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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

DONTE L. KELLY,

Plaintiff,

vs.

MATANUSKA ELECTRIC
ASSOCIATION, INC., TUCKERMAN
BABCOCK, and WAYNE D.
CARMONY,

Defendants.

Case No. 3:09-CV-0027 TMB

**Limited Opposition to MEA's Motion to Dismiss
Title VII Claims Against Carmony and Tuckerman**

Defendants Carmony and Tuckerman have moved to dismiss all racial discrimination claims plaintiff has asserted against them on the basis of Ninth Circuit authority. In *Miller v. Maxwell's International, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993), the Ninth Circuit reasoned that Congress could not have intended Title VII liability to attach to individual employee and/or supervisors. The logic

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used to achieve this result disregards the statutory language, and instead presumes that if Congress didn't wish to impose liability on employers with less than 15 employees, then it could not have intended to impose liability on individuals. 991 F.2d at 587-88. At the present time, *Miller* continues to be controlling law in this circuit. See *Craig v. M & O Agencies, Inc.*, 496 F.3d 1047, 1058 (9th Cir. 2007). Other courts have noted that this "logic" is flawed and that *Miller* "has been subjected to much criticism." See e.g. *Berry v. USCF*, 2009 WL 5092027, *2 (N.D.Cal. 2009). The criticism appears justified.

1. The Statutory Language of Title VII is Clear and Disregarded by the *Miller* Decision.

Title VII specifically defines the term "employer" as:

A person engaged in an industry affecting commerce who has fifteen or more employees ... **and any agent of such person....**

42 U.S.C. § 2000e(b) (emphasis added). A literal reading of this statutory term is that Title VII imposes liability on employers **and** their agents. The *Miller* decision essentially disregards this language by claiming the term "agent" only serves to incorporate respondent superior liability into the statute. *Miller*, 991 F.2d at 587. This creative reading of statutory language is at odds with common sense, well-recognized canons of statutory construction and the legislative history.

"In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry

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into the statute's meaning, in all but the most extraordinary circumstances, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). *Miller's* reading of the statute violates this rule, and reduces the agency language to surplusage.¹ It fails to identify any "extraordinary circumstances" that require a departure from the plain meaning of the statute. Instead, from thin air it pulls out the "legislative purpose" of Title VII to buttress its argument. This argument is advanced without any citation or support from the legislative record. Thus, at best, the *Miller* court was speculating about the legislative purpose of Title VII when it advanced its view of this "purpose" to bolster its failure to read the plain language of Title VII.

Reliance on speculative legislative history is flawed given the actual legislative history on point. The floor debates concerning Title VII suggest that the minimal employee threshold was not created to protect small "entities" from potential liability, but rather, that it was deemed necessary to justify federal legislation in the employment context under the Commerce Clause. *See e.g.*, 110 Cong.Rec. 6566 (1964) (letter from minority membership of House Committee on the Judiciary); 110 Cong.Rec. 6548 (1964); 110 Cong.Rec. 7052, 7054 (1964) (remarks of Sen. Stennis); 110 Cong.Rec.S. 7207-12 (remarks of Sen.Clark).

The assumption that Congress was concerned with the impact of civil liability upon small "entities" is further undermined by the fact that employers and

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¹ *See also Crane v. Arizona Republic*, 972 F.2d 1511, 1519 (9th Cir. 1992) (court should not

agents of those employers face unlimited civil liability for similar discriminatory acts under 43 U.S.C. § 1981, regardless of the number of persons they employ. *See e.g. Mitchell v. Keith*, 752 F.2d 385, 388 (9th Cir.), *cert. denied* 472 U.S. 1028 (1985). The liability scheme under § 1981 is of particular relevance to Title VII because proponents of the 1991 amendments to Title VII made “parity” between the damages available under § 1981 and those available under Title VII a stated goal of those amendments. H.R.Rep.No. 102-40(II), 102d Cong. 1st Sess. 24-30 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 717-23 (1992). The “purpose” of Title VII as concluded by the *Miller* decision is at odds with actual legislative history, and the stated purpose of the 1991 amendments.

2. The *Miller* Case Frustrates the Remedial Purpose of Title VII.

Title VII incorporates a congressional declaration of a “national policy of nondiscrimination.” *See* 110 Cong.Rec. 13, 169 (1964). As a remedial statute, exemptions to the statutes application are to be construed narrowly.² In spite of this law, and the concession that a plain meaning reading imposing liability on agents “is not without merit” the court arbitrarily limits application of the statute to employers. *Miller*, 991 F.2d at 583, 587. This limitation disregards the written language of the statute, statutory construction law and also overlooks the purpose of compensatory and punitive damages which the statute allows.

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construe statutes so as to render specific language mere surplusage).

² *See e.g. Nichols v. Hurley*, 921 F.2d 1101, 1103-04 (10th Cir. 1990).

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Punitive damages are typically imposed upon the perpetrators of wrongful conduct and not necessarily on those whose liability is merely derivative. *See e.g. Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986) (plaintiff's coworker's sexually harassing conduct not automatically ascribed to employer); *E.E.O.C. v. Waffle House*, 534 U.S. 279, 295 (2002) (punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor, and to deter him and others from similar conduct). By failing to recognize the agent language the Ninth Circuit has created a situation where employers are responsible for the intentional discriminatory acts of supervisors. By holding individuals harmless for their own conduct, while imposing vicarious liability upon the organizations that employ those individuals, one of the purposes of Title VII is frustrated. *See Hamilton v. Rodgers*, 791 F.2d 439, 443 (5th Cir. 1986) (refusing to hold perpetrators liable "encourage[s] supervisory personnel to believe that they may violate Title VII with impunity"). For example, in this case, MEA and its owners may be placed in a position where they are liable for punitive damages due to the intentional and illegal acts of their agents (Carmony and Babcock). Surely, Congress did not intend to protect civil rights by having employers hold harmless their supervisor employees who engaged in the illegal conduct.

3. The Trial Court's Options Given the Ninth Circuit Authority.

Based on the above reasons, it appears that the *Miller* case was wrongly decided. Nonetheless, this court is bound by Ninth Circuit's ruling and its

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controlling nature. The above arguments are made to preserve arguments in the event this matter ends up on appeal. Accordingly, plaintiff recognizes that the Title VII claims against Carmony and Babcock are required to be dismissed.

Dated at Anchorage, Alaska January 22, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of January, 2010, a copy of the foregoing was served electronically on:

Ms. Patricia A. Vecera, Attorney
Terrance A. Turner, Esquire

s/ William H. Ingaldson

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