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The Equal Employment Opportunity Commission (EEOC or Commission) takes the remarkable position that an employment staffing firm[1] should be liable under the federal employment-discrimination statutes[2] when the firm's client terminates an employee assignment for a discriminatory reason, unless the firm takes "corrective measures within its control."[3] The position is remarkable because it presumes an employer can be liable for an adverse employment action taken by neither it nor any of its agents. It also presumes an employer can be liable when neither it nor any of its agents acted with a discriminatory motive.

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* Assistant Professor, University of Central Florida, Department of Criminal Justice and Legal Studies; Adjunct Professor of Law, Barry University School of Law; Of Counsel, Ford & Harrison LLP, Orlando, Florida. B.A., *summa cum laude*, University of Central Florida, 1990; J.D., *cum laude*, New York University, 1993. The views expressed in this article are those of the author alone. I would like to thank M. Susan Sacco for her helpful comments during the preparation of this article.

1. I use the term "staffing firm" to refer to any business entity that places workers with, or leases employees to, client companies, including those entities referred to as "professional employer organizations," "employee leasing companies," "temporary employment agencies," "contract firms," and "payroll services." For a discussion of the various types of arrangements between staffing firms and their clients, *see* Jason E. Pirruccello, Note, *Contingent Worker Protection from Client Company Discrimination: Statutory Coverage, Gaps, and the Role of the Common Law*, 84 TEX. L. REV. 191, 196-97 (2005).

2. Such statutes include Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2000), the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2000), and Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12117 (2000).

3. *EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, 3 EEOC Compliance Manual N:3317 (Dec. 3, 1997) [hereinafter *EEOC Enforcement Guidance*].

The EEOC is attempting to extend the rule of liability for coworker and third-party harassment to tangible employment actions by third parties, despite such extension being inconsistent with the statutes. While no one disagrees that "a staffing firm must hire and make job assignments in a non-discriminatory manner,"[4] the EEOC's position that a staffing firm can be liable for a client's discriminatory termination of an employee assignment should be rejected by the courts.

Part I of this article discusses general concepts that will help lay the groundwork for showing that the EEOC's position is incorrect. Part II examines the EEOC's position, announced in its 1997 Enforcement Guidance, that a staffing firm should be liable for a client's discrimination against an assigned employee if the firm fails to take corrective measures within its control. Part III analyzes the judicial decisions, if any, that support the EEOC's position. Lastly, Part IV demonstrates that the EEOC's position has no support in the statutes, and therefore should be rejected.

I

The primary employment discrimination statutes are Title VII of the Civil Rights Act of 1964 (Title VII),[5] which prohibits discrimination based on race, color, religion, sex, and national origin;[6] the Age Discrimination in Employment Act of 1967 (ADEA),[7] which prohibits discrimination based on age;[8] and Title I of the Americans with Disabilities Act of 1990 (ADA),[9] which prohibits discrimination based on disability.[10] To establish a claim against an employer[11] under any of the statutes, a plaintiff must prove that (1) the defendant is an "employer" as that term is defined under the applicable statute; (2) the plaintiff was discriminated against for a prohibited reason; (3) the discrimination related to the plaintiff's employment; and (4) the

4. *Id.* at N:3317.

5. 42 U.S.C. §§ 2000e-2000e-17 (2000).

6. *Id.* § 2000e-2(a). The Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2000), also prohibits pay discrimination based on sex.

7. 29 U.S.C. §§ 621-634 (2000).

8. *Id.* § 623(a).

9. 42 U.S.C. §§ 12101-12117 (2000).

10. *Id.* § 12112(a).

11. Title VII, the ADEA, and the ADA also prohibit discrimination by employment agencies and labor organizations. 42 U.S.C. § 2000e-2(b), (c) (2000); 29 U.S.C. § 623(b), (c); 42 U.S.C. § 12111(2) (2000). The ADA further prohibits discrimination by joint labor-management committees. 42 U.S.C. § 12111(2) (2000). This article does not address the liability of staffing firms in the referral process based on their status as employment agencies.

defendant is liable for the discrimination.[12] Certain matters regarding these elements should be emphasized to help understand how the law properly applies when a plaintiff seeks to hold a staffing firm liable for the discriminatory termination of his or her assignment by the firm's client.

A. The Defendant Must be an "Employer"

Each statute prohibits discrimination by an "employer" as that term is defined by the statutes.[13] Under Title VII and the ADA, an 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 . . . ."[14] Under the ADEA, an employer is defined as "a person engaged in an industry affecting commerce who has twenty 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 . . . ."[15] The "current" year is the year in which the alleged discriminatory act occurred.[16]

If two or more nominally separate entities are an "integrated enterprise," the employees of the entities can be combined to have each entity reach the number of employees needed to be an "employer."[17] This is known as the "single employer" doctrine.[18] Similarly, a person can be employed by two or more entities that are in fact distinct, and the person will be counted as an employee of each entity to determine whether either entity is an "employer."[19] This is known as the "joint employer" doctrine.[20]

When determining if an entity has enough employees to be an "employer," the entity's independent contractors are not counted.[21]

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12. 42 U.S.C. § 2000e-2(a) (2000); 29 U.S.C. § 623(a)(1) (2000); 42 U.S.C. § 12112(a) (2000).

13. *See* 42 U.S.C. § 2000e-2(a) (2000) (prohibiting an "employer" from committing unlawful employment practice); *id.* § 12111(2) (defining "covered entity" as including, among others, an "employer"); 29 U.S.C. § 623(a)(1) (2000) (prohibiting an "employer" from discriminating).

14. 42 U.S.C. § 2000e(b) (2000); *id.* § 12111(5)(A). The ADA's definition uses the numerals "15" and "20." *See id.* § 12111(5)(A).

15. 29 U.S.C. § 630(b) (2000).

16. Dumas v. Town of Mount Vernon, 612 F.2d 974, 979 n.4 (5th Cir. 1980), *overruled in part on other grounds by* Arbaugh v. Y & H Corp., 546 U.S. 500 (2006).

17. Anderson v. Pac. Mar. Ass'n, 336 F.3d 924, 929 (9th Cir. 2003).

18. Lyes v. City of Riviera Beach, 166 F.3d 1332, 1341 (11th Cir. 1999) (en banc).

19. Virgo v. Riviera Beach Assocs., 30 F.3d 1350, 1359-60 (11th Cir. 1994). *See* 27 AM. JUR. 2D *Employment Relationships* § 5 (1996).

20. *Virgo*, 30 F.3d at 1359-60.

21. Rao v. Kenya Airways, Ltd., No. 94 Civ. 6103 (CSH), 1995 U.S. Dist. LEXIS

Thus, whether a person is an employee or an independent contractor of the defendant is relevant to determining if the defendant has enough employees to be an "employer." Whether a person is an employee or an independent contractor under the statutes is a question of federal law.[22]

The statutes simply define "employee" as "an individual employed by an [or any] employer."[23] Lacking greater guidance, lower courts have applied three different tests to determine if a person is an employee or an independent contractor. Some apply the common-law test of agency, which focuses on the hiring party's right to control the worker.[24] Others apply the so-called economic-realities test,[25] which focuses on whether the worker is, "as a matter of economic fact, in business for himself."[26] Yet others apply a hybrid of the common-law test and the economic-realities test.[27] In *Clackamas Gastroenterology Associates, P.C. v. Wells*[28] the Supreme Court held that the common-law's focus on control applied to determining "whether four physicians actively engaged in medical practice as shareholders and directors of a professional corporation should be counted as 'employees'" under the ADA,[29] thereby providing support for the position that the common-law test also applies to determine who is an independent contractor and who is an employee.[30]

When a plaintiff sues a staffing firm for a client's discrimination, whether the firm is an "employer" involves simply determining if it had enough employees in the year the alleged discriminatory act occurred, or in the preceding year, using the term "employee" as interpreted by the courts.[31] If it did, whether it employed the plaintiff is irrelevant to this

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8416, at *5 (S.D.N.Y. June 19, 1995).

22. Calderon v. Martin County, 639 F.2d 271, 272-73 (5th Cir. Unit B Mar. 1981).

23. 42 U.S.C. § 2000e(f) (2000); *id.* § 12111(4); 29 U.S.C. § 630(f) (2000). The ADEA uses the phrase "any employer." 29 U.S.C. § 630(f) (2000).

24. Camacho v. P.R. Ports Auth., 369 F.3d 570, 573-74 (1st Cir. 2004).

25. Spirides v. Reinhardt, 613 F.2d 826, 831 (D.C. Cir. 1979).

26. Oestman v. Nat'l Farmers Union Ins. Co., 958 F.2d 303, 305 (10th Cir. 1992).

27. Garrett v. Phillips Mills, Inc., 721 F.2d 979, 981 (4th Cir. 1983).

28. 538 U.S. 440 (2003).

29. *Id.* at 442, 449.

30. *See also* Nat'l Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (adopting common-law agency test for determining who is an "employee" under the Employee Retirement Income Security Act of 1974).

31. *See, e.g.*, Blagg v. Tech. Group, Inc., 303 F. Supp. 2d 1181, 1187 (D. Colo. 2004) (holding that consultants placed by defendant with clients were not defendant's employees and were therefore not included to determine if the defendant was an "employer" under Title VII); March v. Technical Employment Servs., Inc., No. 98-636-M, 2000 U.S. Dist. LEXIS 2645, at *10-12 (D.N.H. Mar. 3, 2000) (holding, for purposes of determining if a staffing firm was an "employer," that temporary workers were employees of the staffing firm because it exercised sufficient control over their employment); Kellam v. Snelling Pers. Servs., 866 F. Supp. 812, 816 (D. Del. 1994) (holding that workers that were placed with clients were not employees of staffing firm, and thus were not to be included in determining whether the staffing firm had fifteen or

element of the case. This flows from the fact that the definition of "employer" is based on the number of employees employed by the employer, irrespective of whether the plaintiff is, or was, one of them.

B. Discrimination for Prohibited Reason

The employment discrimination statutes only prohibit discrimination based on the plaintiff's race, color, religion, sex, national origin, age, or disability.[32] Thus, an employer can take an adverse employment action against a person "for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason."[33] When the plaintiff asserts a disparate-treatment claim, the plaintiff must establish that the defendant engaged in intentional discrimination.[34]

C. An Employment Relationship

For a defendant to be liable under the statutes, the defendant must have taken an adverse action against the plaintiff regarding his or her employment.[35] Thus, "a plaintiff must have some connection with an

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more employees), *aff'd*, 65 F.3d 162 (3d Cir. 1995).

32. 42 U.S.C. § 2000e-2(a) (2000); 29 U.S.C. § 623(a) (2000); 42 U.S.C. § 12112(a) (2000).

33. Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1187 (11th Cir. 1984).

34. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988) (Title VII); Tsombanidis v. W. Haven Fire Dep't, 352 F.3d 565, 573 (2d Cir. 2003) (ADA); Schaffner v. Glencoe Park Dist., 256 F.3d 616, 620 (7th Cir. 2001) (ADEA). There are two types of discrimination claims: disparate treatment and disparate impact. The difference has been explained as follows with respect to Title VII claims:

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment . . . .
>
> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate-impact theory.

Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (citations omitted). An ADA claim can also be established without discriminatory intent if an employer fails to reasonably accommodate an employee with a disability. *See* 42 U.S.C. § 12112(b)(5)(A) (2000).

35. *See* 29 U.S.C. § 623(a)(1) (2000) (making it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . . ."); 42 U.S.C. § 2000e-2(1) (2000) (making it an unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions,

employment relationship for [the statutes'] protections to apply,"[36] and whether a person is an employee or an independent contractor is therefore relevant to determining if the statutes protect him or her. A person placed by a staffing firm with a client will usually, at a minimum, be considered the client's employee.[37]

The statutes prohibit an employer from discriminating against any "individual,"[38] not just against an employer's employee. Most circuit courts therefore hold that an employer can violate the statutes by discriminating against a person who is not its employee if the discrimination involves the person's employment with another entity.[39] The classic example of this is *Sibley Memorial Hospital v. Wilson*,[40] in which the court held that a hospital could be liable under Title VII if it refused to allow a male nurse, who was not the hospital's employee, to treat female patients at the hospital.[41] The court held that if the hospital discriminated against the plaintiff concerning his employment with his employer, it was irrelevant that the hospital did not employ him.[42]

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or privileges of employment . . . ."); *id.* § 12112(a) (prohibiting discrimination "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.").

36. Gina M. Delahunt, Comment, *Pointing Fingers—Will the Real Employer Please Stand Up! When is an Entity an Employer in a Sexual Harassment Claim?*, 7 J. SMALL & EMERGING BUS. L. 501, 507 (2003); *see also* Lutcher v. Musicians Union Local 47, 633 F.2d 880, 883 (9th Cir. 1980) ("[T]here must be some connection with an employment relationship for Title VII to apply.").

37. *See, e.g.*, Goodwin v. Orange & Rockland Utils., Inc., 04 Civ. 0207 (WCC), 2005 U.S. Dist. LEXIS 42466, at *13 (S.D.N.Y. Oct. 14, 2005) (finding that a temporary employee was employed by the company with which she was placed); Adams v. Debevoise & Plimpton, No. 03 Civ. 3015 (AKH), 2004 U.S. Dist. LEXIS 14914, at *6-7 (S.D.N.Y. Aug. 3, 2004) (finding that a temporary legal secretary was employed by a law firm); Amarnare v. Merrill Lynch, Pierce, Fenner & Smith Inc., 611 F. Supp. 344, 349 (S.D.N.Y. 1984) (finding that a temporary employee was likely employed by the company with which she was placed), *aff'd*, 770 F.2d 157 (2d Cir. 1985).

38. 42 U.S.C. § 2000e-2(a)(1) (2000); *id.* § 12112(a); 29 U.S.C. § 623(a)(1) (2000).

39. Pirruccello, *supra* note 1, at 202.

40. 488 F.2d 1338 (D.C. Cir. 1973).

41. *Id.* at 1342.

42. *Id.*; *see also* Gomez v. Alexian Bros. Hosp., 698 F.2d 1019, 1021-22 (9th Cir. 1983) (holding that the plaintiff stated a claim when he alleged that the defendant refused to enter into a contract with his corporation for discriminatory reasons, under which the plaintiff, as an employee of his corporation, would have served as a director of an emergency room); King v. Chrysler Corp., 812 F. Supp. 151, 154 (E.D. Mo. 1993) (holding that a cashier employed at a cafeteria on the premises of an automobile company could assert a claim against the automobile company for failing to prevent sexually harassing work environment); Fairman v. Saks Fifth Ave. of Mo., Inc., No. 87-0394-CV-W-3, 1988 U.S. Dist. LEXIS 13087, at *6-7 (W.D. Mo. Nov. 18, 1988) (holding that a plaintiff who performed cleaning services at a store on behalf of her employer could assert a claim against the store who terminated her services); *Amarnare*, 611 F. Supp. at 349-50 (holding that a client of a temporary employment agency could be liable for

This is known as an "interference claim," because the employer interferes with the plaintiff's employment with a third party.[43] Thus, if *someone* employs the plaintiff, and the defendant (who must be an "employer") is accused of discriminating against the plaintiff concerning his or her employment, whether the defendant employs the plaintiff is relevant only to determine if the defendant has enough employees to be an "employer."

D. Holding the Defendant Liable

Because a business entity acts only through natural persons,[44] an employer is liable under the statutes only if there is a basis for holding it responsible for the act of the person who discriminated. Although Congress did not explicitly address employer liability in the statutes,[45] the definition of "employer" includes "any agent" of the employer.[46] Thus, "[t]he plain language of the Act imposes liability for discrimination by any agent,"[47] and, as a result, the Supreme Court has stated that "Congress . . . directed federal courts to interpret Title VII based on agency principles."[48]

Though the statutes do not define "agent," and while it is unclear if Congress intended to incorporate common-law doctrines,[49] the Supreme

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discriminating against a temporary worker even if the client was not the worker's employer), *aff'd*, 770 F.2d 157 (2d Cir. 1985); Pao v. Holy Redeemer Hosp., 547 F. Supp. 484, 494-95 (E.D. Pa. 1982) (holding that a physician stated a claim against a hospital that was not his employer, when the hospital denied him staff privileges); Puntolillo v. N.H. Racing Comm'n, 375 F. Supp. 1089, 1092 (D.N.H. 1974) (holding that the plaintiff stated a claim against defendants, who were not his employers, because they allegedly interfered with his employment opportunities).

43. Pirruccello, *supra* note 1, at 200. The EEOC has stated that an interference claim cannot be asserted against a federal agency because claims under Title VII and the ADEA can only be asserted against the federal government by "employees or applicants for employment." *EEOC Enforcement Guidance*, *supra* note 3, at N:3322. Also, the Equal Pay Act of 1963, "unlike Title VII, the ADA, and the ADEA, only permits claims by employees against their employers, not against third party interferers." *Id.* at N:3326 n.39.

44. Niesig v. Team I, 558 N.E.2d 1030, 1033 (N.Y. 1990).

45. *See* Kathleen A. Smith, Note, *Employer Liability for Sexual Harassment: Inconsistency Under Title VII*, 37 CATH. U. L. REV. 245, 259 (1987) ("Although title VII makes it unlawful for 'an employer' to discriminate . . . it does not specify the basis for employer liability arising from discrimination.").

46. 42 U.S.C. § 2000e(b) (2000); *id.* § 12111(5)(A); 29 U.S.C. § 630(b) (2000).

47. John B. Attanasio, *Equal Justice Under Chaos: The Developing Law of Sexual Harassment*, 51 U. CIN. L. REV. 1, 32 (1982).

48. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 754 (1998); *see also* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986) ("Congress wanted courts to look to agency principles for guidance in th[e] area [of employer liability].").

49. Christine O. Merriman & Cora G. Yang, Note, *Employer Liability for Coworker Sexual Harassment Under Title VII*, 13 N.Y.U. REV. L. & SOC. CHANGE 83, 96 (1984-85).

Court has cited the Restatement (Second) of Agency with approval when determining employer liability.[50] The EEOC also has taken the position "that courts formulating employer liability rules should draw from traditional agency principles."[51] One court stated that the use of "agent" in the definition of "employer" is "an unremarkable expression of respondeat superior—that discriminatory personnel actions taken by an employer's agent may create liability for the employer."[52] The Supreme Court relies "on the general common law of agency, rather than the law of any particular State . . . ."[53]

While the general common law of agency provides the "starting point" for an analysis of employer liability,[54] the Supreme Court has stated that courts should not simply transplant common-law doctrines into the statutes, but rather should "adapt agency concepts to [the statutes'] practical objectives . . . ."[55] The Court, however, has also stated that

> [w]hile such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.[56]

When an employee, for a discriminatory reason, takes a tangible

50. *Meritor*, 477 U.S. at 72. In 2006, the American Law Institute published the Restatement (Third) of Agency. Interestingly, the Restatement (Third) of Agency "does not deal extensively with the duties that an employer owes its employees [because] [s]uch duties are now extensively prescribed by statute and administrative regulation and enforced to a considerable degree through processes external to the civil-justice system." RESTATEMENT (THIRD) OF AGENCY, *Introduction* (2006). Also, the Third Restatement's treatment of respondeat superior "is inapplicable to an employer's liability for one employee's tortious conduct toward a fellow employee, a topic being considered by Restatement Third, Employment Law, in preparation as Restatement Third, Agency, was completed." *Id.* § 7.07 cmt. a. Notwithstanding, because the Supreme Court has held that general principles of agency law apply to determining liability under the federal employment discrimination statutes, the Restatement (Third) of Agency is relevant to determining employer liability, and it is therefore relied on in this article when discussing general agency law.

51. *See Meritor*, 477 U.S. at 70 (noting that the "[t]he EEOC, in its brief as *amicus curiae*, contends that courts formulating employer liability rules should draw from traditional agency principles.").

52. Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 510 (4th Cir. 1994).

53. *Burlington Indus.*, 524 U.S. at 754 (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989)).

54. Faragher v. City of Boca Raton, 524 U.S. 775, 802 (1998).

55. *Id.* at 802 n.3; *see also* Barnes v. Costle, 561 F.2d 983, 996 (D.C. Cir. 1977) (MacKinnon, J., concurring) ("Analysis of liability of an employer for violation of Title VII takes us beyond the common law of agency and tort, but the rules operative in those spheres provide a necessary starting point.").

56. *Meritor*, 477 U.S. at 72.

employment action against a subordinate employee, "such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits,"[57] the employer is liable because the employee who took the action used the power given to him or her by the employer.[58] Under traditional agency law, this is a situation in which an employer can be held liable for an employee's act.[59]

The liability rules for discriminatory harassment are more complex. When a person sufficiently high in the organization—such as the president, an owner, or an officer—subjects a subordinate to discriminatory harassment, the employer is automatically liable.[60]

When a supervisor sexually harasses a subordinate but no tangible employment action is taken, the employer is liable unless it can establish "(a) that [it] exercised reasonable care to prevent and correct promptly any . . . harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."[61] The Supreme Court developed this rule to accommodate the fact that a harassing supervisor is often aided by the agency relationship (thus suggesting liability under common-law agency principles)[62] with several competing considerations. These competing considerations include: (1) "Congress' intention to promote conciliation rather than litigation in the Title VII context;"[63] (2) promoting Title VII's deterrent purpose by

57. *Burlington Indus.*, 524 U.S. at 761.

58. *Id.* at 760.

59. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958) (providing that an employer is liable for the tort of an employee committed outside the scope of employment if "he was aided in accomplishing the tort by the existence of the agency relationship"). Under the Restatement (Third) of Agency, this doctrine is not included as a distinct basis for vicarious liability. *See* RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. b (2006) ("This Restatement does not include 'aided in accomplishing' as a distinct basis for an employer's (or principal's) vicarious liability."). Rather, the American Law Institute believes that "[t]he purposes likely intended to be met by the 'aided in accomplishing' basis are satisfied by a more fully elaborated treatment of apparent authority and by the duty of reasonable care that a principal owes to third parties with whom it interacts through employees and other agents." *Id.*

60. *See Faragher*, 524 U.S. at 789 (stating that an employer's president would be "within that class of an employer organization's officials who may be treated as the organization's proxy" and whose harassment of a subordinate would subject the employer to liability); Torres v. Pisano, 116 F.3d 625, 634 (2d Cir. 1997) (stating that a supervisor may hold a position sufficiently high "in the management hierarchy of the company for his actions to be imputed automatically to the employer"); Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983) (stating that an employer would be liable for harassment by a "proprietor, partner or corporate officer").

61. *Burlington Indus.*, 524 U.S. at 765.

62. *Id.* at 764.

63. *Id.*

encouraging employees to report harassing conduct before it becomes severe or pervasive;[64] and (3) implementing the "avoidable consequences doctrine" of tort law, which applies to Title VII.[65]

If a coworker harasses another employee for a discriminatory reason, lower courts agree that the employer is liable if the plaintiff establishes that the employer knew or should have known of the harassment and failed to take prompt remedial action.[66] This is a negligence standard of liability.[67] If the employer fails to adequately respond to coworker harassment, it is liable even if the harassment stops after the employer knew or should have known about it.[68] Liability attaches in such a situation because the liability rule for coworker harassment has two purposes—"ending the current harassment and deterring future harassment . . . by the same offender or others"—and a failure to respond does not deter future harassment.[69] Although it has never explicitly approved the doctrine, the Supreme Court has suggested support for the negligence-based liability rule for coworker harassment.[70]

An agency-law basis for the liability rule for coworker harassment

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64. *Id.*

65. *Id.*

66. Moore v. Kuka Welding Sys., 171 F.3d 1073, 1079 (6th Cir. 1999); Waltman v. Int'l Paper Co., 875 F.2d 468, 485 (5th Cir. 1989); Barrett v. Omaha Nat'l Bank, 726 F.2d 424, 427 (8th Cir. 1984); Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982); 29 C.F.R. § 1604.11(d); BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 244 (1992). The rule regarding employer liability for coworker harassment has been described as "not a controversial area." 3 L. LARSON & A. LARSON, EMPLOYMENT DISCRIMINATION § 46.07[4][a], at 46-101 (2d ed. 1998).

67. Robert F. Conte & David L. Gregory, *Sexual Harassment in Employment—Some Proposals Toward More Realistic Standards of Liability*, 32 DRAKE L. REV. 407, 409 (1982-83); *see also* Faragher v. City of Boca Raton, 524 U.S. 775, 789 (1998) ("[T]he combined knowledge and inaction may be seen as demonstrable negligence . . . ."); *id.* at 799 (referring to the standard as "a negligence standard").

68. Fuller v. City of Oakland, Cal., 47 F.3d 1522, 1528-29 (9th Cir. 1995). Significantly, the Supreme Court described the standard as follows: "An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct *and failed to stop it.*" Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 759 (1998) (emphasis added). This suggests that liability attaches only if the harassment continues after the employer knew or should have known of it. This is consistent with the Court's statement that an employer's liability under this standard is based on the agency principle that an employer is liable for an employee's tort outside the scope of employment "when the tort is attributable to the employer's own negligence." *Id.* at 758.

69. *Fuller*, 47 F.3d at 1528-29.

70. *See Faragher*, 524 U.S. at 789 ("There have . . . been myriad cases in which District Courts and Courts of Appeals have held employers liable on account of actual knowledge by the employer, or high-echelon officials of an employer organization, of sufficiently harassing action by subordinates, which the employer or its informed officers have done nothing to stop . . . . In such instances, the combined knowledge and inaction may be seen as demonstrable negligence, or as the employer's adoption of the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy.").

is difficult to discern. Agency law is not a good fit because an employer is generally liable only for an employee's torts within the scope of his or her employment.[71] Coworker harassment cannot be said to occur within such scope, particularly because a coworker does not have any authority over the person he or she harasses. Also, an employee who harasses rarely does so for the employer's benefit, which is generally a requirement for tortious conduct to be within the scope of employment.[72]

The Supreme Court, without passing on their correctness, has acknowledged two bases for the coworker harassment liability rule, stating that "combined knowledge and inaction may be seen as demonstrable negligence, or as the employer's adoption of the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy."[73] Neither of these rationales, however, is an adequate basis for the rule, and neither is consistent with the statutes' requirement that either the employer or its agent engage in intentional discrimination.

The negligence rationale is questionable because an employer is liable when it fails to respond, even if the harassment stops once the employer knew or should have known of it.[74] Under common law, "[a]n essential element of the plaintiff's cause of action for negligence, or for that matter for any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered."[75] If the harassment stops, the employer's negligence did not cause the harm, unless some prior negligence by the employer caused the initial harassment. Also, even if the harassment continued after notice, the employer's negligence would only cause the subsequent harm, not the prior harm.

Further, the negligence standard is a direct liability standard, not an agency standard: "[T]he employer's liability in cases of co-worker harassment is direct, not derivative; the employer is being held directly responsible for its own acts or omissions."[76] An employer is directly liable when it has violated a duty of care owed to the employee, and if an

71. Nancy F. Chudacoff, *New EEOC Guidelines on Discrimination Because of Sex: Employer Liability for Sexual Harassment Under Title VII*, 61 B.U. L. REV. 535, 545 (1981).

72. Under common-law agency principles, "[a]n employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment," RESTATEMENT (THIRD) OF AGENCY § 7.01 (2006), and "[a]n employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer." *Id.* § 7.07(2).

73. *Faragher*, 524 U.S. at 789.

74. Fuller v. City of Oakland, Cal., 47 F.3d 1522, 1528-29 (9th Cir. 1995).

75. W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 263 (5th ed. 1984) [hereinafter PROSSER].

76. Blankenship v. Parke Care Ctrs., Inc., 123 F.3d 868, 873 (6th Cir. 1997).

employer breaches such a duty, it is irrelevant that an employer would not have been vicariously liable at common law for the coworker's conduct. This direct liability rationale was seemingly acknowledged by the Fifth Circuit when it stated that "federal law imposes a specific duty upon employers to protect the workplace and the workers from sexual harassment . . . ."[77] Thus, an "employer . . . has a duty to maintain a harassment-free working environment."[78]

However, to be a legitimate basis for the coworker harassment liability rule, the breach of duty theory must effect a duty imposed by the statutes. Whether a sound interpretation of the statutes can support a duty to maintain a harassment-free workplace is questionable because the statutes only allow for liability when an employer or its agent engaged in intentional discrimination. At least if the conduct continues after the employer had notice, it can be argued the employer made submission to discrimination a condition of employment, meaning the employer itself engaged in the discrimination. But because liability attaches when the employer fails to act, even if the harassment stops,[79] this is not an adequate explanation for the liability rule.

The liability rule has also been premised on the doctrines of ratification or acquiescence.[80] "The failure to investigate gives tacit support to the discrimination because the absence of sanctions encourages abusive behavior."[81] A commentator has suggested that a failure to remedy the harassment is the equivalent of participating in it: "If the employer has actual knowledge that an employee is harassing other employees and does nothing to prevent or rectify it, the employer, in one sense, participates in the harassment and through its own fault is directly liable."[82]

Ratification does not apply in this situation, however, because ratification applies only if the "actor acted or purported to act as an agent on the person's behalf."[83] Acquiescence does not apply because it applies when a party's tacit consent to a transaction is "intended, in some extent at least, to carry it into effect, and to obtain or claim the benefits

77. Garziano v. E.I. Du Pont De Nemours & Co., 818 F.2d 380, 387 (5th Cir. 1987).

78. Merriman & Yang, *supra* note 49, at 98.

79. Fuller v. City of Oakland, Cal., 47 F.3d 1522, 1528-29 (9th Cir. 1995).

80. Figueroa v. Paychex, Inc., No. CV-99-797-ST, 1999 U.S. Dist. LEXIS 14216, at *11 (D. Or. Aug. 5, 1999), *adopted*, 1999 U.S. Dist. LEXIS 14235 (D. Or. Sept. 7, 1999).

81. Munford v. James T. Barnes & Co., 441 F. Supp. 459, 466 (E.D. Mich. 1977); *see also* Kyriazi v. W. Elec. Co., 461 F. Supp. 894, 935 (D.N.J. 1978) (stating that a failure to take action demonstrates implicit encouragement of the conduct).

82. Katherine S. Anderson, Note, *Employer Liability Under Title VII for Sexual Harassment After* Meritor Savings Bank v. Vinson, 87 COLUM. L. REV. 1258, 1274-75 (1987).

83. RESTATEMENT (THIRD) OF AGENCY § 4.03 (2006).

resulting from it . . . ."[84] When an employer fails to respond to coworker harassment, the employer is not usually intending to carry the harassment into effect, or to obtain or claim any benefits from it.

There is, however, the potential to reconcile the coworker harassment liability rule with traditional agency principles. In some instances "the scope of employment has been defined broadly enough to hold employers vicariously liable for intentional torts that were in no sense inspired by any purpose to serve the employer."[85] "The rationales for these decisions have varied, with some courts . . . explaining that the employee's acts were foreseeable and that the employer should in fairness bear the resulting costs of doing business . . . ."[86] Discriminatory harassment can perhaps be considered foreseeable, and the loss, in fairness, shifted to the employer. Although the employer is absolved of liability if it takes prompt remedial action, this can be considered a limitation on liability that promotes the statutes' purposes. Prompt remedial action provides an employer-created remedy for the employee, and deters future wrongdoing by sending the message that the employer does not tolerate harassment.[87]

This agency-law rationale cannot be used, however, because the same liability rule applies when a third party harasses an employee.[88] A rule holding an employer liable for third-party harassment of an employee cannot be based on agency law because a third-party harasser is in no sense the employer's agent, and an employer is not liable for the tortious conduct of a person who is not its servant.[89]

Thus, attempting to base the liability rule for coworker and third-party harassment on agency law is unsuccessful.[90] For example, when

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84. BLACK'S LAW DICTIONARY 24 (6th ed. 1990).

85. Faragher v. City of Boca Raton, 524 U.S. 775, 794 (1998).

86. *Id.* at 796.

87. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 805-06 (1998) (noting that Title VII's purposes are compensating victims and deterring future wrongdoing).

88. *See* Freitag v. Ayers, 468 F.3d 528, 538 (9th Cir. 2006) (holding that an employer is liable for harassment by non-employee if it knew of the harassment, or should have known of the harassment, and failed to take corrective action), *cert. denied*, 127 S. Ct. 1918 (2007); Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1074 (10th Cir. 1998) (same); BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 250-51 (1992) ("Where employers can control the conduct of nonemployees, the analysis strongly resembles that used in determining employer liability for co-worker harassment.").

89. *See* Fleming James, Jr., *Vicarious Liability*, 28 TUL. L. REV. 161, 178 (1954) (listing cases).

90. The rationale has been linked to ratification or acquiescence: "[A]n employer may be held liable for sexual harassment on the part of a private individual . . . where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct." Folkerson v.

the Sixth Circuit stated that the rule means the plaintiff must prove "respondeat superior liability,"[91] a commentator correctly remarked that "[t]he use of the 'respondeat superior' label in the context of the knowledge standard is confusing since the knowledge standard measures the employer's own direct fault."[92] As stated by Judge Posner, "in the case of coworker as distinct from supervisor harassment, the employer is liable only if negligent; respondeat superior is not applied."[93] Once it is concluded that neither an employer's own intentional discrimination nor agency law is the basis for the coworker and third-party harassment liability rule, it becomes clear that the rule is premised not on the statutes' plain meaning, but on an effort to promote the statutes' twin purposes—compensation and deterrence.[94]

It is beyond the scope of this article to address whether the liability rule for coworker and third-party harassment, being premised not on the statutes' plain meaning, is legitimate.[95] What is important for present purposes is to recognize that, assuming it is sound, the rule is an aggressive form of purposivism[96] at the edge of legitimacy, and any attempt to import the rule into other areas—such as holding staffing firms liable for a client's tangible act of discrimination—should be greeted with caution.

II

In 1997, the EEOC issued enforcement guidance regarding the application of the employment discrimination statutes to workers placed by staffing firms.[97] The EEOC, in its enforcement guidance, correctly

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Circus Circus Enters., Inc., 107 F.3d 754, 756 (9th Cir. 1997).

91. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 621 (6th Cir. 1986), *abrogated on other grounds by* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).

92. Anderson, *supra* note 82, at 1262 n.30 (1987).

93. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 189 (6th ed. 2003).

94. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 805-06 (1998) (noting that Title VII's purposes are compensating victims and deterring future wrongdoing).

95. It is also beyond the scope of this article to address (1) whether the Ninth Circuit in *Fuller v. City of Oakland, Cal.*, 47 F.3d 1522 (9th Cir. 1995), incorrectly held that an employer who fails to respond to a harassment complaint is liable even if the harassment stops after the employer knew or should have known of it, and (2) whether courts have correctly held that an employer can be liable for third-party harassment. For purposes of this article, the scope of which is limited to addressing whether a staffing firm should be liable for a client's discriminatory termination of an employee assignment, I accept these holdings as correct.

96. A purposive approach to interpreting a statute focuses on the statute's purpose when the text does not provide a clear answer. *See generally* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 85-101 (2005) (describing and advocating a purposive approach to statutory interpretation).

97. *See EEOC Enforcement Guidance*, *supra* note 3.

states that a threshold question is whether the worker is an "employee."[98] As recognized by the EEOC, however, the issue at this stage of the analysis is simply whether the worker is an employee of either the staffing firm or the client;[99] which entity employs the worker, or whether both employ him or her, is irrelevant. As stated by the EEOC, "[t]he worker is a covered employee under the anti-discrimination statutes if the right to control the means and manner of her work performance rests with the firm and/or its client rather than with the worker herself."[100] The first issue, therefore, is whether the statutes apply, or whether the worker is beyond their protection because the relationship that was the subject of the alleged discrimination is not an employment relationship. The EEOC believes such workers will be "employees" within the meaning of the statutes in the great majority of cases.[101]

The EEOC then states that it must be determined which entity or entities employ the worker.[102] If the staffing firm does not have the right to exercise control over the worker, it would not be the worker's employer under the statutes.[103] This would be the result even if the staffing firm treats the worker as its employee for payroll and benefits purposes, as often happens with so-called "employee leasing" arrangements.[104]

The EEOC does not at this point state why it is relevant which entity or entities employ the worker.[105] The EEOC simply notes that if the staffing firm "qualifies as the worker's employer, and if that entity has the statutory minimum number of employees, then it can be held liable for unlawful discriminatory conduct against the worker."[106] The EEOC, however, suggests this inquiry's lack of relevance by noting that an employer can be liable for interfering with a worker's employment with another entity.[107]

The EEOC then discusses liability. The Commission believes "a staffing firm is liable if it honors a client's discriminatory assignment request or if it knows that its client has rejected workers in a protected class for discriminatory reasons and for that reason refuses to assign individuals in that protected class to that client."[108] The EEOC considers

98. *Id.* at N:3319.
99. *Id.*
100. *Id.*
101. *See id.*
102. *Id.*
103. *Id.* at N:3320.
104. *Id.*
105. *See id.*
106. *See id.* (parenthetical omitted).
107. *Id.* at N:3321.
108. *Id.* at N:3323.

the staffing firm to be liable because it participated in the client's discrimination.[109]

The Commission also believes, however, that if a client discriminates against an assigned worker, the staffing firm "is liable if it knew or should have known about the client's discrimination and failed to undertake prompt corrective measures within its control,"[110] provided the firm is the worker's employer under the statutes.[111] Thus, whether the worker is the firm's employee determines if the firm must take corrective action when a client discriminates against the worker.

The EEOC then elaborates on the types of corrective measures that can be taken by the staffing firm to avoid liability, stating:

> Corrective measures may include, but are not limited to: 1) ensuring that the client is aware of the alleged misconduct; 2) asserting the firm's commitment to protect its workers from unlawful harassment and other forms of prohibited discrimination; 3) insisting that prompt investigative and corrective measures be undertaken; and 4) affording the worker an opportunity, if (s)he so desires, to take a different job assignment at the same rate of pay.[112]

The EEOC further notes:

> The staffing firm should not assign other workers to that work site unless the client has undertaken the necessary corrective and preventive measures to ensure that the discrimination will not recur. Otherwise, the staffing firm will be liable along with the client if a worker later assigned to that client is subjected to similar misconduct.[113]

For this latter proposition, the EEOC cites *Paroline v. Unisys Corp.*,[114] in which the court held that an employer is liable if it anticipated or reasonably should have anticipated that the plaintiff would be subjected to sexual harassment, yet failed to take action to prevent it.[115]

Under the above guidelines, the Commission believes a staffing firm would be liable for a client's harassment and *discharge* of a worker when: the employee is employed by the staffing firm; the employee complains to the staffing firm; the firm tells the worker it cannot force the client to take corrective action; the firm removes the worker from the

109. *Id.* at N:3324.
110. *Id.*
111. *See id.* at n.32.
112. *See id.* at N:3324-N:3325.
113. *Id.* at N:3325.
114. 879 F.2d 100 (4th Cir. 1989), *vacated in part on other grounds*, 900 F.2d 27 (4th Cir. 1990) (en banc).
115. *Paroline*, 879 F.2d at 107.

assignment at the client's request (the client referred to the worker as a troublemaker in the EEOC's example); and the firm finds the worker a different assignment.[116] The EEOC believes the firm should be "liable for the harassment and *retaliatory discharge* because it knew of the misconduct and failed to undertake adequate corrective action."[117] According to the EEOC, the firm

> should have insisted that the client investigate the allegation of harassment and take immediate and appropriate corrective action. The agency should also have asserted the right of its workers to be free from unlawful discrimination and harassment, and declined to assign other workers until the client undertook the necessary corrective and preventive measures.[118]

The EEOC also believes that the firm "unlawfully participated in its client's discriminatory misconduct when it acceded to the client's request to replace the worker with one who was not a 'troublemaker.'"[119] Further, "[i]f the replacement worker is subjected to similar harassment, the [firm] . . . will be subject to additional liability."[120]

The Commission does not disclose the basis for its conclusion that a staffing firm must take corrective action when it has reason to know a client terminated an employee's assignment for an unlawful reason.[121] The EEOC does, however, cite to its Guidelines on Sexual Harassment,[122] which provide that an employer may be liable for the sexual harassment of an employee by a third party if the employer knew or should have known of the harassment and failed to take immediate and appropriate corrective action within its control.[123] The Guidelines on Sexual Harassment do not, however, address tangible acts of discrimination (except for tangible acts involved with harassment),[124] and thus do not provide direct support for the EEOC's position.

The EEOC also cites three court decisions—*EEOC v. Sage Realty*

116. *EEOC Guidance*, *supra* note 3, at N:3325.
117. *Id.* (emphasis added).
118. *Id.*
119. *Id.*
120. *Id.*
121. In a subsequent case, however, the EEOC relied on the concept of ratification, arguing that a staffing firm who fails to take corrective measures within its control ratifies the discriminatory conduct. *See* Pl.'s Mem. Resp. Opp'n Def. Adecco's Mot. Summ. J. at 24, *EEOC v. Olver, Inc.*, No. 7:05CV00417 (W.D. Va. filed June 30, 2005), *available at* https://ecf.vawd.uscourts.gov/cgi-bin/login.pl (doc. 43).
122. *EEOC Guidance*, *supra* note 3, at N:3324 n.33 (citing EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11 (1996)).
123. *See* 29 C.F.R. § 1604.11(e) (2007).
124. *Id.* § 1604.11(a), (g) (2007).

Corp.,[125] *Magnuson v. Peak Technical Services, Inc.*,[126] and *Caldwell v. ServiceMaster Corp.*,[127]—as well as a decision by the National Labor Relations Board—*Capitol EMI Music, Inc.*[128] As discussed below, these decisions do not provide direct support for the EEOC's position.

In *EEOC v. Sage Realty Corp.*,[129] the court held that a cleaning contractor who employed a lobby attendant, and the building management company who had the principal role in supervising her, were jointly liable when the contractor fired her for refusing to comply with the management company's directive that she wear a revealing uniform that resulted in her being sexually harassed by the public.[130] Although the management company was responsible for the uniform requirement, the cleaning contractor was held liable because it was her employer, it was aware of the harassment, and there was no evidence it was powerless to remedy the situation.[131]

Thus, *Sage Realty Corp.* stands for the proposition that an employer is liable for the sexual harassment of an employee by third parties, if it knew of the harassment, had the power to remedy it, and failed to take action to stop it. With respect to the plaintiff's termination, *Sage Realty Corp.* shows that an employer cannot terminate an employee "for refusing to comply with . . . sex-based terms and conditions of employment . . . ."[132] Although the contractor's termination of the plaintiff could be likened to a staffing firm complying with a client's termination of an employee assignment for an unlawful reason, the contractor did not merely remove her from the assignment; it terminated her employment with the contractor. Thus, the contractor itself took an adverse employment action against the plaintiff. Therefore, *Sage Realty Corp.* does not stand for the proposition that an employer can be liable for another entity's tangible act of discrimination.

In *Magnuson v. Peak Technical Services, Inc.*[133] a staffing firm assigned the plaintiff to a client who owned car dealerships.[134] The plaintiff alleged that the general manager of the dealership to which she was assigned sexually harassed her.[135] She complained to the client and the staffing firm, but they failed to take action, and the harassment

125. 507 F. Supp. 599 (S.D.N.Y. 1981).
126. 808 F. Supp. 500 (E.D. Va. 1992), *aff'd*, 40 F.3d 1244 (4th Cir. 1994).
127. 966 F. Supp. 33 (D.D.C. 1997).
128. 311 N.L.R.B. 997 (1993), *enforced*, 23 F.3d 399 (4th Cir. 1994).
129. 507 F. Supp. 599 (S.D.N.Y. 1981).
130. *Id.* at 611.
131. *Id.* at 613.
132. *Id.* at 608.
133. 808 F. Supp. 500 (E.D. Va. 1992), *aff'd*, 40 F.3d 1244 (4th Cir. 1994).
134. *Id.* at 504.
135. *Id.* at 505.

continued.[136] The staffing firm later removed her from the dealership at the general manager's request and assigned her to work at other dealerships.[137] The staffing firm later terminated her, claiming she no longer "fit the profile" of what the client sought for the position.[138] The plaintiff then sued the firm and others for violating Title VII, alleging sexual harassment, discriminatory discharge, and retaliation.[139]

The court, addressing the firm's motion for summary judgment, began by stating that "[i]n order to be subject to liability under Title VII, a defendant must (1) fall within Title VII's statutory definition of 'employer,' and (2) have exercised substantial control over significant aspects of the compensation, terms, conditions, or privileges of plaintiff's employment."[140] The court found that the firm fell within the statutory definition of "employer" because it employed fifteen or more employees during the relevant time period.[141]

The court then noted that it still had to determine if the firm was the plaintiff's employer for Title VII purposes, i.e., whether it exercised sufficient control over her employment.[142] The court stated that because of Title VII's broad remedial purposes, "the term 'employer' under Title VII should be 'construed in a functional sense to encompass persons who are not employers in conventional terms, but who nevertheless control some aspect of an individual's compensation, terms, conditions, or privileges of employment.'"[143] The court also noted that more than one employer can employ the plaintiff for Title VII purposes.[144] The court stated that no one disputed that the firm was the plaintiff's employer, referencing the paychecks and benefits it provided to the plaintiff, the written employment agreement with the plaintiff, and the firm supervisors to whom the plaintiff reported.[145]

The court next addressed whether the firm could be held liable for

136. *Id.* at 506.
137. *Id.*
138. *Id.*
139. *Id.* at 503.
140. *Id.* at 507. This statement of law is incorrect. The second factor fails to take into account that an employer can be liable for interfering with a person's employment with another entity.
141. *Id.*
142. *Id.*
143. *Id.* at 507-08 (quoting Bostick v. Rappleyea, 629 F. Supp. 1328, 1334 (N.D.N.Y. 1985), *aff'd*, 907 F.2d 144 (1990) (in turn quoting Spirt v. Teachers Ins. & Annuity Assocs., 475 F. Supp. 1298, 1308 (S.D.N.Y. 1979), *aff'd in part and rev'd in part on other grounds*, 691 F.2d 1054 (2d Cir. 1982), *vacated and remanded on other grounds*, 463 U.S. 1223 (1983)).
144. *Magnuson*, 800 F. Supp. at 508.
145. *Id.*

the alleged harassment,[146] stating that the firm could be liable if it knew of the harassment and failed to take corrective action.[147] Because there was evidence that the plaintiff told the firm about the harassment, and because it was undisputed the firm did not take remedial action, there was sufficient evidence to sustain the harassment claim.[148]

Additionally, the court held there was sufficient evidence to support a discriminatory discharge claim against the firm because there was evidence the plaintiff's supervisor at the firm had expressed doubts about placing women at male-dominated dealerships.[149] The court also held there was sufficient evidence to support a retaliatory discharge claim against the firm.[150]

Magnuson stands for the propositions that a staffing firm must take prompt remedial action when a client sexually harasses a worker, provided the worker is the staffing firm's employee, and the firm cannot terminate the employee for discriminatory or retaliatory reasons. *Magnuson*, however, did not address the liability of a firm for a client's tangible act of discrimination with which the firm was uninvolved, and thus does not support the EEOC's position.

In *Caldwell v. ServiceMaster Corp.*,[151] four plaintiffs sued a staffing firm for allegedly failing to correct the discriminatory environment that existed at the assignment with a client, and for failing to address adverse actions taken against them by the client.[152] The firm, conceding there was a factual issue as to whether it was a joint employer of the plaintiffs, moved for summary judgment on the grounds that it was not on notice of any alleged discrimination and that, even if it had been, it took corrective action within its control.[153] The court stated that "[t]o prevail on a theory of joint employer liability, a plaintiff must show that the defendant knew or should have known of the discriminatory conduct and that it failed to take those corrective measures within its control."[154] For this proposition, the court cited to *Magnuson* and *Powell v. Las Vegas Hilton Corp.*,[155] the latter involving whether an employer can be liable for sexual harassment by a customer at the employer's workplace.[156]

The court granted summary judgment for the firm because the

146. *Id.* at 512.
147. *Id.* at 513.
148. *Id.*
149. *Id.* at 514.
150. *Id.* at 515.
151. 966 F. Supp. 33 (D.D.C. 1997).
152. *Id.* at 35-6.
153. *Id.* at 46.
154. *Id.*
155. 841 F. Supp. 1024 (D. Nev. 1992).
156. *Id.* at 1027-28.

plaintiffs had not provided it with sufficient notice of the client's discrimination.[157] Further, even if the firm had determined the client terminated the plaintiffs for discriminatory reasons, the firm had no authority under its agreement with the client to oversee it or force it to change its request that the plaintiffs not be assigned to it.[158] The court also noted that the firm offered alternative positions to the plaintiffs.[159] Additionally, the court stated that the firm investigated the basis for the terminations, and found no proof of discrimination.[160]

Thus, while *Caldwell* purportedly applied the corrective action standard to a client's tangible acts of discrimination, the court's grant of summary judgment for the firm arguably renders such application dicta. Also, the court seemingly acknowledged that the standard has little effect because a staffing firm has no control over a client. Lastly, the cases relied on by the court in support of the corrective action standard involved either tangible acts of discrimination by the staffing firm or harassment, not a tangible act of discrimination by the client.

In *Capitol EMI Music, Inc.*[161] the National Labor Relations Board (Board) addressed "the circumstances under which [it would] deem both employers in a joint employer relationship to have committed a violation of Section 8(a)(3) and (1) of the [National Labor Relations] Act [NLRA] when only one of those employers took the unlawful action in question."[162] The case involved a temporary employment agency that assigned a temporary employee to a position with a client company.[163] The Board concluded that the agency and the client were joint employers of the employee.[164] The client asked that the employee be removed from the assignment for unlawful reasons, but those reasons were not told to the agency, and it had no knowledge of those reasons.[165] There was no evidence or argument that the agency engaged in wrongdoing;[166] thus, the issue was whether the agency should be liable for the client's

157. *Caldwell*, 966 F. Supp. at 46-47.
158. *Id.* at 48.
159. *Id.*
160. *Id.*
161. 311 N.L.R.B. 997 (1993), *enforced*, 23 F.3d 399 (4th Cir. 1994).
162. *Id.* at 997. Section 8(a)(3) makes it an unfair labor practice for an employer, "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization[.]" 29 U.S.C. § 158(a)(3) (2000). Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7[.]" *Id.* § 158(a)(1).
163. 311 N.L.R.B. at 997.
164. *Id.* at 998 n.7.
165. *Id.* at 998.
166. *Id.*

wrongdoing simply because it was a joint employer of the employee.[167]

The Board stated that where "one joint employer merely supplies employees to its coemployer and otherwise takes no part in the daily direction of the employees, does not participate in their oversight, and has no representatives at the worksite,"[168] the staffing firm is liable only if (1) the staffing firm "knew or should have known that the other employer acted against the employee for unlawful reasons"; and (2) the staffing firm "acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist it."[169] The Board, however, stated that when the non-acting entity jointly manages the employees at the work site, and has representatives at the work site, it might be held liable because it could benefit from "warding off union representation from the jointly managed employees."[170] It is also "in a position to hear of, inquire into, and investigate reports of its coemployer's unlawful actions."[171] The Board noted that "[a]scribing vicarious liability to the joint employer in these circumstances requires it to undo or otherwise remedy unlawful actions of which it is in the best position to know and from which it might gain advantage."[172]

While *EMI Music* suggests support for applying the corrective action standard to tangible employment actions under the employment discrimination statutes, an NLRA decision is of limited value in interpreting such statutes. For example, section 8(a)(1) can be violated without discriminatory motive,[173] whereas a disparate-treatment claim under the employment discrimination statutes requires such a motive.[174] The Board also held that agency principles did not "apply to the statutory liability issue here."[175] Agency principles, however, apply to the employment discrimination statutes.[176]

Thus, while the authority relied on by the EEOC provides some support for applying the corrective action standard to a client's tangible acts of discrimination, they do not provide direct support, and certainly do not provide sufficient support for applying the standard without further exploring the legitimacy of such an application.

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167. *Id.* at 999.
168. *Id.* at 1000 (footnote omitted).
169. *Id.*
170. *Id.* at 999.
171. *Id.*
172. *Id.*
173. Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 269 (1965).
174. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988).
175. 311 N.L.R.B. at 1000 n.18.
176. *See supra* Part I.D.

III

I will now review other cases involving staffing firms and the employment discrimination statutes to determine if there is any other support within the case law for the EEOC's position.

In *Astrowsky v. First Portland Mortgage Corp.*,[177] an employee leasing company leased the plaintiff to a mortgage company.[178] The mortgage company used the leasing company for payroll and benefits services.[179] The leasing company did not direct, control, or supervise the plaintiff's work, though it paid his commission checks and made the required withholdings.[180] After missing work without permission, the mortgage company fired the plaintiff,[181] a decision in which the leasing company played no role.[182] The plaintiff sued the employee leasing company and other entities for discrimination.[183]

The court, in granting the leasing company's motion for summary judgment,[184] held that even if the company was an "employer" because it employed fifteen or more employees, it did not exercise sufficient control over the plaintiff's employment to be considered his employer under the applicable federal statutes.[185] The court relied on the fact that the mortgage company, not the leasing company, supervised the plaintiff.[186] Therefore, the EEOC's position that the corrective action standard applies to a client's tangible acts of discrimination finds no support in *Astrowsky* because the leasing company was not held liable for the mortgage company's alleged discrimination.

In *Williams v. Caruso*[187] the plaintiff worked for a temporary employment firm and was placed with a client.[188] The firm played no role in the manner and means by which the plaintiff's work was accomplished; she was trained and supervised by an employee of the client; and the firm was not accountable on a daily basis to any of the client's employees.[189] The firm did, however, have a policy that provided that a temporary employee who was sexually harassed on an assignment should notify his or her firm supervisor, and the supervisor

177. 887 F. Supp. 332 (D. Me. 1995).
178. *Id.* at 333.
179. *Id.*
180. *Id.* at 334.
181. *Id.*
182. *Id.*
183. *Id.* at 333.
184. *Id.* at 337.
185. *Id.* at 335-36.
186. *Id.* at 336.
187. 966 F. Supp. 287 (D. Del. 1997).
188. *Id.* at 289.
189. *Id.* at 296.

would work with the client to investigate the complaint and safeguard the employee, including, if necessary, removing the employee from the worksite.[190]

The plaintiff alleged that the employee who trained her (and who was employed by the client) sexually harassed her.[191] The plaintiff first complained to the client, and then to the firm.[192] On the day the plaintiff complained to the firm, the client told the firm that it wanted to terminate the plaintiff's assignment, and the firm apparently complied.[193] About a month later the firm offered the plaintiff another assignment, but she declined.[194]

The plaintiff then sued the firm, among others, for sex discrimination and retaliatory discharge under Title VII.[195] The court began its discussion of the sex-discrimination claim by stating that "[w]hether [the plaintiff] can sue [the firm] as her employer turns on an evaluation of common law agency principles."[196] The court thus suggested that for the plaintiff to be able to sue the firm, she had to establish that she was the firm's employee.[197] Although the plaintiff alleged that the firm was her employer because it issued her paychecks,[198] the court held that under agency principles this was insufficient, and she could not sue the firm.[199] The court then rejected her retaliatory discharge claim because there was insufficient evidence that she was constructively discharged.[200] Thus, because the court ruled in the firm's favor, *Caruso*[201] does not support the EEOC's position that the corrective action standard applies to a client's tangible acts of discrimination.

In *Mullis v. Mechanics & Farmers Bank,*[202] the plaintiff was a temporary secretary assigned by a staffing firm to a client.[203] The plaintiff alleged that her supervisor, who was an employee of the client,

190. *Id.* at 298.
191. *Id.* at 289.
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.* at 294.
196. *Id.* at 295.
197. *See id.* at 295 n.5 (discussing the test for determining if a person is an employee for purposes of suing under Title VII and the ADEA).
198. *Id.* at 296.
199. *Id.*
200. *Id.* at 298.
201. I refer to this case as *Caruso* instead of *Williams* because another case that will be discussed also has Williams as the first name of the case.
202. 994 F. Supp. 680 (M.D.N.C. 1997).
203. *Id.* at 683.

sexually harassed her.[204] She alleged that she complained to the staffing firm, but it failed to act.[205] She then sued the firm for discrimination under Title VII.[206]

In deciding whether the plaintiff stated a claim against the firm, the court first addressed whether the firm was the plaintiff's employer.[207] The court held that under the loaned-servant doctrine,[208] the firm and the client were both the plaintiff's employer.[209] The court then held that because an employer can be liable for the harassment of an employee by a third party if the employer knew or should have known of the alleged harassment, the plaintiff's allegations stated a claim against the firm.[210] This case does not, however, support the EEOC's position because it involved sexual harassment and not a tangible act of discrimination.

In *Williams v. Grimes Aerospace Co.*,[211] a temporary employment agency placed the plaintiff with a client.[212] The plaintiff completed all employment-related paperwork at the employment agency, but the agency did not provide her with any written employment policies or procedures.[213] She used the client's time clock, and the employment agency received the time and payment information from the client and paid her.[214] She served three different assignments with the client.[215] During the last two, she applied for five different full-time positions with the client,[216] but did not receive such a position until after complaining and filing a charge of discrimination.[217] She later filed suit against the agency and the client for race discrimination based on the client failing to offer her a full-time position until after she filed a charge of discrimination.[218]

The court first rejected the plaintiff's argument that the agency and the client were liable as one another's agents.[219] The court relied on the forum state's law, which provided that a party is an agent only if the

204. *Id.*
205. *Id.*
206. *Id.* at 683-684.
207. *Id.* at 684.
208. Under the loaned-servant doctrine, "an employee directed or permitted to perform services for another 'special employer' may become the special employer's employee while performing those services." *Id.* at 685.
209. *Id.*
210. *Id.* at 686.
211. 988 F. Supp. 925 (D.S.C. 1997).
212. *Id.* at 931.
213. *Id.*
214. *Id.*
215. *Id.* at 932.
216. *Id.* at 939.
217. *Id.* at 932.
218. *Id.* at 930.
219. *Id.* at 933.

other party has a right to control the conduct of the purported agent.[220] The court held that neither company was under the other's control.[221]

The court, relying on *Magnuson*, then stated that "[a] defendant may be held liable under Title VII if it (1) fits within the 'employer' definition of Title VII and (2) 'exercises substantial control over significant aspects of the compensation, terms, conditions, or privileges of plaintiff's employment.'"[222] The court first held that the agency was an "employer" as that term is defined under Title VII.[223] The court then held there was a factual issue whether the agency had the requisite control over the plaintiff to be her employer under the statute.[224] The court noted that the agency paid her wages, benefits, and taxes, handled any complaints she had, and retained the right to hire and fire her.[225]

The court then held that the plaintiff could not establish a discrimination claim against the agency because an employer is only liable for discrimination if it knew or should have known of the discrimination and failed to take corrective measures within its control, and there was no evidence the agency was aware of the plaintiff's efforts to be hired into a full-time position with the client.[226] Thus, like *Caldwell*, while the court's use of the corrective action standard to a tangible employment action provides support for the EEOC's position, the grant of summary judgment for the employer weakens that support.

In *Riesgo v. Heidelberg Harris, Inc.*,[227] a temporary employment agency recruited, screened, and referred the plaintiff to a client for a temporary assignment.[228] The client's employees allegedly harassed the plaintiff because of his race and national origin,[229] and he complained to the agency.[230] The agency forwarded the complaint to the client,[231] and the client's employee relations manager told the plaintiff that she would investigate immediately.[232] The agency's president later called the

220. *Id.* (citing Fernander v. Thigpen, 293 S.E.2d 424, 426 (S.C. 1982)).
221. *Id.*
222. *Id.* at 934 (quoting Magnuson v. Peak Tech. Servs., Inc., 808 F. Supp. 500, 507 (E.D. Va. 1992), *aff'd*, 40 F.3d 1244 (4th Cir. 1994)).
223. *Id.* at 935.
224. *Id.* at 936.
225. *Id.*
226. *Id.* at 937-38. The court, discussing *Kellam v. Snelling Personnel Services*, 866 F. Supp. 812, 816 (D. Del. 1994), *aff'd*, 65 F.3d 162 (3d Cir. 1995), mistakenly stated that if a temporary employment agency is not the assigned workers' employer, it "cannot be held liable for Title VII discrimination." 988 F. Supp. at 938 n.9. This is contrary to the "interference" theory discussed previously.
227. 36 F. Supp. 2d 53 (D.N.H. 1997).
228. *Id.* at 55.
229. *Id.* at 56.
230. *Id.*
231. *Id.*
232. *Id.*

plaintiff to check on the client's response to the complaint, and to ask him if he wanted to continue working for the client.[233] The plaintiff said that he would "play it by ear," and did not complain again.[234] Though the client took action to stop the harassment, the plaintiff alleged that it continued.[235] The client later terminated the plaintiff's assignment, and the agency offered to place him in another position.[236]

The plaintiff then sued the agency asserting, among other claims, claims for hostile-work-environment discrimination and retaliation.[237] The court held it was unnecessary to address if the agency was the plaintiff's employer because, even if it was, it had responded appropriately.[238] Though the plaintiff argued that the agency "could have, inter alia, conducted its own investigation in response to the events alleged by the plaintiff, more accurately passed on the plaintiff's reaction to [the client's] response, or placed pressure on [the client] by threatening to remove its employees," the court found "these proposals impose a wholly unrealistic burden on [the agency.]"[239] The court noted that the agency "had virtually no control over the plaintiff's activities at work and was not the employer of any of the [client's] employees responsible for the harassment."[240] The court pointed out that the agency's "president was not authorized to enter [the client's] premises without [the client's] permission, and did not have the right to take direct action against [the client's] direct employees."[241]

Thus, *Riesgo* does not support the EEOC's position. The court not only ruled in the agency's favor, it suggested that the corrective action standard placed an unrealistic burden on the staffing firm.

In *Neal v. Manpower International, Inc.*,[242] the plaintiff sued a temporary employee company, Manpower International (Manpower), and a client of Manpower's, with whom she had been placed.[243] Manpower was uninvolved in the client's management or operations, and did not have authority or control over the client's employees.[244] Manpower did, however, have an office at the client's facility and employed on-site supervisors who interacted with the client's supervisors

233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.* at 56-58.
238. *Id.* at 58.
239. *Id.* at 59 (alteration in original).
240. *Id.* (alteration in original).
241. *Id.* (alteration in original).
242. No. 3:00-cv-277/LAC, 2001 U.S. Dist. LEXIS 25805 (N.D. Fla. Sept. 17, 2001).
243. *Id.* at *3, *8.
244. *Id.* at *3.

to identify openings.[245] Manpower also "facilitated" terminations and employee counseling.[246] Additionally, Manpower provided salaries to the temporary employees and issued rules for them, including attire and attendance policies.[247] Except for terminations because of attendance policy violations, Manpower took direction regarding terminations from the client.[248]

Two employees of the client supervised the plaintiff.[249] The plaintiff alleged she was sexually harassed by one of them,[250] and that the harasser later requested that Manpower remove the plaintiff from the facility.[251] In accordance with the agreement between Manpower and the client, Manpower complied.[252] Manpower offered the plaintiff alternative employment positions, but she did not pursue the offer.[253] She then sued Manpower and the client under a state law that was patterned after Title VII, alleging sexual harassment and retaliation.[254]

The court, addressing Manpower's motion for summary judgment, stated that the first issue was whether Manpower was an "employer" under the state statute, and the second was if there was a basis for holding it liable for the alleged harassment.[255] The court held that it was unnecessary to resolve the first issue because the court's finding on the second issue rendered it moot.[256]

The court then held that an employer can be liable for harassment by a non-employee only if the employer knew or should have known of the harassment.[257] Because Manpower did not know of the alleged harassment until after the client terminated her assignment,[258] a basis for holding Manpower liable did not exist.[259]

The court then rejected the plaintiff's argument that Manpower was liable under the Supreme Court's decisions in *Faragher v. City of Boca Raton*[260] and *Burlington Industries, Inc. v. Ellerth*[261] as a result of the

245. *Id.* at *3-4.
246. *Id.* at *4.
247. *Id.*
248. *Id.* at *4-5.
249. *Id.* at *8.
250. *Id.* at *8-10.
251. *Id.* at *14.
252. *Id.*
253. *Id.* at *16.
254. *Id.* at *16-17.
255. *Id.* at *24.
256. *Id.* at *25.
257. *Id.* at *29-30.
258. *Id.* at *14.
259. *Id.* at *29-31.
260. 524 U.S. 775 (1998). In *Faragher*, the Court held that an employer is liable when a supervisor takes a tangible employment action against a subordinate. *Id.* at 808.
261. 524 U.S. 742 (1998). As in *Faragher*, the Court held that an employer is liable

client's tangible employment action against the plaintiff, i.e., the termination of her assignment.[262] The court noted that an employer is liable for a supervisor's tangible act of discrimination because of the power given to him or her by his or her employer,[263] a theory that does not apply when another entity's supervisor takes the action. Further, Manpower did not have an opportunity to guard against misconduct by the client's supervisors, or to "screen them, train them, and monitor their performance,"[264] relevant considerations under the standard for liability for a supervisor's discrimination.[265] Thus, the adverse employment action was not attributable to Manpower.[266]

The court further held that neither the loaned-servant doctrine[267] nor the joint employer doctrine[268] provided for liability because even if Manpower was the plaintiff's employer under the statute, the plaintiff never informed Manpower of the harassment and it had no reason to know of the harassment.[269] The court also granted summary judgment for Manpower on the retaliation claim because the plaintiff conceded she did not inform Manpower of the alleged harassment before her assignment was terminated, and thus Manpower could not have acted with a retaliatory motive.[270]

Thus, *Neil* does not provide support for the EEOC's position. The court correctly held that the client's supervisor was not the staffing firm's agent, and his conduct, including the tangible employment action taken by him, could therefore not be attributed to the firm.

In *Watson v. Adecco Employment Services, Inc.*,[271] a temporary employee placement service assigned the plaintiffs to work at a school cafeteria pursuant to a contract between a school board and the placement service.[272] The school board's cafeteria management trained and supervised the plaintiffs.[273] The placement service issued the

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for a supervisor's tangible employment action taken against a subordinate. *Id.* at 760. The Court in *Ellerth* explained that this holding is premised on agency law, which provides that an employer is responsible for an employee's tortious act when the employee is aided in accomplishing the act by the agency relationship. *Id.* at 761.

262. *Neal*, 2001 U.S. Dist. LEXIS 25805, at *32-34.

263. *Id.* at *32.

264. *See id. at* *33 (quoting *Faragher*, 524 U.S. at 803).

265. *Id.* at *33.

266. *Id.*

267. For an explanation of the loaned-servant doctrine, *see supra* note 208.

268. Under the "joint employer" doctrine, an employee is employed by two or more separate entities. Virgo v. Riveria Beach Assocs., 30 F.3d 1350, 1359 (11th Cir. 1994).

269. *Neal*, 2001 U.S. Dist. LEXIS 25805, at *34-35.

270. *Id.* at *35-36.

271. 252 F. Supp. 2d 1347 (M.D. Fla. 2003).

272. *Id.* at 1349.

273. *Id.*

plaintiffs' paychecks and made applicable withholdings.[274] Although the placement service issued general guidelines about work attire, the cafeteria's manager dictated the specific requirements.[275] The plaintiffs alleged that after they objected to wearing Santa hats as part of their uniforms, the placement service told them to not report to their assignment because the school board wanted their assignments terminated.[276] The plaintiffs then sued the placement service and the school board for religious discrimination under Title VII.[277]

The court, ruling on the placement service's motion for summary judgment, held that it was not the plaintiffs' employer under Title VII because it exercised no control over their work.[278] The court therefore held that it lacked jurisdiction over the placement service.[279]

The court further held that even if the placement service could be considered the plaintiffs' employer under Title VII it could not be held liable because "[f]or a joint employer to be held liable for discriminatory conduct, a plaintiff must show that the joint employer knew or should have known of the conduct and failed to take corrective measures within its control."[280] The court stated that although the placement service was aware the plaintiffs objected to wearing the hats, the plaintiffs failed to show that the placement service failed to take corrective measures within its control.[281]

In so finding, the court noted that the corrective measures that were available to the placement service were limited because it could not force the school board to avoid discrimination or to run its operations in a particular manner.[282] The court also noted that the placement service contacted the school board to reach an accommodation over the dispute about the hats.[283] The court further relied on the fact that the placement service merely reported to the plaintiffs the school board's desire to have the assignment terminated, and thus had not taken any adverse employment action against them.[284]

Thus, while *Watson* provides some support for the EEOC's position, the court seemed skeptical of the corrective action standard, and ruled in the staffing firm's favor.

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274. *Id.*
275. *Id.*
276. *Id.* at 1350.
277. *Id.* at 1351.
278. *Id.* at 1356.
279. *Id.*
280. *Id.* at 1356-57.
281. *Id.* at 1357.
282. *Id.* at 1357-58.
283. *Id.* at 1357 n.33.
284. *Id.* at 1357.

In *EEOC v. Olver, Inc.*,[285] the employee was a receptionist who interviewed with, and was hired directly by, a staffing firm's client, but was then referred to the firm to complete the necessary paperwork for placement with the client, including payroll documents.[286] The firm gave her a handbook that included the procedure for calling in sick and reporting discrimination and harassment.[287] After four and a half days, the client terminated her assignment,[288] and she conceded she had no reason to believe the firm played a role in the decision.[289] The firm offered to search for a new placement for her, but she declined.[290]

The EEOC then sued the firm and the client on the employee's behalf, alleging the client had terminated her assignment because of her race and national origin.[291] The EEOC argued that "while [the client] and [the firm] are distinct business entities which are independently operated, they shared control over [the employee's] employment and working conditions such that they are considered joint employers of [her]."[292] Interestingly, the EEOC seemed to argue that this alone meant the firm should be liable for the client's alleged discriminatory termination.[293] The EEOC asserted that "[i]f both the staffing firm and the client have the right to control the worker, and each has the statutory minimum number of employees, they are both liable as 'joint employers,'" citing its 1997 Enforcement Guidance.[294] Then, however, the EEOC stated that the firm "maintained the right to exert control over [the employee's] employment and it is liable as a joint employer for failing to promptly act to rectify the alleged discriminatory termination."[295]

The court, in addressing the firm's motion for summary judgment, assumed that the firm was the employee's employer under Title VII,[296] but stated that "as part of its prima facie case, the EEOC must demonstrate that [the firm] took an adverse employment action against [the employee]."[297] The court then granted summary judgment for the

285. No. 7:05CV00417, 2006 U.S. Dist. LEXIS 50495 (W.D. Va. July 24, 2006).
286. *Id.* at *2-3.
287. *Id.* at *3.
288. *Id.* at *5.
289. *Id.* at *7.
290. *Id.*
291. *Id.* at *1.
292. Mem. Supp. Pl.'s Cross Mot. Partial Summ. J. at 10, *available at* https://ecf.vawd.uscourts.gov/cgi-bin/login.pl, doc. 39.
293. *See id.* ("Thus, both [the client] and [the staffing firm] are subject to liability under Title VII for [the employee's] alleged discriminatory discharge.").
294. *Id.* at 12.
295. *Id.* at 15.
296. *Olver*, 2006 U.S. Dist. LEXIS 50495, at *7.
297. *Id.*

firm because the EEOC failed to introduce sufficient evidence to find that the firm was involved in the decision to terminate the employee's assignment, or that it "shared control over employees placed with [the client] to the point of rendering [it] jointly liable for [the client's] employment decisions."[298]

The court rejected the EEOC's argument that the firm was jointly liable for the termination simply because it "placed temporary employees with [the client], administered payroll for those employees, and served as the party to whom those employees could call in sick or report discrimination."[299] The court held that this was not the sort of day-to-day control over the employees that was necessary to render it jointly responsible for her termination.[300]

Thus, *Olver* does not support the EEOC's position. The court correctly held that an employer can be liable only if it took an adverse employment action against the employee.

An analysis of relevant case law thus demonstrates that no court has held a staffing firm liable for a client's tangible act of discrimination. Although courts have suggested a staffing firm can be liable if it fails to take corrective action within its control, a review of the cases that have suggested that the corrective action standard applies to tangible acts shows the origin of this standard is *Magnuson*, a harassment case. For example, the *Watson* court cited *Neal* for this standard;[301] *Neal*, however, referred to this standard when discussing liability for sexual harassment, citing to *Magnuson* and *Caldwell*,[302] the former being a sexual harassment case[303] and the latter being a case in which the court cited two other sexual harassment cases for the standard (one of which was *Magnuson*).[304] The *Williams* court, which also referred to the standard in the context of a tangible employment action, cited to *Caldwell* and noted that *Caldwell* cited to *Magnuson*.[305]

Thus, these courts have, in dicta, transplanted the rule of liability for coworker and third-party harassment to staffing firm cases involving a client's tangible act of discrimination. They have done so, however, without critical analysis, sometimes seemingly conceding that the

298. *Id.* at *8.
299. *Id.* at *9-10.
300. *Id.*
301. Watson v. Adecco Employment Servs., Inc., 252 F. Supp. 2d 1347, 1357 (M.D. Fla. 2003).
302. Neal v. Manpower Int'l, Inc., No. 3:00-cv-277/LAC, 2001 U.S. Dist. LEXIS 25805, at *31 (N.D. Fla. Sept. 17, 2001).
303. *See* Magnuson v. Peak Technical Servs., Inc., 808 F. Supp. 500, 505-06 (E.D. Va. 1992) (discussing sexual harassment allegations), *aff'd*, 40 F.3d 1244 (4th Cir. 1994).
304. Caldwell v. ServiceMaster Corp., 966 F. Supp. 33, 46 (D.D.C. 1997).
305. Williams v. Grimes Aerospace Co., 988 F. Supp. 925, 937 (D.S.C. 1997).

standard is inappropriate because a staffing firm has no control over a client. They have also never ruled for the plaintiff when addressing a client's tangible act of discrimination. Therefore, there is little support in the case law for the EEOC's position.

IV

Although there is little support in the case law for the EEOC's position, the question remains whether its position is a sound interpretation of the federal employment discrimination statutes.

As an initial matter, it should be emphasized that the EEOC's position is not entitled to so-called *Chevron* deference, under which courts defer to an agency's interpretation of a statute that the agency administers as long as the statute is silent or ambiguous on the particular issue and the agency's interpretation is a permissible construction of the statute.[306] The EEOC does not have the authority to issue regulations having the force of law that interpret Title VII's substantive provisions, and such regulations therefore are not entitled to *Chevron* deference.[307] In contrast, the EEOC has the authority to issue regulations having the force of law that interpret the ADEA and Title I of the ADA, and such regulations are therefore entitled to *Chevron* deference.[308]

306. *See* Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) (holding that when a statute is silent or ambiguous regarding a particular issue, courts should defer to an agency interpretation of a statute it administers as long as the agency's interpretation is based on a permissible construction of the statute).

307. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976), *superseded on other grounds by statute*, 42 U.S.C. § 2000e(k) (2000). The EEOC does, however, have the authority to issue procedural regulations having the force of law to carry out Title VII's provisions. *See* 42 U.S.C. § 2000e-12(a) (2000) ("The Commission shall have [the] authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter. Regulations issued under this section shall be in conformity with the standards and limitations of subchapter II of chapter 5 of Title 5.").

308. *See* Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 84 (2002) (holding that EEOC's regulation interpreting Title I of the ADA was entitled to *Chevron* deference); EEOC v. Seafarers Int'l Union, 394 F.3d 197, 202 (4th Cir. 2005) (holding that EEOC's regulation interpreting the ADEA was entitled to *Chevron* deference). The EEOC's regulations under the ADEA and Title I of the ADA are entitled to *Chevron* deference because those statutes provide the EEOC with the power to issue regulations to carry out those laws. *See* 29 U.S.C. § 628 (2000) ("In accordance with the provisions of subchapter II of chapter 5 of Title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest."); 42 U.S.C. § 12116 (2000) ("No later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of Title 5."). Which agency, if any, has the power to issue regulations with the force of law interpreting the general provisions of the

An EEOC position announced in interpretive guidance, however, as opposed to a regulation, while "constitut[ing] a body of experience and informed judgment to which courts and litigants may properly resort for guidance,"[309] does not have the force of law.[310] Such guidance is only entitled to so-called "*Skidmore* deference."[311] Under *Skidmore* deference, the weight to be accorded to the EEOC's interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . . ."[312]

A critical analysis of the EEOC's position shows that it does not withstand scrutiny under the low level of deference dictated by *Skidmore*, and should therefore be rejected. As demonstrated below, the position is not supported by the statutes' plain language; it does not significantly advance the statutes' purposes; and the various rationales for holding a business or person liable for particular harm do not apply. Thus, irrespective of whether one is a "textualist," focusing almost exclusively on a statute's text when engaging in statutory interpretation,[313] or a "purposivist," focusing on the statute's purpose when the text does not provide a clear answer,[314] the result is the same.[315]

ADA, 42 U.S.C. §§ 12101-12102 (2000), has not been resolved by the Supreme Court. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 479 (1999) ("No agency, however, has been given authority to issue regulations implementing the generally applicable provisions of the ADA, *see* §§ 12101-12102, which fall outside Titles I-V.").

309. *Gen. Elec. Co.*, 429 U.S. at 141-42.

310. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110 n.6 (2002) ("[T]he EEOC's interpretive guidelines do not receive *Chevron* deference. Such interpretations are 'entitled to respect' under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944), but only to the extent that those interpretations have the 'power to persuade.'") (quoting Christensen v. Harris County, 529 U.S. 576, 587 (2000)) (citation omitted).

311. *Id.*

312. *Gen. Elec. Co*, 429 U.S. at 142 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)); *see, e.g.*, Clackamas v. Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 449 (2003) (applying *Skidmore* deference to EEOC's interpretation of definition of "employee" in EEOC's guidelines, and deferring to such interpretation because the EEOC's position was persuasive).

313. *See generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23-25 (1997) (advocating a textualist approach to statutory interpretation).

314. *See generally* BREYER, *supra* note 96 at 85-101 (advocating a purposive approach to statutory interpretation).

315. I would like to thank Sylvia Denys for providing me with a copy of her draft paper titled "The Scalia/Breyer Debate and Employment Discrimination," which she discussed at the First Annual Colloquium on Current Scholarship in Labor & Employment Law hosted by Marquette University Law School in 2006.

A. The Statutes' Text

"When the statutory 'language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'"[316] A review of the employment discrimination statutes demonstrates that the EEOC's corrective action rule, at least with respect to a tangible act of discrimination such as a discriminatory termination of an assignment, is inconsistent with the statutes' plain language.

The statutes prohibit an employer from discriminating against an individual with respect to such person's employment. When a staffing firm's client discriminates against an employee by terminating the employee's assignment for a prohibited reason, and the staffing firm is uninvolved in the termination decision, the firm in no way discriminates against the person for a prohibited reason. Although "employer" is defined as the employer and its agents,[317] neither the client nor the client's employee who terminated the person's assignment can be considered the firm's agent. Thus, under the statutes' plain language, the staffing firm cannot be held liable.

The staffing firm's acquiescence to the client's termination of the assignment is not itself an adverse employment action, and an argument that the staffing firm is liable because it somehow participates in the client's wrongdoing ignores the realities of the relationship between a staffing firm and its clients. When a client terminates an employee's assignment, it is not accurate to say that the staffing firm has removed the employee from the assignment; rather, the *client* has removed the employee from the assignment, and the staffing firm is simply without the power to force the client to continue the assignment.[318]

Further, the staffing firm and its agents lack the requisite discriminatory intent for the firm to be found liable. The staffing firm is not intending to treat the employee differently because of his or her race, color, religion, national origin, sex, age, or disability. Rather, the staffing firm is complying with the client's decision because it has no other choice. The staffing firm is treating the employee the same as it treats any employee whose assignment is terminated by a client. Thus,

316. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455, 2459 (2006) (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A., 530 U.S. 1, 6 (2000) (in turn quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) (in turn quoting Caminetti v. United States, 242 U.S. 470, 485 (1917))) (internal quotation marks omitted).

317. 42 U.S.C. § 2000e(b) (2000); 42 U.S.C. § 12111(5)(A) (2000); 29 U.S.C. § 630(b) (2000).

318. Of course, if the staffing firm encouraged the client to terminate an employee's assignment for a prohibited reason, the staffing firm might be liable.

neither the firm nor any of its agents possess the requisite discriminatory intent to subject the firm to liability.

The same result applies even if the staffing firm is aware that the client is terminating the employee's assignment for a discriminatory reason. For example, under tort law concepts of joint liability for concerted action, mere knowledge of another's wrongdoing is insufficient to impose liability. The standard for concerted action to result in joint liability is as follows:

> All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer's acts done for their benefit, are equally liable.[319]

When a client terminates an employee assignment for a discriminatory reason, but the staffing firm does not participate in that decision, the staffing firm and the client do not have a common plan or design to discriminate. Although there need not be an express agreement for joint liability under tort law, there must at least be a "tacit understanding."[320] Also, merely doing what the staffing firm is required to do cannot be considered actively taking part in the decision, furthering it by cooperation or request, lending aid or encouragement to the client, or ratifying and adopting an act done for its benefit (the termination is not done for the staffing firm's benefit).

As the leading torts treatise states, mere knowledge of what the other person is doing is insufficient to establish an agreement:

> There are . . . occasional statements that mere knowledge by each party of what the other is doing is sufficient 'concert' to make each liable for the acts of the other; but this seems clearly wrong. Such knowledge may very well be important evidence that a tacit understanding exists; but since there is ordinarily no duty to take affirmative steps to interfere, mere presence at the commission of the wrong, or failing to object to it, is not enough to charge one with responsibility.[321]

It then notes that "[i]t is, furthermore, essential that each particular defendant who is to be charged with responsibility shall be proceeding tortiously, which is to say with the intent requisite to committing a tort, or with negligence."[322]

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319. PROSSER, *supra* note 75, at 323 (footnotes omitted).
320. *Id.*
321. *Id.* at 323-24 (footnotes omitted).
322. *Id.* at 324.

The Supreme Court's recent decision in *Ledbetter v. Goodyear Tire & Rubber Co.*,[323] which emphasized the difference between an unlawful employment practice and the effects of an unlawful employment practice, demonstrates that a staffing firm's acquiescence in a client's discriminatory termination of an employee assignment is simply an effect of the client's unlawful employment practice, and not itself an unlawful employment practice. In *Ledbetter*, the Court held that an unlawful employment practice did not occur each time an employer issued an employee a paycheck that was less than it would have been had the employer not previously discriminated against the employee with respect to pay raises.[324] The Court held that the smaller paychecks that continued to be issued as a result of prior discrimination were simply the effects of such discrimination, and not themselves discriminatory acts upon which liability could be based.[325] The Court stated that "[a] new violation does not occur . . . upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination."[326] Because a staffing firm has no power to prevent a client from terminating an employee assignment, the firm's acquiescence in a client's discriminatory assignment termination is simply an effect of the client's unlawful employment practice; under *Ledbetter*, it would not itself be an unlawful employment practice.

Accordingly, because neither the staffing firm nor any agent of the firm takes an adverse employment action against the employee, or discriminates against the employee because of the employee's race, color, religion, national origin, sex, age, or disability, the statutes' plain language precludes liability.

B. Promoting the Statutes' Purposes

As I have demonstrated, the liability rule for coworker and third-party harassment, which subjects an employer to liability if it fails to take prompt remedial action in response to a harassment complaint, cannot be supported by agency law. Rather, this duty to act is premised on the statutes' twin purposes of compensating victims and deterring future discrimination.[327] The statutes' purposes have, correctly or not, overridden the statutes' plain language. In fact, commentators have complained that incorporating common-law tort and agency principles

323. 127 S. Ct. 2162 (2007).
324. *Id.* at 2169.
325. *Id.*
326. *Id.*
327. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 805-06 (1998) (noting that Title VII's purposes are to compensate victims and to deter future discrimination).

wholesale into the employment discrimination statutes "is inconsistent with the broad remedial purposes of Title VII."[328] Do these twin purposes also warrant going beyond the statutory text (if that is ever permissible)[329] when a staffing firm's client terminates an employee assignment for discriminatory reasons, particularly because the statutes are remedial statutes that should be interpreted liberally to effectuate their purposes?[330]

An initial concern is that a staffing firm will rarely have sufficient information to determine if a client terminated an assigned employee for a discriminatory reason. Unlike an investigation of wrongdoing by its own employees, the staffing firm does not have the power to compel the client to cooperate in an investigation. Under the EEOC's corrective action standard, the staffing firm is asked to assume a role usually assigned to the government—investigating wrongdoing and determining whether a third party violated the law—yet it lacks the power to compel the client to participate in the investigation. Even if the client cooperates, the client's control over the dissemination of information to the staffing firm will make it difficult for the firm to reach an informed conclusion. This will make it unlikely that the statutes' purposes of compensation and deterrence will be advanced.

Also, requiring a staffing firm to investigate its client's actions puts the parties in roles neither will be comfortable assuming, and it is unlikely the firm will conclude the client discriminated. The client will almost always articulate a legitimate, non-discriminatory reason for the termination, and the staffing firm, because of either an inability to conduct a searching inquiry or the lack of a desire to conduct such an inquiry (because the firm will not want to lose the client), will most likely conclude discrimination did not occur. The staffing firm will hope that the investigation, even though concluded with a finding of innocence, will be a satisfactory corrective measure to absolve it of liability, while at the same time not unduly straining its relationship with the client. Thus, even when the client has discriminated, the staffing firm will rarely reach such a conclusion, even if it is aware of its potential liability, and the statutes' purposes will not be significantly

328. Merriman & Yang, *supra* note 49, at 101.

329. Even a purposivist follows the text of a statute when it is clear. *See, e.g.*, BREYER, *supra* note 96, at 85 ("The interpretive problem arises when statutory language does not clearly answer the question of what the statute means or how it applies.").

330. *See* Wheeler v. Hurdman, 825 F.2d 257, 262 (10th Cir. 1987) ("In our review of the antidiscrimination laws we must be mindful of their remedial purposes, and liberally interpret their provisions to that end."). Most notably, Justice Scalia takes issue with the cannon of construction that provides that remedial statutes should be interpreted liberally. *See* SCALIA, *supra* note 313, at 27-29; Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 581-86 (1990).

advanced.

Even if the staffing firm concludes discrimination occurred, the twin purposes of the statute will not be appreciably promoted by the EEOC's rule. With respect to remedying the harm, the staffing firm is not in a strong position to do this. The staffing firm has no control over the client, and cannot force it to keep the employee or pay the employee damages. Furthermore, the employee will have a claim against the client, and thus be fully compensated for any harm irrespective of the staffing firm's liability (unless the client has gone out of business).

With respect to deterrence, the staffing firm's lack of control over the client will prevent it from implementing measures to avoid discriminatory terminations. In particular, the firm's inability to discipline the wrongdoer means holding the firm liable is unlikely to increase deterrence. For example, the prompt remedial action standard to determine employer liability in coworker sexual harassment cases[331] generally requires "some disciplinary measures against the perpetrator . . . ."[332] As stated by a commentator:

> Examples of taking prompt remedial action include fully investigating, reprimanding the harasser for inappropriate conduct, and warning the harasser that a repeat incident will result in suspension or termination. Basically, an employer should impose sufficient penalties to assure a workplace free from sexual harassment by persuading individual harassers to discontinue unlawful conduct.[333]

While a staffing firm's protests might have an impact on deterring future wrongdoing by the client, and might even compel the client to remedy the wrong, the firm's lack of control over the client and its employees means the impact will be slight, if any. Furthermore, the client's potential liability will already advance the statutes' purposes to a satisfactory degree.

C. Tort Law and Liability for Nonfeasance

The EEOC's position is that a staffing firm which fails to take corrective measures within its control is essentially guilty of

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331. *See supra* note 66.

332. Joseph G. Allegretti, *Sexual Harassment of Female Employees by Nonsupervisory Coworkers: A Theory of Liability*, 15 CREIGHTON L. REV. 437, 470 (1982).

333. Jamie C. Chanin, Comment, *What is it Good For? Absolutely Nothing: Eliminating Disparate Treatment of Third Party Sexual Harassment and All Other Forms of Third Party Harassment*, 33 PEPP. L. REV. 385, 395-96 (2006) (footnote omitted).

nonfeasance,[334] and the EEOC might look to tort law to incorporate into the statutes a duty to act. For example, though there has been a reluctance to impose tort liability for nonfeasance,[335] employers have a common-law duty to prevent third parties from harming employees.[336] "[T]he obligation is not an absolute one to insure the plaintiff's safety, but requires only that the defendant exercise reasonable care."[337] This common-law duty of protection likely influenced the EEOC in announcing its corrective action standard, a standard it believes applies only if the worker is found to be the staffing firm's employee, and which only requires that the firm act reasonably.

Reliance on an employer's common-law duty to protect its employees from harm is, however, a mistake. The statutes themselves determine the scope of any duty, and, as previously demonstrated, the duty imposed is limited to an employer and its agents not discriminating against the plaintiff.

D. Distributing Losses Among the Beneficiaries of the Risks

Holding a staffing firm liable for a client's discrimination is a form of vicarious liability. Thus, vicarious liability's purposes should be considered to determine if the corrective action standard is appropriate.

One of the benefits of vicarious liability is that "the employer [is] in a better position than the employee [who committed the wrong] to absorb and distribute these costs."[338]

> [T]he employer is in a strategic position to take out liability insurance that will cover broadly all the legal liability which the courts subject

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334. The EEOC might take issue with the characterization of a staffing firm's conduct in removing an employee from an assignment at a client's request as inaction as opposed to action. The leading torts treatise discusses the difference between action and inaction as follows:

> In theory the difference between the two is fairly clear; but in practice it is not always easy to draw the line and say whether conduct is active or passive . . . . The question appears to be essentially one of whether the defendant has gone so far in what he has actually done, and has got himself into such a relation with the plaintiff, that he has begun to affect the interests of the plaintiff adversely, as distinguished from merely failing to confer a benefit upon him.

PROSSER, *supra* note 75, at 374-75 (footnote omitted). Honoring a client's request to remove an employee cannot be considered "action" because the client has the right to have the employee removed from the assignment, and the staffing firm has no power to prevent the removal. The alleged wrongdoing by the staffing firm is not its removal of the employee from the assignment, but its failure to protest the client's action. Thus, the alleged wrongdoing is a failure to act.

335. *Id.* at 375.

336. *Id.* at 383.

337. *Id.* at 385.

338. James, *supra* note 89, at 163.

> him to . . . , or to decide that his own risks are numerous enough to warrant his becoming a self-insurer with respect to them . . . . [T]he employer will tend to pass on to the consumers of his product the costs of its production. And he will reckon among such costs what he pays in premiums for liability insurance. This means that by and large the losses caused by the risks of the enterprise will be distributed on a fairly wide and equitable basis among its beneficiaries.[339]

As stated by Justice Traynor in *Escola v. Coca Cola Bottling Co.*,[340] with regard to applying strict liability to a company whose defective product injures a consumer: "The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."[341]

This rationale for vicarious liability does not, however, apply to holding staffing firms liable when a client discriminates against assigned employees. In such circumstances, the "employees should rarely have a problem proving to a court that they have standing to sue a client company under [the federal anti-discrimination statutes.]"[342] Thus, the client will already absorb and distribute these costs.

E. Placing Liability with the Person in the Best Position to Prevent the Harm

A factor considered in determining whether a person should be liable for harm is whether that person is in the best position to prevent it. For example, a rationale for respondeat superior

> is that most employees lack the resources to pay a judgment if they injure someone seriously. They therefore are not very responsive to the threat of tort liability. The employer, however, can induce them to be careful, as by firing or otherwise penalizing them for their carelessness. Making the employer liable for his employees' torts will give him an incentive to use such inducements.[343]

The less likely it is that an employer can prevent particular employee wrongdoing, the less justification for employer liability. Thus, "[t]he commonest test of a relationship to which the law attaches vicarious liability is control or the general right of control."[344] The

339. *Id.* at 163 n.12.
340. 150 P.2d 436 (Cal. 1944).
341. *Id.* at 441 (Traynor, J., concurring).
342. Pirruccello, *supra* note 1, at 204.
343. POSNER, *supra* note 93, at 188 (parenthetical omitted).
344. James, *supra* note 89, at 165 (emphasis omitted).

significance of the control requirement

> lies not in any connection between control and fault but rather in its bearing on the possibility of accident prevention. There is little doubt that employers of labor are among those strategically placed to promote accident prevention in connection with their operations . . . . [O]ne of the main reasons why the employer is in this strategic position is his general right of control over his employees while they are engaged about his business . . . . Pressure of legal liability on the employer therefore is pressure put in the right place to avoid accidents.[345]

Respondeat superior does not apply to torts committed outside an employee's scope of employment because "the employer lacks good information for taking the steps to minimize them."[346] Similarly, respondeat superior does not apply to torts committed by an employer's independent contractors because "[t]he principal does not supervise the details of the independent contractor's work and is therefore less likely to be able to make him work safely than to make an employee work safely."[347]

The Supreme Court, in holding employers liable for supervisors' harassment, relied on the "position to prevent the harm" rationale, noting "that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers" and that "employers have greater opportunity and incentive to screen them, train them, and monitor their performance."[348] Holding employers liable for coworker and third-party harassment also encourages employers to eliminate such conduct, and places liability "on the party most able to control the work environment . . . ."[349] As stated by one judge, "the employer . . . can establish prophylactic rules which, without upsetting efficiency, could

345. *Id.* at 168.

346. POSNER, *supra* note 93, at 188.

347. *Id.* at 188-89; *see also* RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b (2006) ("Respondeat superior is inapplicable when a principal does not have the right to control the actions of the agent that makes the relationship between principal and agent performing the service one of employment . . . . Agents who are retained as the need arises and who are not otherwise employees of their principal normally operate their own business enterprises and are not, except in limited respects, integrated into the principal's enterprise so that a task may be completed or a specified objective accomplished. Therefore, respondeat superior does not apply.").

348. Faragher v. City of Boca Raton, 524 U.S. 775, 803 (1998).

349. Merriman & Yang, *supra* note 49, at 102. Although Merriman and Yang were arguing for greater employer liability for coworker harassment than under the "knew or should have known standard," their statements about placing liability on the party most able to prevent the harm are equally applicable as a rationale for the "knew or should have known standard" as opposed to a standard of no liability.

obviate the circumstances of potential discrimination . . . ."[350] That judge further stated, "the type of conduct at issue is questionable at best, and it is not undesirable to induce careful employers to err on the side of avoiding possibly violative conduct."[351]

A staffing firm, however, without any control over a client and its employees, is not in a position to prevent the client or its employees from discriminating. The entity in the best position to prevent the harm—the client—is already subject to liability for the discrimination. Thus, the "position to prevent the harm" rationale does not support holding the staffing firm liable.

F. The Deep Pocket

One commentator has argued that "[i]n hard fact, the reason for the employer's liability [under respondeat superior] is [that] the damages are taken from a deep pocket,"[352] and "the plight of the uncompensated accident victim presents a grave social problem."[353] This rationale does not apply, however, to holding a staffing firm liable for a client's discrimination because the employee will have a claim against the client who, unlike an employee who is personally liable for a tort, is as likely to be a deep pocket as the staffing firm. Consequently, there is not a significant danger that an employee discriminated against by a staffing firm's client will be left as an uncompensated victim.

G. Liability for Faults that May Fairly Be Regarded as Risks of the Business

A basis for vicarious liability is "that the employer should be liable for those faults which may fairly be regarded as risks of his business . . . ."[354] Thus, the test for "scope of employment," under which an employer is held liable for an employee's torts, has been described as "elastic."[355] It has also been stated that "'the integrating principle' of respondeat superior is 'that the employer should be liable for those faults that may be fairly regarded as risks of his business, whether they are

350. Barnes v. Costle, 561 F.2d 983, 998 (D.C. Cir. 1977) (MacKinnon, J., concurring).

351. *Id.*

352. James, *supra* note 89, at 170 (quoting BATY, VICARIOUS LIABILITY 154 (1916)).

353. *Id.*; *see also* RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b (2006) ("Respondeat superior also reflects the likelihood that an employer will be more likely to satisfy a judgment.").

354. James, *supra* note 89, at 182.

355. Warren A. Seavey, *Speculations as to "Respondeat Superior," in* STUDIES IN AGENCY 129, 155 (1949).

committed in furthering it or not.'"[356] Under this rationale, an employer is held liable because it is fair to require it "to bear the burden of foreseeable social behavior . . . ."[357]

This rationale could arguably be used to hold a staffing firm liable for a client's discrimination. The Supreme Court, however, rejected this rationale for a finding that sexual harassment is within the scope of the harasser's employment.[358] If this rationale is not used to hold an employer liable for an employee's harassment, it should not be used to hold an employer liable for discrimination by a third party.

H. Interpreting the Statutes Consistently

An argument can be made that because an employer is liable for a coworker's or third-party's harassment of an employee unless it takes prompt remedial action, consistency requires that a similar duty be placed on a staffing firm when a client takes a tangible discriminatory employment action against an employee of the staffing firm. While this argument has appeal, and is perhaps the reason some courts have suggested staffing firms have such a duty, it is ultimately unpersuasive.

An employer has a greater ability to control harassment in its workplace, whether by employees or third parties, than a staffing firm has an ability to control discriminatory assignment terminations by its clients. Thus, the prompt remedial action standard for coworker and third-party harassment promotes the statutes' purposes more than the corrective action standard applied to assignment terminations.

The prompt remedial action requirement for harassment encourages employers to take action designed to prevent future harassment, such as disciplining the harasser and reemphasizing to employees its condemnation of harassment. Such action will have a significant deterrent effect because of the employer's power over the employees' employment. The statutes' purposes are even likely to be promoted if the harasser is a third party. Harassment is usually a series of acts, which are often occurring when the employee complains. Thus, unlike the limited corrective measures available to a staffing firm faced with a completed tangible act of discrimination (like a terminated assignment), an employer faced with an employee's complaint of ongoing harassment by a third party will be in a position to stop the harassment, either through its control of the workplace or by removing the employee from

356. Taber v. Me., 67 F.3d 1029, 1037 (2d Cir. 1995) (quoting FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, THE LAW OF TORTS § 26.8 (2d ed. 1986)) (emphasis omitted).

357. Faragher v. City of Boca Raton, 524 U.S. 775, 800 (1998).

358. *Id.* at 801.

contact with the third party.

Also, as the Supreme Court has stated about sexual harassment, "Congress has left it to the courts to determine controlling agency law principles in a new and difficult area of federal law."[359] Unlike harassment, tangible acts of discrimination by a staffing firm's client should not be considered a "new and difficult area of federal law" justifying modification (or rejection) of agency principles.

Further, to the extent the liability rule for coworker and third-party harassment cannot be based on agency law, and is therefore inconsistent with the statutes, it should not be extended. As Professor Melvin Eisenberg has shown with respect to the common law, a common-law rule that is unsound should not be extended,[360] even though this might result in "a model of [the legal rule's] development that can best be described as jagged . . . ."[361] Likewise, an unsound interpretation of a statute should not be extended simply for the sake of consistency.

I. The Argument that the Corrective Action Standard Places a Minimal Burden on Staffing Firms

It might be argued that the corrective action standard, which only requires staffing firms to take corrective measures within their control, places a minimal burden on them, and therefore should not be rejected simply because it might be incompatible with the statutes' text. While such an argument is contrary to the rules of statutory interpretation, it is faulty for yet another reason.

When a staffing firm is neither aware of a client's discrimination nor should be aware of it, the firm cannot take any corrective measures. If, however, there is a disputed issue of fact as to whether the firm knew or should have known of the discrimination, the firm will not obtain summary judgment and will have to defend the case through trial. Even if the jury finds that the firm neither knew nor should have known of the client's discrimination, the cost of defending the case through trial will make the win Pyrrhic. Also, the risk of an adverse jury finding regarding the firm's actual or constructive knowledge of the client's discrimination will cause many staffing firms to settle prior to trial. Thus, the corrective action standard, while appearing to impose a minimal and reasonable burden on staffing firms, may have a substantial financial impact on them.

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359. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 751 (1998).
360. MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW 70-71 (1988).
361. *Id.* at 71.

As demonstrated above, the EEOC's position that a staffing firm can be liable for failing to take corrective measures within its control when a client terminates an employee's assignment for a discriminatory reason has no foundation in the employment discrimination statutes. Neither the staffing firm nor any of its agents take an adverse employment action against the employee or acts with the requisite discriminatory intent, and there are no compelling reasons to impose a duty contrary to the statutes' plain language. The EEOC's position should therefore be rejected by the courts.