without a difference.” Thus, federal court decisions interpreting Title VII suggest that the WLAD “person acting in the interest of” language incorporates respondeat superior liability, but does not impose personal liability.

**B. WLAD Statutory Language and Structure Bar Liability for Individuals as Employers**

Relief for sexual harassment may be sought only from an employer because the statutory structure of the WLAD and its distinct provisions are targeted at specific entities and specific conduct. While the WLAD prohibits employers from discriminating in the terms or conditions of

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110. See supra notes 22–23 and accompanying text.
111. See infra Part III.D.1.
112. Restatement of Agency § 387 (1933).
113. Restatement of Agency § 387 cmt. a.
employment," it bars employment agencies from failing or refusing to classify properly, refer for employment, or otherwise discriminate against individuals in a protected class. In addition, the WLAD enjoins labor unions or organizations from discriminating with respect to membership rights or privileges, and forbids persons from discriminating in real estate or credit transactions. This precise language defining which entities are prohibited from which activities confirms that by using the term "employer," the legislature intended to impose liability for sexual harassment only on employers, not persons or individuals.

1. Explicit Language Imposing Personal Liability in Other WLAD Provisions Confirms No Individual Liability for Sexual Harassment

The Washington Legislature knew what language was necessary to impose personal liability through the WLAD, but chose not to use this language when proscribing the unlawful employment practices that include sexual harassment. The WLAD declares that it is an unfair employment practice for an employer to discriminate based on an individual's sex. In contrast, a subsequent section states that "[i]t is an unfair practice for any person to aid, abet, encourage, or incite" a violation of the chapter. Notably, these provisions specifically impose liability on "persons" rather than "employers." If the legislature had intended to impose personal liability for sexual harassment on individuals, it would have used the word "person" in setting out the unfair practices that include sexual harassment.

120. The Fifth Circuit made this argument about personal liability under Title VII. See Grant v. Lone Star Co., 21 F.3d 649, 653 (5th Cir. 1994).
122. Wash. Rev. Code § 49.60.222.
123. Wash. Rev. Code § 49.60.176.
2. Legislative History Shows that Congress Never Intended Personal Liability

The absence of any mention of personal liability in the legislative history of the WLAD or the regulations promulgated by the WHRC indicates that the legislature never contemplated personal liability. If the legislature intended to impose personal liability, it had the burden to make that clear either on the face of the statute or somewhere in the legislative history. As the Supreme Court of Washington stated in Bennett v. Hardy, "[a] court may not read into a statute those things which it conceives the Legislature may have left out unintentionally." The lack of even a single reference to personal liability in the legislative history or WHRC regulations demonstrates that the framers of the WLAD never intended to create personal liability for individuals as employers.

C. Policy Reasons Support Relief Only Against an Employer

Courts should not feel compelled to inject personal liability into the WLAD because other legal means allow redress against individual harassers personally. Although sexual harassment is a statutorily created cause of action, harassment victims may still sue their harassers under common law theories such as outrage, intentional or negligent infliction of emotional distress, battery, or tortious interference with a business contract.

124. Montanari, supra note 14, at 366 ("It is the job of Congress to clearly enunciate the principles it codifies.").


By limiting liability to an employer, the WLAD encourages harassment victims to report the alleged offensive conduct to the employer early in the course of the harassment. If the employee reports the harassment and the employer takes steps reasonably calculated to end the harassment, the harassment theoretically stops and the employer will not be liable.130 If the employer fails to take measures reasonably calculated to stop the harassment after the employee reports it, the employer will be directly liable for failing to act.131 Because employers cannot regulate every inch of a workplace, encouraging early reporting provides employers an opportunity to stop harassment before it becomes unbearable, an essential goal of all anti-discrimination laws.132 If individuals could be liable for harassment, there would be less incentive for employees to report harassment to their employers in the early stages. Thus, employers would have fewer chances to remedy this unreported harassment in the workplace as opposed to the courtroom.

Because employers, not individual employees, are responsible for the creation and maintenance of the workplaces that the WLAD seeks to regulate, employers are in the best position to monitor and remedy discrimination by sanctioning offending employees and deterring future misconduct. Only employers have the ability to provide company-wide training and education about sexual harassment and the WLAD in particular. If individuals are held liable, they will certainly have an incentive to learn about the law and possibly inform friends and family. However, individuals have no incentive to engage in widespread education about sexual harassment and the WLAD. Focusing liability exclusively on employers best furthers the goals of the WLAD by giving employers strong incentive to take measures to keep the entire workplace free from discrimination.133 Although employers cannot recover money

(Supp. 1997). Unlike successful suits under the WLAD, however, these common law theories do not provide for the recovery of attorneys’ fees. See Wash. Rev. Code § 49.60.030(2) (1998).


132. “To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII’s deterrent purpose.” Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2270 (1998).

133. In Burrell v. Star Nursery, Inc., the Ninth Circuit suggested that part of the reason for the U.S. Supreme Court’s creation of an affirmative defense for employers in Title VII litigation is to encourage them to adopt anti-harassment policies. No. 97-17370, 1999 WL 160796, at *4 (9th Cir. 1999).
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from wayward employees, employers are in the best position to absorb the costs of litigation and also have the means to discipline and punish employees who cause them to be liable for WLAD damages awards.

The WLAD provision mandating liberal construction of the law does not require that liability be extended to encompass individuals. "[A] legislative mandate to apply a liberal interpretation to an act will not justify the judicial creation of rights or liabilities under the guise of 'construction.'" The WLAD specifically aims its prohibition against sexual harassment at employers, not individuals. As the Seventh Circuit stated in the context of the Americans with Disabilities Act:

We do not doubt that the employment discrimination statutes have broad remedial purposes and should be interpreted liberally, but that cannot trump the narrow, focused conclusion we draw from the structure and logic of the statutes. A liberal construction does not mean one that flies in the face of the structure of the statute.

Even if protected by the canopy of the liberal construction clause, to impose personal liability under the WLAD would be to impermissibly read into the law something that is simply not there.

D. Analogous Statutes from Other States Support Interpreting the WLAD to Bar Personal Liability

The interpretation given similar anti-discrimination statutes in other states constitutes additional evidence that the correct interpretation of the WLAD shields individuals from liability as employers. The reasoning

134. In order to seek contribution under Washington law, joint tortfeasors must be liable on the same claim and injury. Wash. Rev. Code §§ 4.22.030, .040 (1998). However, this is not possible in the WLAD context because individuals cannot be personally liable for sexual harassment.


136. 3 Norman J. Singer, Sutherland Statutory Construction § 58.05, at 86 (5th ed. 1992) (citing Rines v. Scott, 432 A.2d 767 (Me. 1981)).

137. See supra Part III.A.2.

138. EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1282 (7th Cir. 1995).

used in interpreting these statutes is compelling because the WHRC has declared that application of the WLAD should be consistent with other state anti-discrimination laws where they are comparable.\textsuperscript{140}

\section{The Missouri Prohibition Against Personal Liability Supports Consistent WLAD Interpretation}

The WHRC mandate of consistency with other state laws, coupled with the holding that Missouri law enjoins personal liability,\textsuperscript{141} support the conclusion that individuals should not be liable as employers under the WLAD. Using language nearly identical to the WLAD, the Missouri Human Rights Act (MHRA) defines “employer” to include “any person employing six or more persons, within the state, and any person directly acting in the interest of an employer.”\textsuperscript{142} Like the WLAD, the MHRA makes it an unlawful employment practice for an employer to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.”\textsuperscript{143}

Although Missouri state courts have not addressed personal liability under the MHRA, federal courts sitting in Missouri have interpreted the MHRA as barring individuals from liability as employers.\textsuperscript{144} In \textit{Lenhardt v. Basic Institute of Technology}, a former employee brought an MHRA disability claim against his employer and the employer’s president who was also the company’s sole director and sole shareholder.\textsuperscript{145} On appeal, the Eighth Circuit noted that it could see no reason why the Missouri Supreme Court would not take analogous federal employment discrimination law into account if faced with the issue of personal liability under the MHRA.\textsuperscript{146} Plaintiff Lenhardt argued that the Title VII

\begin{footnotesize}
\begin{enumerate}
\item Gatewood Prod., Inc., 484 S.E.2d 481, 489 (W. Va. 1997) (finding individuals may be liable because statute imposes liability upon “any person, employer, employment agency”); see supra note 6.
\item Lenhardt v. Basic Inst. of Tech., Inc., 55 F.3d 377 (8th Cir. 1995).
\item 55 F.3d at 377–78.
\item \textit{Id.} at 380.
\end{enumerate}
\end{footnotesize}
and MHRA definitions of "employer" were not analogous because under Missouri law, an individual need not be an agent to fit the definition of "employer." The court rejected this argument, calling it "a distinction without a difference," and explaining, "If the words 'any agent of such a person' and 'any person directly acting in the interest of an employer' subjected corporate supervisory personnel to individual liability, [the defendant] would come within either definition of an employer." In other words, because the definitions of "employer" are essentially the same, if the individual defendant were liable under one statute, he would have to be liable under the other statute as well. The court concluded, however, that every federal circuit that had ruled on the issue of personal liability had held that individuals could not be liable under the Title VII definition of "employer." Therefore, the individual defendant in this case could not be liable as an employer under the MHRA.

The Eighth Circuit's analysis of the MHRA in Lenhardt provides two compelling arguments against liability for individuals as employers under the WLAD. First, Lenhardt interprets language nearly identical to the WLAD definition of "employer" and finds no basis for personal liability. Second, Lenhardt illustrates that the Title VII "any agent" language and the MHRA and WLAD "person acting in the interest" language are sufficiently similar to warrant an interpretation of the WLAD consistent with the Title VII prohibition against personal liability.

2. The Tennessee Bar on Personal Liability Confirms Correctness of Precluding Personal Liability Under the WLAD

The interpretation of Tennessee law as barring personal liability also demonstrates that individuals should not be liable as employers under the WLAD. In Carr v. United Parcel Service, the Supreme Court of Tennessee interpreted the Tennessee Human Rights Act (THRA), which is analogous to the WLAD in several respects, as protecting individuals from liability as employers. Under the THRA, "employer" includes

147. Id.
148. Id.
149. Id. at 381.
150. Id.
persons employing eight (8) or more persons within the state, or any person acting as an agent of an employer, directly or indirectly.

The THRA also forbids discrimination in the terms or conditions of employment because of one’s sex. The Carr court examined the THRA in the context of a sexual harassment claim against both the employer and co-employees, and held that the “agent of an employer” language does not impose personal liability. The court found more compelling the argument that the agent language imposed vicarious, as opposed to personal, liability for three reasons. First, the court stated that vicarious liability was more consistent with the THRA small business exemption. Second, the court found that agents are generally not individually liable for acts taken on behalf of a principal. Third, the court noted that personal liability was not consistent with the federal courts’ interpretation of Title VII. The similarity between the WLAD and the THRA definitions of “employer,” coupled with the Supreme Court of Tennessee’s reasons for holding individuals not liable under the THRA, support interpreting the WLAD as barring personal liability.

3. Analogous Florida Law Precludes Personal Liability, Supporting WLAD Prohibition Against Personal Liability

Individuals should not be liable under the WLAD because they are not liable under the analogous Florida law and because the WHRC regulations require consistency with analogous laws from other states. Federal courts sitting in Florida have examined the Florida Civil Rights Act (FCRA) and held that it does not allow for personal liability for sexual harassment. Identical to Title VII, the FCRA defines

154. 955 S.W.2d at 835.
155. Id.
156. Id.
157. Id. The court also held that the statutory language barring “persons” from aiding and abetting violations of the act could result in personal liability. Id. at 836 (referring to Tenn. Code Ann. § 4-21-301(2)); see Steele v. Superior Home Health Care, No. 03A01-9709-CH-00395, 1998 WL 783348, at *8-9 (Tenn. Ct. App. Nov. 10, 1998) (holding individual liable as aider and abettor).
“employer” as “any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.”

The FCRA further states that it is an unlawful employment practice for an employer to “discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual’s... sex.” In Sanders v. Mayor’s Jewelers, an employee brought Title VII and FCRA sexual harassment claims against her employer and supervisors. The Sanders court agreed with the defendants that because the FCRA is closely modeled after Title VII, Florida courts should apply federal case law interpreting Title VII to decide issues under the FCRA. By analogy to the Title VII holdings regarding personal liability, the Sanders court held that individuals should be exempt from liability for sexual harassment under the FCRA.

The plaintiff in Sanders sought to distinguish the FCRA from Title VII by arguing that there were sufficient differences between the laws so as to warrant an independent examination of the state statute. Although the Sanders opinion does not elaborate, it appears that the plaintiff cited the liberal construction provision of the FCRA as support for her claim that the FCRA casts a wider liability net than Title VII and thus includes personal liability under the state law. The court explicitly rejected this argument and concluded that there was "no reason why this Court should construe identical statutory provisions to produce meanings differing widely enough to submit a whole new class of defendant to suit in discrimination actions brought under the FCRA." The Sanders case is an additional example of a court interpreting a state statute analogous to the WLAD to bar individuals from liability as employers. Therefore,
individuals should be protected from liability as employers under Washington law.

4. Other State Sexual Harassment Statutes Bar Individuals from Liability as Employers

Courts in many states have not independently examined their state sexual harassment laws regarding the specific question of personal liability, but have followed the federal interpretation of Title VII and barred personal liability.168 These cases interpreting analogous state laws, coupled with the WHRC regulations encouraging interpretation and application of the WLAD consistent with analogous federal and state anti-discrimination laws, further illustrate that Washington courts should interpret the WLAD to bar personal liability in sexual harassment cases.

IV. CONCLUSION

For the past thirty years, personal liability for sexual harassment under Title VII has been vigorously litigated in federal courtrooms across the country. In the absence of Washington case law or scholarly commentary on the issue, the federal courts’ reasons for consistently denying personal liability under Title VII are invaluable when examining personal liability in Washington.169 Analysis of the statutory structure of the WLAD, its legislative history, and public policy, in conjunction with the interpretation of Title VII and other states’ sexual harassment laws, demonstrates that individuals should not be personally liable as employers under the WLAD. Individuals should remain exempt from personal liability for sexual harassment unless and until the American political conscience motivates a change in the law.


169. See supra note 9 and accompanying text.