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Genaro v. Central Transport: a New Direction in Ohio Law Regarding Employment Discrimination

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GENARO V. CENTRAL TRANSPORT

**GENARO V. CENTRAL TRANSPORT: A NEW DIRECTION IN OHIO LAW REGARDING
EMPLOYMENT DISCRIMINATION.**

“From a practical perspective, this decision may cause supervisors and managers to be less inclined to vigorously enforce the employer’s work rules and to make disciplinary decisions involving employees who are members of a protected class.”¹

I. INTRODUCTION

The Ohio Supreme Court’s 4-3 decision in *Genaro v. Central Transport* crafted a new way of thinking about employment discrimination.² In the past, anti-discrimination statutes such as Title VII and many similar state statutes (including the one at issue in *Genaro*, Ohio Revised Code Chapter 4112), allowed a victim of discrimination to sue his or her employer, including the supervisor in his or her

¹Bricker & Eckler LLP, *Supervisor Personal Liability and Punitive Damages Under Ohio’s Anti-Discrimination Law*, CLIENT BULLETIN No. 99-1 (March 26, 1999) <http://benet-np.1.bricker.com/Practice/employ/EMPLOYBULL_99-1.htm>. This is only one example of various legal newsletters and bulletins notifying employer clients of this new way of regarding employment discrimination.

The author would like to thank Suellen Oswald, Esquire, of Duvin, Cahn & Hutton, Cleveland, Ohio, for her gracious assistance in providing the briefs for this case.

²*Genaro v. Central Transp.*, 703 N.E.2d 782 (Ohio 1999), hereinafter *Genaro*. *Genaro* is actually a consolidation of three almost-identical cases, *Genaro v. Central Transport*, *Baldwin v. Future Electronics, Inc.*, and *Greer v. Bally Total Fitness*.

Genaro has been cited several times by both federal and state courts since the Ohio Supreme Court decided the case. See, e.g., *Blough v. Hawkins Mkt. Inc.*, 51 F. Supp.2d 858, 865 (N.D. Ohio 1999) (stating plaintiff’s claim failed in a Title VII action because under that statute a claim can only be made against an employer, but would survive under Ohio Revised Code 4112 according to *Genaro*); *Thomas v. General Elec. Co.*, No. C-970981, 1999 Ohio App. LEXIS 301, at *3 (Ohio Ct. App. Feb. 5, 1999) (“ . . . under Ohio law, a supervisor/manager may be held jointly and/or severally liable with his employer for his discriminatory conduct”); *Summerville v. Ross/Abbott Labs.*, No. 98-3517, 1999 U.S. App. LEXIS 21009, at *13 (6th Cir. Aug. 10, 1999) (stating that while the Ohio Supreme Court ruled that supervisors may be held individually liable, this case involves non-supervisory employees, which that court has not yet addressed); *Peterson v. Buckeye Steel Casings*, No. 98AP-685, 1999 Ohio App. LEXIS 2613, at *16 (Ohio Ct. App. June 8, 1999) (“ . . . the Ohio Supreme Court recently held that supervisors and managers are accountable for discriminatory conduct and may be held liable under R.C. 4112”); *Eperesi v. Northernenvirotest Sys.*, No. 98-3452, 1999 U.S. App. LEXIS 25186, at *11 (6th Cir. Ohio, filed October 6, 1999) (comparing the absence of supervisor liability in Title VII and its presence in Ohio law); *Vivian v. Madison*, No. 191/98-849 1999 Iowa Sup. LEXIS 246, at *17 (Iowa filed October 13, 1999) (concluding that the Iowa Civil Rights Act does authorize the subjecting of a supervisory employee to individual liability).

supervisory capacity.³ In *Genaro*, the Ohio Supreme Court interpreted Ohio Revised Code Chapter 4112 to allow a victim of employment discrimination to sue his or her supervisor or manager in an individual capacity, making the liability for such discrimination joint and several.⁴ This was the first time this Court addressed the issue, though a few Ohio appellate courts had previously made this decision.⁵

Such a decision cannot help but inject a new feeling of fear and uneasiness into the workplace, with supervisors and managers now forced to strike a difficult and delicate balance between employment decisions which may or may not turn out to be discriminatory and the hard reality that in a suit by an employee, the supervisor may lose everything.⁶ Such a decision as the one in *Genaro* does little to add to the potential recovery of plaintiffs, but does much to add to the potential harm of defendants.⁷ *Genaro* will prove harmful to already-tense workplace environments. While one perhaps can applaud the Ohio Supreme Court in its effort to eradicate discrimination, it has gone too far and the decision will ultimately have more harmful effects than the ones it set out to eliminate.⁸

³*See, e.g.*, 42 U.S.C. § 2000(e)(b); Kentucky Civil Rights Act, KY. REV. STAT. ANN. § 344.030 et seq. (Banks-Baldwin 1996); Missouri Human Rights Statute, MO. ANN. STAT. § 213.010 (West 1997 & Supp. 1999); OHIO REV. CODE ANN. § 4112 (Anderson 1998 & Supp. 1999); Tennessee Human Rights Act, TENN. CODE ANN. § 50-2-201 et. seq. (1996); A suit against an individual in his official capacity is considered a suit against the employer. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985).

Title VII has served the dual purposes of compensating the victims of discrimination and deterring future discriminatory conduct. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

⁴*Genaro*, 703 N.E.2d at 782. “A liability is said to be joint and several when the creditor may demand payment or sue one or more of the parties to such liability separately, or all of them together at his option.” BLACK’S LAW DICTIONARY 583 (Abridged 6th ed. 1991).

⁵*Genaro*, 703 N.E.2d at 785 (“... while this court has not previously spoken on this issue, three decision from courts of appeals of this state have held that liability may be imposed against supervisors and managers in their individual capacity for conduct in violation of R.C. Chapter 4112.”). *See also infra* note 13.

⁶Phillip L. Lamberson, *Personal Liability for Violations of Title VII: Thirty Years of Indecision*, 46 BAYLOR L. REV. 419, 421 (1994).

⁷*See, e.g.*, *Janken v. GM Hughes Elec.*, 53 Cal. Rptr. 2d 741, 747 (1996) (holding that the California Fair Employment and Housing Act was not intended to place supervisory employees at risk of individual liability for performing the job of making personnel decisions, such as hiring and firing, assignment of projects, and performance evaluations).

⁸In *Cheek v. Industrial Powder Coatings*, 706 N.E.2d 323 (Ohio 1999), the first case to follow *Genaro* in dealing with this subject, Justice Lundberg Stratton, a dissenter in *Genaro*, dissented, citing the lack of intent on the part of the Ohio General Assembly to provide for supervisor liability. Chief Justice Moyer and Justice Cook, vigorous dissenters in *Genaro*, concurred in the majority opinion. *Cheek*, 706 N.E.2d at 323 (Lundberg Stratton, J., dissenting).

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Part I of this Note will examine the *Genaro* decision in depth, focusing on the Ohio Supreme Court's reasoning.⁹ The court looked at the language of Ohio Revised Code Chapter 4112, specifically the use of the word "agent" as support for its imposition of individual liability.¹⁰ In addition, Part II will also examine the policy goals the Ohio Supreme Court has attempted to achieve.¹¹ Finally, Part II will also demonstrate that the *Genaro* decision is a poor one, one which was not legislatively intended, one that imposes an undue burden on individuals without a corresponding increase in benefit to plaintiffs and one that was unnecessary, given the protections to plaintiffs which already exist through vicarious liability and other causes of action.¹²

II. BACKGROUND

Genaro was decided in an atmosphere of judicial unwillingness to hold supervisors or managers individually liable for their discriminatory acts.¹³ A majority of the Circuit Courts of Appeal have interpreted Title VII and analogous state statutes to provide only for employer liability under the doctrine of respondeat superior.¹⁴

⁹See *infra* notes 13-48 and accompanying text.

¹⁰*Supra* note 9 and accompanying text.

¹¹See *infra* notes 34-42 and accompanying text.

¹²See *infra* notes 49-112 and accompanying text.

¹³*Infra* notes 14 and 16. Few cases have been decided on this subject in Ohio, though a few Ohio appellate court cases have been handed down in the last decade. See, e.g., *Davis v. Black*, 591 N.E.2d 11, 19 (Ohio Ct. App. 1991) ("Clearly, the supervisor for whom an employer may be vicariously liable under the doctrine of respondeat superior is also an employer within this definition."); *Seiber v. Wilder*, No. 94CA32, 1994 WL 558969, at *5 (Ohio Ct. App. October 12, 1994) (stating that individual defendants not entitled to summary judgment because they were supervisors); *Hart v. Justarr Corp.*, 649 N.E.2d 316, 319 (Ohio Ct. App. 1994), *appeal denied*, 646 N.E.2d 1125 (Ohio 1995) (holding that individual defendant, as director and officer of a corporation, could be held liable as an "employer" on claim of sexual harassment).

¹⁴Respondeat superior, roughly translated, means "let the master answer." This doctrine means that a master is liable in certain cases for the wrongful acts of his servant or a principal is for those of his agent. BLACK'S LAW DICTIONARY 909 (Abridged 6th ed. 1991). The Second Restatement of Agency defines agency as "a fiduciary relation which results from the manifestation of consent by one person that the other shall act on his behalf and subject to his control, and consent by the other to act." RESTATEMENT (SECOND) OF AGENCY §1 (1958). "A master is subject to liability for the torts of his servants committed while acting in the scope of their employment." RESTATEMENT (SECOND) OF AGENCY §219 (1958).

For a survey of these circuit court decisions, see, e.g., *Serapion v. Martinez*, 119 F.3d 982 (1st Cir. 1997); *Tomka v. Seiler Corp.*, 66 F.3d 1295 (2d Cir. 1995); *Dici v. Pennsylvania*, 91 F.3d 542 (3d Cir. 1996); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507 (4th Cir. 1994); *Grant v.*

Although the question came up time and again a majority of federal courts have refused to hold supervisors individually liable.¹⁵ The United States Supreme Court has yet to decide upon such a case.¹⁶ The Sixth Circuit followed the lead of the majority of the other circuits, with the exception of one of its district courts.¹⁷

Lone Star Co., 21 F.3d 649 (5th Cir. 1994), *cert. denied*, 513 U.S. 1015 (1994); Wathen v. General Elec. Co., 115 F.3d 400 (6th Cir. 1997); E.E.O.C. v. AIC Sec. Investigations, Ltd., 55 F.3d 1276 (7th Cir. 1995); Lenhardt v. Basic Inst. of Tech., Inc., 55 F.3d 377 (8th Cir. 1995); Miller v. Maxwell's Int'l, Inc., 991 F.2d 583 (9th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994); Sauers v. Salt Lake County, 1 F.3d 1122 (10th Cir. 1993); Busby v. City of Orlando, 931 F.2d 764 (11th Cir. 1991) (*per curiam*); Gary v. Long, 59 F.3d 1391 (D.C. Cir. 1995). *But see* Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 n.1 (11th Cir. 1989) (stating that supervisor may be "directly liable for his actions that violate Title VII); Paroline v. Unisys Corp., 879 F.2d 100, 104-05 (4th Cir. 1989), *vacated*, 900 F.2d 27 (4th Cir. 1990) (stating supervisor may be held liable as employer). *See also* Gregory M. P. Davis, Comment, *More Than a Supervisor Bargains For: Individual Liability Under the Americans With Disabilities Act and Other Employment Discrimination Statutes*, 1997 WIS. L. REV. 321, 328-30 (1997) (stating there has been a "dramatic shift" away from the imposition of individual liability).

In the Sixth Circuit, prior to the decision in *Wathen*, the cases of *York v. Tennessee Crushed Stone Association* and *Jones v. Continental Corporation* stated in dicta that individuals may be held liable under the federal employment statutes. *York* stated "an agent of the employer who may be sued as an employer in Title VII suits has been construed to be a supervisor or managerial employee to whom employment decisions have been delegated by the employer." 684 F.2d 360, 362 (6th Cir. 1982). In *Jones*, the court stated that "the law is clear that individuals may be held liable for violations of section 1981, . . . and as 'agents' of an employer under Title VII." 789 F.2d 1225, 1231 (6th Cir. 1986).

¹⁵*Supra* note 14.

¹⁶The closest the United States Supreme Court has come to deciding this issue is in the case of *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). In that case, a female bank employee brought a Title VII sexual harassment suit against both her employer and supervisor. The Supreme Court there noted that "Congress' decision to define "employer" to include any "agent" of an employer evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Meritor Sav. Bank*, 477 U.S. at 58. The Supreme Court decided that liability in cases of sexual harassment brought under Title VII should be decided utilizing agency principles. *Id.* at 73. However, an interesting aspect of this case is the distinction the Court draws between sexual harassment and sexual discrimination and a further distinction between hostile work environment harassment and quid pro quo harassment. This case is often cited by other cases brought under Title VII, though this is the closest the Supreme Court has come to deciding who should be responsible for the effects of discrimination. *See also* Maria M. Carillo, *Hostile Environment Sexual Harassment By a Supervisor Under Title VII: Reassessment of Employer Liability in Light of the Civil Rights Act of 1991*, 24 COLUM. HUM. RTS. L. REV. 41 (1993); Rachel B. Lutner, *Employer Liability for Sexual Harassment: The Morass of Agency Principles and Respondeat Superior*, 1993 U. ILL. L. REV. 589, 627 (1993) (concluding that courts should adopt a standard for hostile environment sexual harassment because it would eliminate inconsistencies and foster the growth of sexual harassment law as a means of

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remedying abuses of power against women that occur in the workplace). *But see* Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at Meritor Savings Bank, FSB v. Vinson*, 44 VAND. L. REV. 1229, 1272 (1991) (concluding that agency law is irrelevant to employer liability for sexual harassment and courts should not use it); Anne C. Levy, *The Change in Employer Liability for Supervisor Sexual Harassment After Meritor: Much Ado About Nothing*, 42 ARK. L. REV. 795, 835 (1989) (“Meritor’s . . . substitution of agency principles for strict liability in hostile work environment cases has created confusion and disparate results in lower courts.”).

¹⁷*Wathen*, 115 F.3d at 400; *Griswold v. Fresenius USA, Inc.*, 964 F. Supp. 1166, 1168-69 (N.D. Ohio 1997) (holding that employee’s co-worker and supervisor could not be liable in their individual capacities under Title VII); *Gausmann v. City of Ashland*, 926 F. Supp. 635, 641 (N.D. Ohio 1996) (holding that applicant could not pursue claim for age and gender discrimination against government supervisor employee in his individual capacity under Ohio law); *Redman v. Lima City School Dist. Bd. of Educ.*, 889 F. Supp. 288, 292 (N.D. Ohio 1995) (holding that officials could not be held individually liable under Title VII); *Czupih v. Card Pak Inc.*, 916 F. Supp. 687, 690 (N.D. Ohio 1996) (holding that individual liability does not exist under Title VII);

Lococo v. Barger, 958 F. Supp. 290, 295 (E.D. Ky. 1997) (deciding that a county attorney could not be held individually liable under the Kentucky Civil Rights Act for sexual discrimination against an assistant county attorney); *Lowry v. Clark*, 843 F. Supp. 228, 229-30 (E.D. Ky. 1994) (holding that “agent” provision in Title VII definition of “employer” does not impose Title VII liability on individual employees); *Winston v. Hardee’s Food Sys., Inc.*, 903 F. Supp. 1151, 1155 (W.D. Ky. 1995) (same);

Burnett v. Tyco Corp., 932 F. Supp. 1039, 1040-41 (W.D. Tenn. 1996) (holding that neither Title VII nor Tennessee Human Rights Act allows employees or supervisors to be sued as individuals); *Frizzell v. Southwest Motor Freight, Inc.*, 906 F. Supp. 441, 449 (E.D. Tenn. 1995) (same); *Wilson v. Wayne County*, 856 F. Supp. 1254, 1262 (M.D. Tenn. 1994) (holding that Title VII did not permit suit against sheriff in his individual capacity); *Shpargel v. Stage & Co.*, 914 F. Supp. 1468, 1478 (E.D. Mich. 1996) (holding that president could not be held liable in his individual capacity for religious discrimination in violation of Title VII).

But see *Johnson v. University Surgical Group Assocs of Cincinnati*, 871 F. Supp. 979, 987-88 (S.D. Ohio 1994) (holding that, in the Sixth Circuit, coemployee supervisor is personally and individually liable under Title VII for his own personal and individual acts of intentional discrimination); *Kramer v. Windsor Park Nursing Home, Inc.*, 943 F. Supp. 844, 850 (S.D. Ohio 1996) (holding that co-owner could be held individually liable for violations of Title VII, the Rehabilitation Act, and the Americans with Disabilities Act); *Kolb v. State of Ohio, Dept. of Mental Retardation and Developmental Disabilities, Cleveland Developmental Ctr.*, 721 F. Supp. 885, 891 (N.D. Ohio 1989) (stating that those individuals who are charged with the responsibility of making and/or contributing to employment decisions for the defendant employer may be liable as agents under Title VII); *DeLoach v. American Red Cross*, 967 F. Supp. 265, 268 (N.D. Ohio 1997) (stating that individual employees may be liable for violations of Ohio antidiscrimination law, though not under Title VII); *Comiskey v. Automotive Indus. Action Group*, 40 F. Supp.2d 877, 891 (E.D. Mich. 1999) (holding that supervisors could be

The Ohio Supreme Court had not previously decided this precise issue, but had followed general interpretations of Title VII.¹⁸ In fact, the first decision decided under the statute interpreted the definition of “employer” in the statute to exclude individual liability.¹⁹ A few intermediate state appellate courts had found individual liability on the part of supervisors.²⁰ However, the decision in *Genaro* marked a definite departure from the Ohio Supreme Court’s previous statements of general reliability on Title VII.²¹

individually liable under Michigan Civil Rights Act but not under Title VII). *Wathen* is still controlling precedent in the Sixth Circuit.

¹⁸*Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civil Rights Comm’n*, 421 N.E.2d 128, 131 (Ohio 1981) (“In previous cases, however, we have determined that federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000(e) et. seq., Title 42, U.S. Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112”); *Ohio Civil Rights Comm’n v. Ingram*, 630 N.E.2d 669, 674 (Ohio 1994) (“As stated in *Plumbers & Steamfitters*, supra, this court will apply federal law precedent interpreting Title VII of the 1964 Civil Rights Act to cases involving violations of R.C. Chapter 4112”); *Little Forest Med. Ctr. of Akron v. Ohio Civil Rights Comm’n*, 575 N.E.2d 1164, 1167 (Ohio 1991) (“In previous cases, however, we have determined that federal case law interpreting Title VII of the Civil Rights Act of 1964. . . is generally applicable to cases involving alleged violations of R.C. Chapter 4112”); *Duvall v. Time Warner Entertainment Co.*, No. C-980515, 1999 Ohio App. LEXIS 2874, at *10 (Ohio Ct. App. June 25, 1999) (“Except where R.C. Chapter 4112 defines the statutory terms differently, the Ohio Supreme Court holds that federal case law interpreting and applying Title VII is generally applicable to R.C. 4112.02 claims”). Interestingly, because the Ohio Supreme Court made that statement in *Duvall*, a post-*Genaro* case, it appears they still will follow Title VII interpretations for issues other than supervisor liability. In *Collins v. Rizkana*, a 1995 case brought under RC. 4112, the Ohio Supreme Court ruled only that a cause of action for wrongful discharge in violation of public policy could be brought. The Court did not reach the issue of liability because the employer in this case fell under the statute’s small business exception. *Collins v. Rizkana*, 652 N.E.2d 653, 660-61 (Ohio 1995).

¹⁹*Sowers v. Ohio Civil Rights Comm’n*, 252 N.E. 2d 463, 477 (1969). The Ohio Supreme Court stated that the objective of the state Civil Rights Act is to prevent and eliminate the practice of discrimination against persons because of race, color, religion, origin or ancestry, and to create Commission to enforce same and to define its powers and duties. *Id.* at 475. This case was decided before the gender component was added to R.C. 4112.

²⁰*See, e.g., Davis v. Black*, 591 N.E.2d 11, 19 (Ohio Ct. App. 1991) (stating that a supervisor for whom an employer may be vicariously liable for sexual harassment under the doctrine of respondeat superior is also an “employer” within the statutory definition, which encompasses any person employing four or more persons within the state, regardless of whether supervisor has four or more employees); *Hart v. Justarr Corp.*, 649 N.E.2d 316, 319 (Ohio Ct. App. 1994), *appeal denied*, 646 N.E.2d 1125 (Ohio 1995) (holding that an individual defendant, as director and officer of a corporation could be liable as an “employer” on claim of sexual harassment); *Seiber v. Wilder*, No. 94CA32, 1994 WL 558969, at *5 (Ohio Ct. App. October 12, 1994) (following a previous decision in *Davis* that the definition of “employer” in R.C. 4112.01 (A)(2) has been construed to include supervisors and individual defendants were not entitled to summary judgment because they were supervisors); *Cisneros v. Birck*, No. 94APE08-1255,

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III. STATEMENT OF THE CASE

A procedural maneuver led to the Ohio Supreme Court's decision to allow individual supervisor liability. *Genaro v. Central Transport* is a consolidation of three cases, *Genaro v. Central Transport*, *Baldwin v. Future Electronics*, and *Greer v. Bally Total Fitness*, all of which have strikingly similar procedural characteristics.²² Originally all three cases were filed in various state courts around Ohio, alleging various violations of Ohio Revised Code Chapter 4112, the Ohio anti-discrimination statute.²³ All three cases were filed against the corporate employers and contained claims against the supervisory or managerial employees in their individual capacities.²⁴ In each case defendants removed the cases to United States District Court, Northern District of Ohio, Eastern Division.²⁵ Plaintiffs filed Motions to Remand the cases back to state court.²⁶

The district court denied the motion to remand in the *Genaro* case on June 16, 1997, making the determinations that R.C. Chapter 4112 does not permit individual liability, that plaintiffs had no basis for recovery under that theory, and the individual

1995 WL 222156, at *5 (Ohio Ct. App. April 11, 1995) (deciding that a physician who employed three employees could be held individually liable under R.C. 4112.01 (A)(2)).

²¹*Genaro v. Central Transp.*, 703 N.E.2d 782, 786-87 (Ohio 1999) (citing *Plumbers & Steamfitters* and *Ingram* but noting *Davis*, *Seiber*, and *Cisneros* as state appellate court cases which had previously held individual liability existed under the statute).

²²*Id.* at 783.

²³*Id.* Michael Genaro, who worked as a truck driver and dockman, alleged that defendants discriminated against him by refusing to provide a reasonable accommodation for his handicap, by terminating his employment, and by refusing to rehire him. Susan Baldwin and two others claimed wrongful termination of employment and retaliation. Kim Greer alleged workplace sexual harassment.

²⁴*Id.* For instance, Genaro's complaint alleges that Alan Bassetti, the individual supervisor, "is . . . an employer within the meaning of Ohio Revised Code Section 4112."

²⁵*Id.* Defendants removed the case to federal court on October 21, 1996, citing as the basis diversity of citizenship because plaintiff was a citizen of Ohio and the corporate defendant was a citizen of another state. Defendants did not address the citizenship of each individual supervisor, which would have destroyed diversity as each were also citizens of Ohio. Defendants in the *Genaro* case asserted that the supervisor had been fraudulently joined specifically for the purpose of destroying diversity jurisdiction. In this removal petition Defendants asserted that no individual supervisor liability exists under the Ohio anti-discrimination statute.

²⁶*Id.* On February 3, 1997 Plaintiff Genaro filed a Motion to Remand, asserting that complete diversity does not exist and no federal question is alleged.

defendants were fraudulently joined for the purposes of defeating removal.²⁷ Plaintiffs in two of the cases, Genaro and Baldwin, filed motions for consideration with the district court and, in the alternative, sought to certify a question to the Ohio Supreme Court regarding supervisor liability.²⁸ The district court certified the following question: "For purposes of Ohio Rev. Code Ann. 4112, may a supervisor/manager [sic] be held jointly and/or severally liable with this employer for his conduct in violation of 4112?"²⁹

The Ohio Supreme Court answered this question in the affirmative.³⁰ The Court based its decision on three considerations: statutory interpretation, public policy

²⁷Genaro v. Central Transp., 703 N.E. 2d 782, 783 (Ohio 1999) *Id.* The district court judge noted that the Ohio Supreme Court "has not ruled on whether §4112 exposes managers or supervisors to individual liability for acts of discrimination against employees. The Ohio Supreme Court has, however, ruled that federal case law applying Title VII is generally applicable to cases involving Ohio Rev. Code §4112" citing *Ingram* and *Plumbers and Steamfitters*. Memorandum of Opinion and Order at 4, Genaro v. Central Transp., 703 N.E. 2d (Ohio 1999) (No. 1:96 CV 2282). However, the judge noted that just that month the Sixth Circuit issued *Wathen v. General Electric Company*, which held no supervisor liability exists under the Kentucky Civil Rights Act, because that statute mirrors Title VII and no individual supervisor liability exists under Title VII. *Id.* at 5. Further, federal courts in the Northern District of Ohio have addressed the issue of supervisor liability under both Title VII and the Ohio antidiscrimination statute (citing *Czupih v. Card Pak, Inc.*, 916 F. Supp. 687 (N.D. Ohio 1996) and *Gausmann v. City of Ashland*, 926 F. Supp. 635 (N.D. Ohio 1996)) and individual supervisor liability exists under neither. *Id.*

Absent a contrary ruling by the Sixth Circuit or the Ohio Supreme Court on supervisor liability under §4112, the law in this district is that §4112, like Title VII, does not provide for claims against supervisors in their individual capacities. Consequently, Plaintiff can have no reasonable belief for predicting that he could prevail against Bassetti in his individual capacity under §4112. Accordingly, Plaintiff's inclusion of Bassetti as a defendant must be deemed as a fraudulent joinder intended to defeat an otherwise proper removal based upon diversity of citizenship.

Id. at 5-6. However, the district court did not remove Bassetti as a defendant, leaving it up to Genaro to file a motion to dismiss him.

This order was filed the same day that another similar case, *DeLoach v. American Red Cross* (967 F. Supp. 265 (N.D. Ohio 1997)), *supra* note 17, was decided in another courtroom in the Northern District of Ohio. That case states that individual supervisors could be held liable under §4112.

²⁸Genaro, 703 N.E.2d at 783-84.

²⁹On October 1, 1997 the Ohio Supreme Court agreed to answer the question. Genaro v. Central Transp., 684 N.E.2d 705 (Ohio 1997). The district court decided that, because the Ohio Supreme Court had never spoken on the issue of individual supervisor liability, the certification was appropriate. Petitioners Brief on the Merits on Behalf of Susan Baldwin, Katrina M. Brill and Colleen Lynn Kulka at 2, Genaro v. Central Transport, 703 N.E.2d 782 (Ohio 1999) (No. 97-1595).

³⁰Genaro, 703 N.E.2d at 785.

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considerations, and trends within Ohio lower courts.³¹ In interpreting R.C. Chapter 4112, the Court looked to two specific provisions, §4112.01(A)(1) and §4112.01(A)(2) to interpret the prohibitions listed in §4112.02.³² By looking at this language, the majority concluded that “the R.C. 4112.01(A)(2) definition of ‘employer’ by its very terms, encompasses individual supervisors and managers whose conduct violates the provisions of R.C. Chapter 4112.”³³

The Ohio Supreme Court then turned to public policy considerations, the most convincing arguments.³⁴ First, the majority explained that §4112.08 requires a liberal

³¹*Id.* at 786.

³²OHIO REV. CODE ANN. §4112.01 reads:

As used in this chapter: (1) “Person” includes one or more individuals, partnerships, associations, organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and other organized groups of persons. “Person” also includes, but is not limited to, any owner, lessor, assignor, builder, manger, broker, salesman, appraiser, *agent, employee*, lending institution, and the state and all political subdivisions, authorities, agencies, boards, and commissions of the state. 2) “Employer” includes the state, any person employing four or more persons within the state, and *any person acting directly or indirectly in the interest of an employer.*

Id. (Emphasis added). §4112.02, the prohibitory provision of the statute, reads:

It shall be an unlawful discriminatory practice: (A) for any *employer*, because of the race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

Id. (Emphasis added.)

³³OHIO REV. CODE ANN. §4112.02. The definition of employer contained in §4112.01 contains the word “person” which is defined “very broadly” as including “one or more individuals, . . . any owner, lessor, assignor, . . . agent, [and] employee. It is clear that the R.C. 4112.01(A)(2) definition of “employer,” by its very terms, encompasses individual supervisors and managers whose conduct violates the provisions of R.C. Chapter 4112.” *Genaro v. Central Transp.*, 703 N.E. 2d 782, 785 (Ohio 1999) Thus, along with §4112.08’s mandate that this chapter shall be construed liberally to accomplish its purposes contributed to the Ohio Supreme Court’s statutory interpretation of “employer” as meaning “employee.” *Id.*

In so interpreting this statute, the Ohio Supreme Court disregarded a large amount of federal case law interpreting Title VII, a statute to which Ohio Revised Code §4112 is similar and on whose interpretations the Ohio Supreme Court has stated it will rely on to interpret §4112. *Supra* note 14 and cases referred therein.

³⁴*Genaro*, 703 N.E.2d at 786. In *Kerans v. Porter Paint Company*, the Ohio Supreme Court commented that the adoption of Title VII, the enactment of R.C. 4112, and its decision two

construction of the anti-discrimination statute to accomplish the purpose of the statute.³⁵

Since this was a case of first impression in this Court, the Court looked at several lower courts in Ohio which have held that liability may be imposed against supervisors and managers in their individual capacities for conduct in violation of R.C. Chapter 4112.³⁶ The Court further reasoned that the definition of “employer” included in R.C. Chapter 4112 is markedly different from that contained in Title VII in two respects.³⁷ First, the small business exception contained in Title VII exempts businesses employing less than fifteen persons while the Ohio statute exempts businesses employing less than four persons; thus, Ohio’s statute is broader than Title VII.³⁸ Second, the wording of the two statutes was apparently different enough for this Court to distinguish it.³⁹ R.C. 4112.01(A)(2) has language of “any person acting directly or indirectly in the interest of an employer whereas Title VII denotes this as “any agent of such a person.”⁴⁰ “The differing numerosity requirements and uses of

years earlier in *Helmick v. Cincinnati Word Processing* “reflect Ohio’s strong public policy against workplace-based sexual harassment.” *Kerans v. Porter Paint Co.*, 575 N.E.2d 428, 435 (Ohio 1991); *see also* *Collins v. Rizkana*, 652 N.E.2d 653, 659-60 (Ohio 1995); R. Gary Winters, *Many Questions: Few Answers--Some Thoughts on the Meaning of Kerans v. Porter Paint Company*, 19 OHIO N.U. L. REV. 641 (1993); David C. Belt, Note, *Election of Remedies in Employment Discrimination Law: Doorway Into the Legal Hall of Mirrors*, 46 CASE W. RES. L. REV. 145 (1995).

³⁵OHIO REV. CODE ANN. § 4112.08 (Anderson 1998 & Supp. 1999) which reads, in pertinent part that “[t]his chapter shall be construed liberally for the accomplishment of its purposes, and any law inconsistent with any provision of this chapter shall not apply.” The Court noted that Ohio has a strong public policy against discrimination and the imposition of individual liability would contribute to deterrence and further this goal, stating “[b]y holding supervisors and managers individually liable for their discriminatory actions, the antidiscrimination purposes of R.C. Chapter 4112 are facilitated, thereby furthering the public policy goals of this state regarding workplace discrimination.” *Genaro*, 703 N.E.2d at 786. *But see* *Lowry v. Clark*, 843 F. Supp. 228, 231 (E.D. Ky. 1994) (stating that “although the purpose of Title VII admittedly is to eradicate employment discrimination, a court may not expand liability onto another class of persons merely to meet that purpose in the absence of Congressional directive”).

³⁶*Genaro*, 703 N.E.2d at 786. Three cases were cited, *Davis*, a 1991 case, *Seiber*, a 1994 case, and *Cisneros*, a 1995 case. *Supra* note 20. All three held that R.C. §4112.01(A)(2) included supervisors in the definition of employer. *Genaro*, 703 N.E.2d at 786.

³⁷*Id.* at 787.

³⁸*Id.*; *see also supra* note 32.

³⁹*Genaro v. Central Transp.*, 703 N.E. 2d 782, 785 (Ohio 1999).

⁴⁰*Id.*; *see also* KY. REV. STAT. ANN. §344.030 (“‘Employer’ means a person who has eight (8) or more employees within the state or more employees within the state in each of twenty (20) more calendar weeks in the current or preceding calendar year and an agent of such a person”); MO. ANN. STAT. §213.010 (“‘Employer’ includes the state, and any political or civil

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agency terminology indicate that Title VII's definition of employer is far less reaching than the encompassing language of R.C. 4112.02(A)(2)."⁴¹

After examining statutory construction and public policy considerations, the Court stated that

[W]e believe that the clear and unambiguous language of R.C. 4112.01(A)(1) and (A)(2), as well as the salutary antidiscrimination purposes of R.C. Chapter 4112, and this court's pronouncements in cases involving workplace discrimination, all evidence that individual supervisors and managers are accountable for their own discriminatory conduct occurring in the workplace environment.⁴²

Three justices dissented.⁴³ Chief Justice Moyer argued that the ordinary and plain meaning of the statute indicates that the Ohio General Assembly did not intend for supervisors and managers to be individually liable.⁴⁴ The word "employer" is clear, but the General Assembly has included no language to impose liability upon employees who participate in discriminatory practices.⁴⁵ Moyer reiterated the *Plumbers & Steamfitters*

subdivision thereof, or any person employing six or more persons within the state, and any person directly acting in the interest of an employer. . . "); TENN. CODE ANN. §50-2-201 ("Employer" includes any person acting in the interest of an employer directly or indirectly. . .").

⁴¹*Genaro*, 703 N.E. 2d at 787. Similarly, the Court denoted *Wathen v. General Electric Company*, the Sixth Circuit case which held that no individual liability existed under Title VII, as inapplicable to *Genaro*. *Id.* In *Wathen*, the statute at issue was the Kentucky Civil Rights Act, a statute "modeled after, and virtually identical to Title VII." *Id.* Thus, because Title VII is not applicable to this action, neither is *Wathen*.

⁴²*Id.* Such a pronouncement brings to mind Chief Justice John Marshall's famous statement in *Marbury v. Madison* that it is "emphatically the province of the duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁴³Chief Justice Thomas Moyer, Justice Deborah Cook and Justice Evelyn Lundberg-Stratton dissented. *Genaro*, 703 N.E. 2d at 788.

⁴⁴*Genaro*, 703 N.E. 2d at 788.

⁴⁵*Genaro v. Central Transp.*, 703 N.E. 2d 782, 788 (Ohio 1999). Chief Justice Moyer argues that the language of this statute is clear and unambiguous and if it so desired, the General Assembly could have "easily included the word 'employee' in R.C. 4112.02(A) to impose individual liability. *Genaro*, 703 N.E.2d at 788. He believes the phrase "any person acting directly or indirectly in the interest of an employer" was included to impose vicarious liability on employers for the discriminatory acts of their employees. *Id.*; *see also* *Gausmann v. City of Ashland*, 926 F. Supp. 635, 641 (N.D. Ohio 1996) (" . . . it seems equally clear that the Ohio statutory definition is meant only to ensure that employers cannot escape respondeat superior liability").

holding which stated that interpretations of federal case law interpreting Title VII are generally applicable to R.C. 4112.⁴⁶ As such, even though Title VII contains slightly different language, “the language of both statutes indicates an intent to hold employers vicariously liable for the discriminatory acts of their employees.”⁴⁷ Justice Cook added her own dissent.⁴⁸

IV. ANALYSIS

The Ohio Supreme Court’s decision in *Genaro*, while encompassing an admirable purpose, goes too far and is based on tenuous reasoning. The court has ignored previously-relied upon and currently-accepted interpretations of Title VII (upon which the Ohio statute is substantially based). Its policy reasoning does not take into account the heavy burdens that will now be placed upon individual employees. Such new burdens hold serious implications for the future of the workplace.

⁴⁶*Genaro*, 703 N.E.2d at 788.

⁴⁷*Id.* at 789. The differences in the language of the two statutes is “minor” and he finds the agency clause in Title VII and the phrase “any person acting directly or indirectly” are “sufficiently similar to warrant the conclusion that both were meant only to impose vicarious liability on employers for the acts of their employees.” *Id.*

⁴⁸Justice Cook, whom Justice Lundberg Stratton joined, stated that R.C. 4112.02(A) prohibits “employers” from discriminating; the statute says nothing about the liability of “employees.” *Genaro*, 703 N.E.2d at 790. “Instead, this statutory definition of “employer” includes ***any person acting directly or indirectly in the interest of any employer. . . thereby framing an employer’s accountability as comprising both direct and vicarious liability.” *Id.* The same statute cannot impose both individual and vicarious liability, but can impose only one. *Id.* Without vicarious liability, as the majority suggests, vicarious liability is eliminated, leaving a plaintiff’s only remedy against his or her supervisor. *Id.* Furthermore, the majority does not define what a supervisor employee is, which would necessarily mean all employees are subject to such liability. *Id.* The language of the statute, coupled with the majority’s interpretation, “would encompass even nonsupervisory conduct.” *Id.* Had the General Assembly wished to burden individual employees through R.C. 4112, it could have easily included such language. *Id.*; *Infra* notes 106-07.

Such reasoning is also put forth in Gregory M.P. Davis’s comment on the applicability of individual liability to suits involving the Americans with Disabilities Act and other employment discrimination statutes. Davis, *supra* note 14, at 324. Describing these statutes, Davis states that one should look to the plain meaning; Congress did not use the terms “manager” or “supervisor” and in the absence of such words, one should not construe them otherwise. *Id.* Of course, arguments can be made the other way. *See, e.g.*, Kathryn K. Hensiak, Comment, *When the Boss Steps Over the Line: Supervisor Liability Under Title VII*, 80 MARQ. L. REV. 645, 652 (1997) (arguing that supervisor liability can be read from the statute).

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This argument will focus on the idea that vicarious liability is and should remain a vital force in the eradication of workplace discrimination.⁴⁹ Employers are in a better position to eliminate such actions on the part of their supervisors.⁵⁰ Second, the increased benefit to the plaintiff in holding the supervisor individually liable does not justify this new burden imposed on the supervisor or manager.⁵¹ Third, the imposition of individual liability on the part of supervisors or managers will inject fear into the workplace, impose unreasonable burdens on the decision-making process, and chill the supervisor's ability to do his or her job.⁵² Fourth, other remedies are available for the

⁴⁹Symposium *Employment Discrimination: Symposium Article: Vicarious and Personal Liability for Employment Discrimination*, 30 GA. L. REV. 509 (1996) (supporting vicarious liability because individual liability is at odds with the structure of the statutes and unnecessary to achieve their goals).

⁵⁰Employers are in the best position to hire, train, discipline, and terminate employees who violate laws and company policies on discrimination. The threat of losing one's job is deterrent enough from engaging in discriminatory behavior. *See, e.g.*, symposium, *supra* note 49, at 524, citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

⁵¹*See, e.g.*, *Janken v. GM Hughes Elecs.*, 53 Cal. Rptr. 2d 741, 752 (1996), where the California Supreme Court states:

imposing liability on individual supervisory employees would do little to enhance the ability of victims of discrimination to recover monetary damages, while it can reasonably be expected to severely impair the exercise of supervisory judgment. The minimal potential for benefit to an alleged victim juxtaposed with the potentially severe adverse effects of imposing personal liability on individual supervisory employees is an additional reason for our conclusion that this is not the result intended by the legislature.

⁵²*Genaro v. Central Transp.*, 703 N.E.2d 782, 790 (Ohio 1999) (stating that "imposing personal liability on supervisory employees would create conflicts of interest and chill effective management"). Such an environment can have the opposite effect the Ohio Supreme Court in *Genaro* wishes; supervisors concerned for their future and financial well-being might well go the opposite direction and promote and hire only women, the elderly, minorities, and the disabled. Reverse discrimination suits will certainly come out of this situation. One is also not hard-pressed to imagine that people will be hesitant to take supervisory positions, knowing that their and their family's financial well-being might very well be in jeopardy every time an employment decision is made. *Id.*

Learned Hand, in one of his well-known quotes, stated:

The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.

Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949).

plaintiff who wishes to recover damages from a supervisors.⁵³ Finally, the plain language and statutory construction of the Ohio statute as well as Title VII does not support the idea of individual liability.⁵⁴

1. Vicarious Liability Has and Will Continue to Eliminate Workplace Discrimination.

The case law which has interpreted Title VII (to which R.C. 4112 is similar and on which the Ohio Supreme Court has said it will base its decisions⁵⁵) has consistently held that the term “agent” included in the statute imposes vicarious liability

⁵³*See, e.g.*, *Helmick v. Cincinnati Word Processing*, 543 N.E.2d 1212, 1216 (Ohio 1989) (holding that allowing a plaintiff to pursue common-law remedies in lieu of the relief provided under R.C. Chapter 4112 creates no conflict and serves to supplement the limited protection and coverage of that chapter).

⁵⁴*Supra* note 45.

⁵⁵*Supra* note 18.

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on the employer and not individual liability on the agent/supervisor himself.⁵⁶ The dissent in *Genaro* also agreed the “agent” language imposed vicarious liability.⁵⁷

For example, in *Miller v. Maxwell’s International*, one of the most often-cited cases for the proposition that the language in Title VII does not impose individual liability, a former employee brought federal gender and age discrimination claims against her employer and individual supervisors.⁵⁸ The Ninth Circuit, establishing a pattern that would be followed by the majority of other circuit courts, held that the “agent” language

⁵⁶Title VII defines “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day. . . and any agent of such a person.” 42 U.S.C. §2000e (b).

See, e.g., *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir. 1995) (interpretations of “agent” language have deemed it “a simple expression of respondeat superior”); *Grant v. Lone Star Co.*, 21 F.3d 649, 651-52 (5th Cir. 1995) (“only ‘employers,’ not individuals acting in their individual capacity who do not otherwise meant the definition of ‘employers,’ can be liable under title VII [sic]”); *see also* Scott B. Goldberg, Comment, *Discrimination by Managers and Supervisors: Recognizing Agent Liability Under Title VII*, 143 U. PA. L. REV. 571, 575 (1994) *But see* Ming K. Arvas, Note, *The Circuit Split on Title VII Personal Supervisor Liability*, 23 FORDHAM URB. L. J. 797, 813 (1996). Arvas also notes that Title VII fails to explicitly allow agent liability.

The Ninth Circuit acknowledged that the “employer definition in Title VII includes any agent of the employer. *Miller v. Maxwell’s Int’l. Inc.*, 991 F.2d 583, 587 (9th Cir. 1993). The Ninth Circuit expressed no discomfort with its ruling. The plaintiff had made the argument that a refusal to impose individual liability on the part of supervisors would meant those persons would believe they may “violate Title VII with impunity.” *Id.* at 588. On the contrary, “no employer will allow supervisory or other personnel to violate Title VII when the employer is liable for the Title VII violation.” *Id.* The Court concluded by stating it found no reason to expand Title VII’s liability provisions beyond the respondeat superior principle Congress intended. *Id.* Thus, a majority of circuit courts have followed suit, holding the “agent” language in Title VII and its analogous statutes imposes respondeat superior liability only. *Supra* note 14; *see also* *Combs v. Kobacker Stores*, 114 N.E.2d 447, 451 (Ohio App. 1953) (holding that master is liable for tortious acts of servants even though servants’ act only indirectly contributed to furtherance of employer’s business).

⁵⁷*Genaro*, 703 N.E.2d at 789. Justice Cook argued that the same statutory phrase “cannot simultaneously mean to impose both individual liability on employees and vicarious liability on employers. If the phrase at issue is construed as the majority suggests, then there is no provision in R.C. Chapter 4112 for vicarious liability of an employer.” *Id.* at 790.

⁵⁸*Miller v. Maxwell’s Int’l. Inc.*, 991 F.2d 583, 584 (9th Cir. 1993); *see also* Steven K. Sanborn, Note, *Employment Discrimination--Miller v. Maxwell’s International, Inc.: Individual Liability for Supervisor Employees Under Title VII and the ADEA*, 17 W. NEW ENG. L. REV. 143, 178 (1995) (stating that this case demonstrates “the importance in finding individual liability under circumstances where the victim cannot otherwise be made whole”).

in Title VII (which plaintiff argued imposed individual liability), was included to ensure that employers would be liable under respondeat superior.⁵⁹

A second reason for courts' refusal to impose individual liability on supervisors stems from the small business exception contained in both Title VII and Ohio Revised Code Chapter 4112.⁶⁰ In both statutes, employers employing less than a certain number of employees (fifteen in Title VII and four in R.C. 4112) are not subject to the provisions of those statutes.⁶¹ The reason for this has been given as a wish not to unduly burden small businesses with the costs of this type of litigation. However, this reasoning becomes irrational in light of individual supervisor liability imposed by *Genaro*. The burden imposed on an individual is much greater than that imposed on a small business; courts which have imposed individual liability tend not to address this issue.⁶²

⁵⁹*Miller*, 991 F.2d at 587. *But see* Goldberg, *supra* note 56, at 576-77:

This [the 9th Circuit's decision in *Miller*] approach is unpersuasive for two reasons. First, the Ninth Circuit cited no authority to support its assertion other than the unpublished opinion of the district court below. Second, even assuming that Congress included the word "agent" for respondeat superior purposes, it does not necessarily follow that Congress intended suits against employers to constitute the exclusive means of Title VII liability.

See also Kendra Samson, *Note: Does Title VII Allow for Liability Against Individual Defendants?*, 84 KY. L. J. 1303, 1334 (1996) (stating that objectives of deterrence and compensation for the victim are better achieved by allowing individual liability); Janice R. Franke, *Does Title VII Contemplate Personal Liability for Employee/Agent Defendants?*, 12 HOFSTRA LAB. L. J. 39, 62 (1994) (concluding that the legislative history of Title VII and its amendments, principles of statutory construction, and policy consideration all point to personal liability for individual employee defendants).

⁶⁰*See, e.g., Miller*, 991 F.2d at 587 ("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."); *Grant v. Lone Star Co.*, 21 F.3d 649, 652-653 (5th Cir. 1994) (noting *Miller's* reasoning on this point); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995) (agreeing with the analysis in *Miller*); *E.E.O.C. v. AIC Sec. Investigations*, 55 F.3d 1276, 1281 (7th Cir. 1995) (argument that individual supervisors should be held liable upsets balance that Congress has struck between the goal of eliminating discrimination and protecting small entities from the hardships of litigation); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510 (4th Cir. 1994) ("... it would be incongruous to hold that the ADEA does not apply to the owner of a business employing, for example, ten people, but that it does apply with full force to a person who supervises the same number of workers in a company employing twenty or more"); *see also* Clara J. Montanari, *Comment: Supervisor Liability Under Title VII: A "Feel Good" Judicial Decision*, 34 DUQ. L. REV. 351 (1996).

⁶¹OHIO REV. CODE ANN. §4112; 42 U.S.C. § 2000e (b).

⁶²*See supra* note 20.

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Collins v. Rizkana, an Ohio Supreme Court case, discusses the Ohio statute's small business exception and its applicability to individual supervisor liability.⁶³ There the Ohio Supreme Court interpreted the small business exception as evidence of the General Assembly's intention to protect small businesses from the burdens of litigation, not from its antidiscrimination policies.⁶⁴ By recognizing and approving of the small business exception, the Ohio Supreme Court was forced to deal with this inconsistency in *Genaro*.⁶⁵ All other mention of the exception, including the apparent inconsistency of not holding small businesses liable, but holding individuals so, is not mentioned.

In Ohio, it has been the appellate courts which have driven the interpretation of the statutory language.⁶⁶ For example, in *Davis v. Black*, an employee sued her supervisor under the Ohio Civil Rights Act for harassment.⁶⁷ Looking at the language of the statute, the court found "clearly, the supervisor for whom an employer may be vicariously liable under the doctrine of respondeat superior is also an employer within this definition."⁶⁸ Individual liability was upheld on the part of the supervisor.⁶⁹

⁶³*Collins v. Rizkana*, 652 N.E.2d 653 (Ohio 1995).

⁶⁴*Id.* at 661.

⁶⁵*Genaro v. Central Transp.*, 703 N.E. 2d 782, 787 (Ohio 1999). The majority simply recognized the small business exception (and its low threshold as compared to that in Title VII) as evidence of the intention of the General Assembly to eradicate employment discrimination. *Id.* at 788. Chief Justice Moyer noted this incongruity in his dissent, stating that "broadening the scope" argument is flawed, in that it precludes liability under R.C. Chapter 4112 for employers with fewer than four employees, while imposing liability on supervisors overseeing the activities of as few as one employee." *Id.* at 789.

See also Goldberg, *supra* note 56, at 586-87 (stating that agent liability creates three additional avenues for deterrence: first, victims are more likely to sue if agent liability is recognized; second, agent liability often affects the magnitude of the damage award accompanying a finding of unlawful discrimination; third, agent liability introduces another risk to potential defendants because defendants would be unable to predict with certainty the amount of an award they might have to pay).

⁶⁶*See, e.g.*, *Seiber v. Wilder*, No. 94CA32, 1994 WL 558969, at *5 (Ohio Ct. App. October 12, 1994) (stating there was no reason to think Ohio Supreme Court would have intended a narrower definition of "employer"); *Hart v. Justarr Corp.*, 649 N.E.2d 316, 319 (Ohio App. 1994), *appeal denied*, 646 N.E.2d 1125 (Ohio 1995) (director and officer of a corporation could be held liable as "employer").

⁶⁷*Davis v. Black*, 591 N.E.2d 11 (Ohio Ct. App. 1991). Some case law treats harassment and discrimination differently. In *Davis*, the 10th District Court of Appeals treated them the same under R.C. 4112.

⁶⁸*Id.* at 19.

⁶⁹*Id.*

However, vicarious liability should govern these cases.⁷⁰ The majority view is that employers are responsible for the torts of their employees, and discrimination should be no different.⁷¹ Employers are in the best position, both in terms of authority and economics, to hire the best people, train them, and ensure that they adhere to the company's policies.⁷² Thus, an employer's power to hire and fire should be the most effective weapon against workplace discrimination. The Ohio General Assembly adheres to that opinion as well, when it included the term "agent" in its definition of employer.⁷³

2. The Increased Benefit to a Plaintiff is not Large Enough to Justify the Increased Burden on the Defendant.

⁷⁰Montanari, *supra* note 60; *see also* Carillo, *supra* note 16, at 84 ("vicarious liability is the proper standard in these cases because it best promotes the goals of Title VII and the Civil Rights Act of 1991 by creating the strongest incentive to establish preventive measures by employer and by providing the maximum opportunity for recovery by victims"); *Lenhardt v. Basic Institute of Technology*, 55 F.3d 377 (8th Cir. 1995), where the Eighth Circuit, in response to the plaintiff's "chamber of horrors" argument which would occur if individual liability was not imposed, stated that a discriminatory supervisor by no means has a "free pass to continue their wrongdoing with impunity." Such a supervisor who continues to discriminate will not be looked upon with favor by his or her employer and such discipline may result in a "free pass to the unemployment line." *Lenhardt v. Basic Inst. of Tech. Inc.*, 55 F.3d 377, 381 (8th Cir. 1995). Interestingly, one author has proposed treating employment discrimination under negligence principles, so that an employer would be found liable when it fails to conform its conduct to the statutorily established standard of care by making discriminatory employment decisions. David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U.P.A. L. REV. 899, 900 (1993).

⁷¹RESTATEMENT (SECOND) OF AGENCY, §§1, 219 (1958); *see also* Czupih v. Card Pak Inc., 916 F. Supp. 687, 690 (N.D. Ohio 1996) ("The employing entity is still liable and its managers have the proper incentives to adequately discipline wayward employees, as well as to instruct and train employees to avoid actions that might impose liability.").

⁷²Goldberg, *supra* note 56, at 586 ("employer are likely to implement similar deterrent policies regardless of whether they expect to share liability with their agents"). Some reasons for this include the fact that discharge and demotion of violating employees are relatively inexpensive and the desire to maintain a good public reputation. *See also* Symposium, *supra* note 49, at 544 (stating that without vicarious liability, the deterrent purpose of the statute would be undermined "because employers can train and discipline which they would be less included to do without vicarious liability."); Michael D. Moberly and Linda H. Miles, *The Impact of the Civil Rights Act of 1991 on Individual Title VII Liability*, 18 OKLA. CITY U.L.REV. 475, 492-93(1993) (concluding that an employer who is still vicariously liable will not allow employees to freely violate Title VII).

⁷³OHIO REV. CODE ANN. § 4112.01.

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Such a decision as the one handed down in *Genaro* does give a plaintiff a bit more recourse than under previous interpretations. Now he or she may bring another defendant into the suit or sue only the supervisor and may also be able to defeat diversity to prevent removal to federal court.⁷⁴ However, one might easily argue that the only additional benefit a plaintiff gets out of this is a psychological one, the satisfaction of seeing one's tormentor in court.⁷⁵ Because the liability is joint and several, the plaintiff cannot necessarily recover anything more than before *Genaro* appeared.⁷⁶

Such a psychological benefit does not belong in a civil suit. In a civil suit the purpose is to compensate the plaintiff for injuries, and not to punish the individual, unless punitive damages are involved.⁷⁷ Punishment such as this is the function of the criminal law system, into which both Congress and the Ohio General Assembly have not seen fit to place anti-discrimination statutes.⁷⁸ The benefit to a plaintiff in bringing a suit against one's individual employer should only be the added opportunity for more compensation which, practically speaking, *Genaro* does not offer.⁷⁹

The burdens on the supervisor far outweigh the benefits to the plaintiff.⁸⁰ Monetary awards in discrimination and harassment cases tend to be high and employers

⁷⁴This is exactly what happened in *Genaro* and the defendants argued that the individual defendants had been jointed fraudulently simply to defeat removal.

⁷⁵*See, e.g.*, Lamberson, *supra* note 6, at 421; Hensiak, *supra* note 48, at 664; *see also* Goldberg, *supra* note 56, at 5, where the author discusses the possibility of a plaintiff having a choice of defendants to sue. He states a suit against an employer might open up a plaintiff to social stigma, where a suit against an unpopular supervisor provides a way around that. *Id.* Suing an individual rather than a company might encourage plaintiffs to sue because it would not force an employer out of business. *Id.* Goldberg also notes the psychological benefit, stating that allowing plaintiffs to sue individual supervisors is a means of allocating blame and a way of holding an individual responsible whom the plaintiff perceives to be more responsible than the employers for the injuries they have suffered. *Id.*

⁷⁶*But see* Goldberg, *supra* note 56, at 583 (stating that in the case of bankrupt employers or other situations where the employer is judgment proof, supervisor liability is needed in order for the plaintiff to recover compensation); Moberly and Miles, *supra* note 71, at 493-94 (same).

⁷⁷Title VII does provide for punitive damages. 42 U.S.C. §1981.

⁷⁸OHIO REV. CODE ANN. §4112.99 ("Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief.").

⁷⁹Lamberson, *supra* note 6, at 421 (usually one is not talking about high-ranking executives, but middle management without high salaries or insurance policies and such suits rarely increase a plaintiff's monetary award). Of course, a plaintiff may recover something if she only sues the supervisor or for some reason, such as bankruptcy, the employer cannot pay.

⁸⁰*Janken v. GM Hughes Elecs.*, 53 Cal. Rptr. 2d 741, 753 (1996).

have built this in to their budgets or have purchased insurance policies in the event they receive a judgment against them.⁸¹ Individual supervisors have no such opportunity.⁸² They cannot purchase insurance policies and one year's salary would not likely cover a possible judgment.⁸³ Thus, an individual supervisor would face jeopardizing his or her own and family's present and future financial security.⁸⁴ Furthermore, a suit such as this one, even one with no basis, might subject a supervisor to the loss of a job and would have adverse consequences on future employment and promotions.⁸⁵ Of course, this is not to belittle the plaintiff who may have suffered humiliation and the loss of a job at the hands of this particular employer; it is only to illustrate the particular burdens of suing a supervisor in his or her individual capacity.⁸⁶ This individual may have not discriminated or the decisions he or she made leading to the accusation were made carefully and with all possible care and may have even been ordered by the employer.⁸⁷ Only a jury can decide.

3. The Imposition of Individual Liability will Chill Effectiveness in the Workplace and Prevent Effective Decision Making on the Part of Supervisors and Managers.

The decision in *Genaro* puts supervisors and managers on notice that they may be held individually liable for decisions they make which a trier of fact later finds to be discriminatory. This may serve as an impetus to exercise additional care when making decisions regarding those persons Ohio Revised Code Chapter 4112 aims to protect.⁸⁸ However, the practical result will be that supervisors and managers, in their zeal to avoid any decision that hints at discrimination will begin to make decisions adversely affecting others besides those in the protected class.⁸⁹ It should not be hard to imagine the effect occurring where supervisors and managers bend over backwards to not discriminate against women, minorities, the elderly, and the disabled.⁹⁰ Such a

⁸¹H.R. REP. NO. 102-40(I), at 73 (1991) *reprinted in* 1991 U.S.C.C.A.N. 549, 552 (discussing the imposition of punitive damages in the 1991 amendments to the 1964 Civil Rights Act).

⁸²Lamberson, *supra* note 6, at 421.

⁸³*Id.*

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶It is also not to advocate the evasion of responsibility for one's action. *Cf.* Oliver Wendell Holmes, *THE COMMON LAW*, 84 (1881) ("The party whose voluntary conduct caused the damage should suffer, rather than one who has no share in producing it."); *see also* Hensiak, *supra* note 48, at 663.

⁸⁷*See, e.g.*, *Janken v. GM Hughes Elecs.*, 53 Cal. Rptr. 2d 741, 746 (1996).

⁸⁸*See, e.g.*, Goldberg, *supra*, note 56, at 585 (noting that agent liability probably deters employment discrimination because supervisors fear employer repercussions and direct exposure to liability).

⁸⁹*Janken*, 53 Cal. Rptr. 2d at 752.

⁹⁰*Id.*

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tendency leaves others (men, non-minorities, younger employees, and the non-disabled) behind. The effect of this will surely be an increasing number of reverse-discrimination suits, which would then defeat the purpose of R.C. 4112 with its purported aim to eliminate workplace discrimination.

Furthermore, the knowledge that supervisors and managers could be held liable for any action they take will surely lead to a more tense workplace and a decreased ability on the part of these employees to work efficiently and make the decisions they must.⁹¹ “Individual supervisors must be able to make well-considered personnel decisions before knowing what claims an employee may later advance or what conclusions a judge or jury may later reach.”⁹²

4. Other Remedies are Available to the Plaintiff Besides the Individual Liability of Supervisor.

In addition to the suit against one’s employer, common law remedies are available to a plaintiff who has suffered workplace discrimination.⁹³ In *Helmick v. Cincinnati Word Processing*, the Ohio Supreme Court held that “allowing a plaintiff to pursue common-law remedies in lieu of relief provided under R.C. 4112 creates no conflict and serves to supplement the limited protection and coverage of that chapter.”⁹⁴

Pursuit of a cause of action for a tort such as intentional infliction of emotional distress might very well be a better path to take against an individual supervisor, though perhaps more difficult to prove. Such causes of action carry with them the possibility of punitive damages, though § 4112 does not.⁹⁵

⁹¹*Id.* at 751 (stating that supervisors need to retain impartial judgment which is difficult to do with the threat of a lawsuit hanging over one’s head, especially if there is a chance that he or she and their family could lose everything they have).

⁹²*Id.* at 752.

⁹³*Helmick v. Cincinnati Word Processing*, 543 N.E.2d 1212, 1215 (Ohio 1989); *see also Collins v. Rizkana*, 652 N.E.2d 653, 660 (Ohio 1995) (holding that in Ohio a cause of action may be brought for wrongful discharge in violation of public policy based on sexual harassment/discrimination, “irrespective of remedies provided by R.C. 4112”); BRADD M. SIEGEL & JOHN M. STEPHEN, *OHIO EMPLOYMENT PRACTICES LAW: A PRACTICAL GUIDE FOR EMPLOYERS AND THEIR LEGAL COUNSEL* §2.03(B) (1998).

⁹⁴*Collins*, 652 N.E.2d at 660. This statement is significant for two reasons, one that the statute does not prevent the pursuit of common law remedies and two, the protection and coverage of §4112 is “limited.” *Id.*

⁹⁵The 1991 amendments to Title VII included provisions for punitive damages. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.).

5. The plain language and legislative history of R.C. 4112 or Title VII does not indicate a desire to include a provision for individual liability.

When a provision of a statute is in doubt, courts often look to the legislative intent in order to ascertain what is meant by a particular word or phrase.⁹⁶ Some general rules apply before a court gets to this point.⁹⁷ First, the plain meaning of the word or phrases should be applied to them, unless application of the plain meaning would yield a ridiculous result.⁹⁸ Second, a court should not be swayed by a single sentence or clause, but should look at the entire provision when deciding upon interpretation.⁹⁹

In interpreting Title VII, many courts have looked to the legislative debates which occurred both at the original passage of the Civil Rights Act in 1964 as well as various amendments to the statute, the most recent one in 1991.¹⁰⁰ Before 1991, courts

⁹⁶2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION §45.09 (5th ed. 1992) (“[l]egislative purpose may. . .be a valuable guide to decisions”) *see also* OHIO REV. CODE ANN. §1.42 (“Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and Phrases that have acquired a technical meaning, whether by legislative definition or otherwise, shall be construed accordingly”); Davis, *supra* note 14, at 324.

⁹⁷SINGER, *supra* note 96, at § 45.09.

⁹⁸Davis, *supra* note 14, at 324 (One should also look to the language that Congress did not use, such as “every person,” “manager,” and “supervisor.” Also, committee reports during the passage of the Age Discrimination in Employment Act mention nothing about the impact this statute would have on individuals.); *see also* 2A SINGER, STATUTES AND STATUTORY CONSTRUCTION §46.01; Montanari, *supra* note 60, at 356 (“It is clear that a simple reading of the statute may not be sufficient to determine whether there is supervisor liability under Title VII. Courts have therefore found themselves exploring other sources of information and offering other or additional rationale for their decisions regarding supervisor liability.”) *But see* Hensiak, *supra* note 60, at 652 and 659 (stating that the plain language of the statute confirms the intention to impose individual liability).

⁹⁹Wathen v. General Elec. Co., 115 F.3d 400, 405 (6th Cir. 1997).

¹⁰⁰Montanari, *supra* note 60, at 356 (No mention of supervisor liability during the debates on Title VII which is telling, since because this was probably a “hot topic” if there was no mention, it means there was no intent to include). For a detailed history of the passage of Title VII in 1964, *see* UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964 (1968). For a background of the passage of the 1991 amendments, *see also* J.R. Franke, *The Civil Rights Act of 1991: Remedial Civil Rights Policies Prevail*, 17 S. ILL. U. L. J. 267 (1993); David A. Cathcart and Mark Synderman, *The Civil Rights Act of 1991*, 8 LAB. LAW 849 (1992); and Caryn Leslie Lilling, Note, *The Civil Rights Act of 1991: An Examination of the Storm Preceding the Compromise of America’s Civil Rights*, 9 HOFSTRA LAB. L. J. 215, 255 (1991) (concluding that this Act is “sorely needed” to remedy the numerous and inconsistent judicial interpretations of employment discrimination law).

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found no legislative intent to indicate Congress even contemplated individual liability.¹⁰¹

After 1991 many plaintiffs pointed to the addition of punitive and compensatory damages as remedies available to them, reasoning that these are damages which can be paid by individuals so their addition surely indicates Congress's willingness to impose individual liability.¹⁰² However, other courts which have found no individual liability point to the fact that the definition of "employer" has not changed, so it is doubtful Congress would "silently" amend the act to include supervisors and managers.¹⁰³ Title VII also includes a sliding scale of maximum amounts for these damages based on employer size, but provides no amount for individuals, which is more evidence of no intention to hold individuals liable.¹⁰⁴ The inclusion of the small business exception is also presented as additional evidence of Congress's unwillingness to impose liability on individuals if small businesses (those with fifteen or less employees) are not liable.¹⁰⁵

The arguments are similar for Chapter 4112. The Ohio General Assembly acted to outlaw certain forms of employment discrimination, and established an exclusive administrative framework for dealing with employment discrimination

¹⁰¹See, e.g., *Padway v. Palches*, 665 F.2d 965, 968 (9th Cir. 1982) ("The very detailed provisions of §2000e-5 [42 U.S.C.] almost compel the conclusion that Congress intentionally left out any provision for either general or punitive damages, and that is our conclusion."); see also *Moberly & Miles*, *supra* note 71, at 482 ("Because reinstatement was available only from the employer entity and back pay is only something that the entity would generally provide, a number of courts interpreted Title VII's remedial provisions to preclude monetary recovery from individual defendants.").

¹⁰²But see *Montanari*, *supra* note 60, at 366 (including punitive measures increases impetus to engage in preventive measures, which only employers can do). See also Labor Law Symposium, *The Civil Rights Act of 1991 and EEOC Enforcement*, 23 STETSON L. REV. 53 (1993) ("The Civil Rights Act injected a large dose of uncertainty into federal employment discrimination law.").

¹⁰³See, e.g., *Winston v. Hardee's Food Sys., Inc.*, 903 F. Supp 1151, 1154 (W.D. Ky. 1995) citing *Lowry v. Clark*, 843 F. Supp. 228 (E.D. Ky. 1994); *Czupih v. Card Pak, Inc.*, 916 F. Supp. 687, 690 (N.D. Ohio 1996) (if Congress had intent to make individuals liable it would have been clear in its 1991 amendments). But see *Goldberg*, *supra* note 56, at 579 ("Title VII's silence regarding the range of damages available against this class of potential defendants does not, however, indicate that Congress intended to foreclose agent liability.") This article goes on to note that the amendments are also silent regarding other potential defendants whose liability is uncontroversial, such as labor organizations and employment agencies.

¹⁰⁴*Goldberg*, *supra* note 56, at 578; see also *Montanari*, *supra* note 60, at 367 ("the wealth or size of employer has no correlation to the wealth of its supervisors"); John M. Husband and Jude Biggs, *The Civil Rights Act of 1991: Expanding Remedies in Employment Discrimination Cases*, 21 COLO. LAW. 881, 889 (1992) (concluding that the effect of these amendments is that employment discrimination will probably increase).

¹⁰⁵*Miller v. Maxwell's Int'l. Inc.*, 991 F.2d 583, 587 (9th Cir. 1993).

claims.¹⁰⁶ No authority existed to impose compensatory and punitive damages.¹⁰⁷ Looking at the plain meaning of the statute, the only realistic interpretation of Chapter 4112 is that supervisors and managers are not to be held liable for actions taken in the course or scope of their employment.¹⁰⁸ §4112.02(A) speaks of “employers,” not individual employees and nowhere in 4112.02 does the text mention individual employees.¹⁰⁹ In *Collins v. Rizkana* the Ohio Supreme Court discusses Ohio’s small business exception as evincing the Ohio General Assembly’s wish to exempt small businesses from the burdens of statute, though not from the policy of anti-discrimination.¹¹⁰ This wish that small businesses should not be burdened holds true for individuals as well.

V. CONCLUSION

Genaro injects a new note of uncertainty into an already-uncertain workplace. The Ohio Supreme Court has attempted to broaden the scope and effect of Ohio’s anti-discrimination statute, but in the process has taken its interpretation far beyond what the General Assembly intended. Admittedly, the court had little to guide them in terms of Ohio law but it had a wealth of case law and commentary on Title VII, which the court itself had said would generally apply to interpretations of R.C. 4112.¹¹¹

Ultimately, the Court chose its own path and in the process went against the prevailing trend of federal and state courts to interpret anti-discrimination statutes as imposing individual liability on the part of supervisors and managers.¹¹² While this decision does provide some additional recourse to plaintiffs wishing to seek damages for discrimination, it places an extremely heavy burden on employees, a burden that has been effectively carried in the past by employers under the doctrine of respondeat superior.¹¹³

¹⁰⁶OHIO REV. CODE ANN. §§ 4112.03, 4112.04, 4112.05; *see also* William M. Van Alstyne, *Civil Rights: A New Public Accommodations Law for Ohio*, 22 OHIO ST. L.J. 683 (1961).

¹⁰⁷Ohio Civil Rights Comm’n v. Lysyj, 313 N.E.2d 3, 7 (Ohio 1974), *cert. denied*, 419 U.S. 1108 (1975).

¹⁰⁸*Supra* note 48; *Genaro v. Central Transp.*, 703 N.E.2d 785, 790 (Ohio 1999) (Cook, J., dissenting).

¹⁰⁹OHIO REV. CODE ANN. §4112.02.

¹¹⁰*Collins v. Rizkana*, 652 N.E.2d 653, 660-61 (Ohio 1995) (stating that plaintiff could not have been discharged in violation of R.C. 4112.02 because that statute only applies to an “employer” who is defined by the statute as any person employing four or more persons in Ohio). The Court also stated that “we cannot interpret R.C. 4112.01(A)(2) as an intent by the General Assembly to grant small businesses in Ohio to sexually harass or discriminate against their employees with impunity.” *Id.*

¹¹¹*Supra* notes 14 and 18 and cases cited therein.

¹¹²*Supra* notes 22-41 and cases cited therein.

¹¹³*Supra* notes 55-72 and cases cited therein.

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There was little wrong with the previous system and the majority of federal courts and many state courts have agreed, holding that employers must shoulder the ultimate responsibility for discrimination.

The *Genaro* decision, while perhaps admirable in its intent, offers little hope of increased deterrence and instead portends serious consequences for the workplace.

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