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A New Standard of Employer Liability Emerges: Kolstad v. American Dental Ass'n Addresses Vicarious Liability in Punitive Damages

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NOTE

A NEW STANDARD OF EMPLOYER LIABILITY EMERGES: *KOLSTAD V. AMERICAN DENTAL ASS'N* ADDRESSES VICARIOUS LIABILITY IN PUNITIVE DAMAGES

I. INTRODUCTION

The incidents that give rise to punitive damages claims for violations of Title VII of the Civil Rights Act of 1964[1] (Title VII) and Title I of the Americans with Disabilities Act[2] (ADA) are certainly not as uncommon as most employers would feel comfortable believing. Following the Supreme Court's June 1999 decision in *Kolstad v. American Dental Ass'n*,[3] which aimed to clarify the standard for awarding punitive damages under these nondiscrimination statutes, the lower courts immediately began assessing large punitive damages awards against employers.[4] For example, within two months of the *Kolstad* decision, two different circuit courts ordered Wal-Mart Stores, Inc. to pay punitive damages for the discriminatory acts of its supervisory agents. In *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, the Fifth Circuit affirmed judgment for a white female who was terminated from her job after she married a black sales associate.[5] Similarly, in *EEOC v. Wal-Mart Stores, Inc.*, the Tenth Circuit affirmed judgment in favor of a hearing-impaired employee who was first demoted and later terminated when he demanded an interpreter for a job-training seminar.[6]

1. 42 U.S.C. §§ 2000e–2000e-17 (1994 & Supp. III 1997).
2. 42 U.S.C. §§ 12112–12117 (1994 & Supp. III 1997).
3. 527 U.S. 526 (1999).
4. *See* discussion of the cases applying *Kolstad* decision *infra* Part IV.D.
5. 188 F.3d 278, 280 (5th Cir. 1999); *see* discussion *infra* Part IV.D.3.
6. 187 F.3d 1241, 1243-44 (10th Cir. 1999); *see* discussion *infra* Part IV.D.2.

It was pursuant to the Civil Rights Act of 1991 (the 1991 Act) that monetary damages became available for certain classes of violations of both Title VII and the ADA.[7] The 1991 Act limits these monetary remedies to cases of "intentional discrimination."[8] In addition, the 1991 Act further conditions the availability of punitive damages on proof that the respondent (employer) has engaged in "a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[9] During the past decade, the various circuit courts developed divergent views with regard to the burden of proof this language imposed on plaintiffs who sought jury instructions on punitive damages.[10]

In *Kolstad v. American Dental Ass'n*, the United States Supreme Court granted certiorari to clarify "the circumstances under which a jury may consider a request for punitive damages."[11] At the heart of the case was whether a petitioner had to demonstrate that the employer had acted "egregiously" or "outrageously."[12] In a 7-2 decision, the Supreme Court rejected the idea that punitive damages could only be imposed if the employer's conduct was "egregious" or "outrageous."[13] Rather, the Court held "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law."[14]

After clarifying the punitive damages standard, five of the nine Justices took the case one controversial step further.[15] This slim majority went beyond the question presented and set forth a standard for holding employers vicariously liable in punitive damages for the acts of their managerial agents.[16] The majority formulated its standard by modifying principles in the Restatement (Second) of Agency. The new rule provides, "[I]n the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good-faith efforts to comply with Title VII.'"[17]

Part II of this Note presents an overview of employer liability under Title VII. Part III discusses the standard for imposing liability on employers for

7. 42 U.S.C. § 1981a (1994 & Supp. III 1997).

8. *Id*. § 1981a(a)(1)-(2).

9. *Id*. § 1981a(b)(1).

10. *See* Baty v. Willamette Indus., Inc., 172 F.3d 1232, 1244 & n.6 (10th Cir. 1999) (identifying the circuit split).

11. *Kolstad*, 527 U.S. at 533; *see* discussion *infra* Part IV.C.

12. *Kolstad*, 527 U.S. at 534.

13. *Id*. at 534-35.

14. *Id*. at 536.

15. *Id*. at 539-46.

16. *Id*. at 545.

17. *Kolstad*, 527 U.S. at 545 (citing en banc dissent of Circuit Judge Tatel).

sexual harassment perpetrated by a supervisor against a subordinate employee. This standard was developed in *Meritor Savings Bank, F.S.B. v. Vinson*,[18] *Burlington Industries, Inc. v. Ellerth*,[19] and *Faragher v. City of Boca Raton*.[20] Part IV addresses the Supreme Court's most recent discussion of employer liability in the punitive damages context. It examines: (1) the history of the Civil Rights Act of 1991; (2) the divergent standards that emerged from the federal courts as they tried to apply the 1991 Act; (3) the 1999 *Kolstad* decision; and (4) cases arising under Title VII and the ADA that have attempted to apply the *Kolstad* decision.

Part V presents the author's analysis. This Part criticizes the majority's decision to set forth a new standard for imputing liability to employers because this issue was not relevant to the facts of the case. *Kolstad* involved discrimination by the two top-ranking officers of the American Dental Association. Such high-echelon officers have generally been considered "proxies" or "alter egos" of the employer, and thus, a consideration of whether liability should be imputed to the employer was unnecessary. This Part then compares the *Kolstad* decision with the Supreme Court's earlier discussions of employer liability in sexual harassment cases, finding the resulting standards to be inconsistent. Finally, this Part highlights ambiguities in the new vicarious liability standard that have already generated conflicting interpretations. Part VI concludes that, in spite of the Court's clarification of the underlying meaning of the punitive damages provision in the 1991 Act, the Court defeated its own efforts by setting forth an ambiguous "good-faith efforts" defense.

II. EMPLOYER LIABILITY UNDER THE CIVIL RIGHTS ACT OF 1964

Title VII is one of three federal statutes at the core of employment discrimination law.[21] The statute makes it unlawful for an employer, "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ."[22] Limiting, segregating or classifying employees or applicants, so as to deprive protected individuals of

18. 477 U.S. 57 (1986).

19. 524 U.S. 742 (1998).

20. 524 U.S. 775 (1998).

21. The other core statutes are the Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (1994 & Supp. III 1997), and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (1994 & Supp. IV 1998). See ROBERT BELTON & DIANNE AVERY, EMPLOYMENT DISCRIMINATION LAW 29-35 (6th ed. 1999), for an exhaustive discussion of the federal laws on employment discrimination.

22. 42 U.S.C. § 2000e-2(a)(1).

employment opportunities or adversely affect their employment status, is also unlawful under the statute.[23]

Title VII defines "employer" to include "a person engaged in an industry affecting commerce who has fifteen or more employees" and "any *agent* of such a person."[24] The statute does not define the term "agent." In addition, the statute does not specify whether an "agent" may be individually liable under Title VII. However, eleven of the twelve circuit courts have held that individuals are *not* personally liable for discrimination under Title VII.[25] The Fourth Circuit is among this majority. In *Lissau v. Southern Food Services, Inc.*, the court explained that it would not make sense "to hold that Title VII does not apply to a five-person company but applies with full force to a person who supervises an identical number of employees in a larger company."[26] In addition, the Fourth Circuit viewed Congress' silence on the issue when it added additional Title VII remedies in the Civil Rights Act of 1991 to mean that the statute does not impose individual liability.[27]

III. EMPLOYER LIABILITY FOR SEXUAL HARASSMENT

Although sexual harassment is not a new phenomenon, it was not even recognized as a viable legal complaint twenty years ago.[28] The most influential proponent of the idea that sexual harassment should be an actionable form of sex discrimination was Catherine MacKinnon.[29] In her 1979 book, *Sexual Harassment of Working Women*, MacKinnon proposed two actionable forms of harassment: (1) "*quid pro quo*, in which sexual compliance is exchanged, or proposed to be exchanged, for an employment opportunity," and (2) "sexual harassment [that] is a persistent *condition of work*."[30] In 1980, the EEOC published guidelines providing that sex discrimination encompassed claims of sexual harassment; the guidelines also accepted MacKinnon's two theories of liability for sexual harassment.[31] In the 1986 case of *Meritor*

23. *Id*. § 2000e-2(a)(2).

24. *Id*. § 2000e(b) (emphasis added). This term is similarly described in the ADA, 42 U.S.C. § 12111(5)(A) and in the ADEA, 29 U.S.C. § 630(b).

25. *See* Alan R. Kabat & Debra S. Katz, *Racial and Sexual Harassment Employment Law*, SE05 ALI-ABA 547, 601 (1999) (citing cases illustrative of this general rule).

26. Lissau v. S. Food Serv., Inc., 159 F.3d 177, 180 (4th Cir. 1998).

27. *Id*. at 180-81; *see infra* discussion of the Civil Rights Act of 1991 in Part IV.A.

28. *See* BELTON & AVERY, *supra* note 21, at 400.

29. *See* CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

30. *Id*. at 32.

31. *See* Sexual Harassment, 29 C.F.R. § 1604.11 (1998).

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment

Savings Bank, F.S.B. v. Vinson, the Supreme Court also recognized "quid pro quo" and "hostile work environment" as the two actionable forms of sexual harassment.[32]

A. Meritor Savings Bank

Mechelle Vinson was a bank teller who brought a sexual harassment suit against her employer and supervisor.[33] She claimed that her supervisor's unwelcome sexual advances had created an "offensive" or "hostile working environment," in violation of Title VII.[34] In a unanimous decision, the Supreme Court held that the language of Title VII is not limited to discrimination that causes "economic" or "tangible" harm.[35] Rather, actionable sexual harassment includes conduct linked to the grant or denial of an economic "quid pro quo," as well as conduct that has the purpose or effect of creating a "hostile or abusive work environment."[36] The Court rejected the appellate court's finding of strict liability, but declined to offer a definitive rule on employer liability for sexual harassment committed by supervisors.[37]

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decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Id.

32. *Meritor*, 477 U.S. at 65.

33. *Id.* at 59-60.

34. *Meritor*, 477 U.S. at 64. Vinson was hired to work at Meritor Savings Bank in 1974, by Sidney Taylor, a vice president of the bank. *Id.* at 59. She worked at the branch for four years, and during that time she was promoted from teller-trainee, to teller, to head teller and finally to branch manager. *Id.* at 59-60. After advising the bank that she was taking indefinite sick leave in 1978, she was fired. *Id.* at 60. Vinson then brought an action against Taylor and the bank, alleging that she had "constantly been subjected to sexual harassment" by Taylor throughout her employment. *Id.*

Vinson claimed that the harassment began when Taylor asked her to dinner and later suggested they have sexual relations. *Meritor*, 477 U.S. at 60. She claimed to have first refused these advances, but out of fear of losing her job, she later submitted to them. Subsequently, Taylor made repeated demands for sexual favors, both during and after work. *Id.* Vinson testified that the two had intercourse on forty or fifty occasions during the course of her employment, and said that on many occasions Taylor had forcibly raped her. *Id.*

The United States District Court for the District of Columbia held that Vinson was not the victim of sexual harassment or sex discrimination. *Meritor*, 477 U.S. at 61-62. The court also addressed the bank's liability, finding that the bank did not have notice of any harassment, and therefore, could not be liable. *Id.* at 62. The United States Court of Appeals for the District of Columbia Circuit reversed, finding that harassment includes a hostile work environment and stating that an employer is *absolutely liable* for harassment by one of its supervisors, whether or not the employer knew or should have known of such harassing conduct. *Id.* (emphasis added).

35. *Meritor*, 477 U.S. at 64.

36. *Id.* at 65.

37. *Id.* at 72.

Nevertheless, it agreed with the EEOC's position that Congress wanted the courts to look to agency principles for guidance.[38] The Court, therefore, found that although there are certain times when employers will be liable for the acts of their supervisors, employers are not automatically liable.[39] In addition, the Court noted that neither absence of employer awareness, nor the mere existence of a grievance procedure and discrimination policy and an employee's failure to utilize the reporting procedure, would always insulate an employer from liability.[40]

After *Meritor*, the number of sexual harassment filings rose steadily.[41] Although the courts consistently held employers vicariously liable for quid pro quo sexual harassment,[42] the standard for determining employer liability for hostile environment harassment was more problematic.[43] In *Meritor*, the Court

> [The] debate over the appropriate standard for employer liability has a rather abstract quality about it given the state of the record in this case. We do not know at this stage whether Taylor made any sexual advances toward respondent at all, let alone whether those advances were unwelcome, whether they were sufficiently pervasive to constitute a condition of employment, or whether they were "so pervasive and so long continuing . . . that the employer must have become conscious of [them]."

Id. (quoting Taylor v. Jones, 653 F.2d 1193, 1197-99 (8th Cir. 1981)).

38. *Meritor*, 477 U.S. at 72. ("While . . . common-law [agency] principles may not be transferable in all their particulars to Title VII, Congress' decision to define 'employer' to include any 'agent' of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers are to be held responsible.").

39. *Id*.

40. *Id*.

41. *See* Patricia M. Buhler, *The Manager's Role in Preventing Sexual Harassment*, SUPERVISION, Apr. 1999 (noting that about one-third of all Fortune 500 Companies have been sued for sexual harassment since the Supreme Court's decision in *Meritor Savings Bank*); see also the statistics published by the EEOC, which demonstrate that the number of sexual harassment charges have increased steadily since 1992. In 1992, 10,532 charges were filed, as compared to 15,222 charges filed last year. *Sexual Harassment Charges EEOC & FEPAs Combined: FY 1992-FY 1999* (last modified Jan. 12, 2000) <http://www.eeoc.gov/stats/harass.html>.

42. *Meritor*, 477 U.S. at 70-71 ("[T]he courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions."); Davis v. City of Sioux City, 115 F.3d 1365, 1367 (8th Cir. 1997) ("In the situation of quid pro quo sexual harassment by a supervisor, where the harassment results in a tangible detriment to the subordinate employee, liability is imputed to the employer."); Nichols v. Frank, 42 F.3d 503, 513 (9th Cir. 1994) ("Once quid pro quo sexual harassment has been established, the harasser's employer is, ipso facto, liable.").

43. *See* Gary v. Long, 59 F.3d 1391, 1398 (D.C. Cir. 1995) ("[A]n employer may not be held liable for a supervisor's hostile work environment harassment if the employer is able to establish that it had adopted policies and implemented measures such that the victimized employee either knew or should have known that the employer did not tolerate such conduct and that she could report it to the employer without fear of adverse consequences."). *But see* Karibian v. Columbia Univ., 14 F.3d 773, 780 (2d Cir. 1994) ("[A]n employer is liable for the discriminatorily abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to

had recognized this as a viable form of sex discrimination, but left the lower courts to grapple with a complex body of agency principles to define the contours of employer liability.[44] For the next twelve years, the lower courts struggled to develop a standard for imputing liability to an employer for hostile environment claims.[45]

B. The 1998 Companion Cases

In 1998, the Supreme Court clarified the circumstances under which employers would be held liable for hostile environment sexual harassment by their supervisory agents in *Burlington Industries, Inc. v. Ellerth*[46] and *Faragher v. City of Boca Raton*.[47] A discussion of these cases is useful because *Kolstad* addressed employer liability in the context of punitive damages. As will be shown, the Court's analysis in *Kolstad* was not entirely consistent with its decisions in the 1998 companion cases.

1. *Burlington Industries, Inc. v. Ellerth*

Kimberly Ellerth was a salesperson for Burlington Industries.[48] She alleged that during her employment, she had been subject to constant sexual harassment by Ted Slowik.[49] Although Slowik was not Ellerth's immediate supervisor, he was the immediate supervisor of Ellerth's boss.[50] Ellerth argued that three acts by Slowik could be construed as threats to deny tangible job benefits, and therefore, the harassment should have been classified as quid pro quo so as to impose vicarious liability on the employer.[51]

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further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship.").

44. *See Meritor*, 477 U.S. at 72.

45. *See generally* David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their* Supervisors, 81 CORNELL L. REV. 66, 131-36 (1995) (discussing the varied standards of employer liability in hostile work environment sexual harassment cases).

46. 524 U.S. 742 (1998).

47. 524 U.S. 775 (1998).

48. *Ellerth*, 524 U.S. at 746.

49. *Id*. at 747. The United States District Court for the Northern District of Illinois granted summary judgment for Burlington Industries, finding that Ellerth had suffered no "tangible job detriment," and that she had failed to use the company's complaint procedure or to make any report at all to management. *Id.* at 749. Reversing en banc, the United States Court of Appeals for the Seventh Circuit "produced eight separate opinions and no consensus for a controlling rationale." *Id*.

50. *Id*. at 747.

51. *Ellerth*, 524 U.S. at 747-48. These threats included a statement that Slowik could make the plaintiff's life "very hard or very easy;" the expression of reservations about promoting the plaintiff because she was not "easy;" and comments regarding the plaintiff's attire, which suggested she could make her job "much easier" by wearing shorter skirts. *Id*. at 748.

The Court began by reviewing case law, in which the courts had formulated different standards of employer liability, depending on whether the claim was stated in terms of quid pro quo or hostile work environment harassment.[52] It explained that the lower courts had erred in using these classifications to determine when liability could be extended to employers.[53] Rather, the Court clarified that these two categories of harassment are only relevant to the determination of whether discrimination under Title VII can be proven.[54] When a tangible employment action results from a refusal to submit to a supervisor's sexual demands, "the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII [quid pro quo harassment]."[55] However, when threats have not been carried out but the harassment has, nevertheless, been *severe or pervasive*, a claim for hostile work environment harassment arises.[56] The Court placed Ellerth's case in the latter category, and formulated the issue as, "[W]hether . . . an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, can recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions."[57] The Court defined a "tangible employment action" as a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly differing responsibilities, or a decision causing a significant change in benefits."[58]

In determining whether Burlington Industries should be held vicariously liable for the creation of a hostile work environment by its supervisor, the Court looked to agency principles, as it had instructed the lower courts to do in *Meritor*.[59] Although it relied on the Restatement (Second) of Agency as a starting point, the Court ultimately modified the Restatement principles to form its own standard for imposing liability.[60] The Court began by looking to section 219(1), which provides that an employer may be vicariously liable when the employee commits a tort "while acting in the scope of employment."[61] The Court adopted a general rule that sexual harassment by a

52. *Id*. at 752-53.
53. *Id*. at 753.
54. *Id*. at 753.
55. *Ellerth*, 524 U.S. at 753-54.
56. *Id*. at 754 (emphasis added).
57. *Id*. at 746-47.
58. *Id*. at 761.
59. *Id*. at 754-55 (citing *Meritor*, 477 U.S. at 72).
60. *Ellerth*, 524 U.S. at 765.
61. *Id*. at 756 (citing RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958)). The Restatement also provides that even an intentional tort may be within the scope of employment when it is "actuated, at least in part, by a purpose to serve the [employer]," even if it is forbidden by the employer. RESTATEMENT (SECOND) OF AGENCY §§ 228(1)(c), 230 & cmt. b (1958).

supervisor is not conduct within the "scope of employment," because supervisors generally act out of their own personal motives of "gender-based animus" or "sexual urges" when they discriminate and not to "serve the employer."[62]

The Court next looked to section 219(2), which imposes liability in limited circumstances when employees act outside the scope of employment.[63] The Court ultimately found section 219(2)(d) to provide the proper basis for finding employer liability in cases of supervisory harassment.[64] The relevant part of this section provides that an employer is liable for the acts of his employees when the employees are "aided in accomplishing their tortious objective by the existence of the agency relation."[65] In order to impose liability under this standard, the Court thought it necessary to require something beyond the mere existence of the employment relationship.[66] The Court, therefore, determined

62. *Ellerth*, 524 U.S. at 756-57.

63. *Id*. at 758. This section provides:

A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

(a) the master intended the conduct or the consequences, or
(b) the master was negligent or reckless, or
(c) the conduct violated a non-delegable duty of the master, or
(d) the servant purported to act or speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

RESTATEMENT (SECOND) OF AGENCY § 219(2) (1958).

The Court clarified that subsection (a) addresses "direct liability," where the employer acts with tortious intent, and "indirect liability," where the agent's high rank makes him or her the company's "alter ego." This provision of the Restatement was not applied in *Ellerth* because the plaintiff did not contend that the supervisor's rank was high enough to impute liability to the corporation. *Ellerth*, 524 U.S. at 758.

Subsection (b) was viewed by the Court as an alternative ground for holding an employer liable on account of a supervisor's acts. The Court said that an employer would be negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it. The Court noted that while negligence sets a minimum standard for liability, the plaintiff sought to invoke "the more stringent standard of vicarious liability." *Ellerth*, 524 U.S. at 758-59.

Subsection (d) set forth two additional standards for employer vicarious liability. The first of these standards is known as the "apparent authority standard." Liability arises pursuant to this standard when an agent "purports to exercise a power which he or she does not have, as distinct from where the agent threatens to misuse actual power." *Ellerth*, 524 U.S. at 759. The Court determined that in the usual case of supervisory harassment, the misuse of actual power is involved. For this reason, the Court declined to apply the "apparent agency standard." *Id.* at 759-60. The second standard set forth in subsection (d) is the "aided in the agency relation standard." This is the standard that the Court opted to apply. *Id.*

64. *Ellerth*, 524 U.S. at 760.

65. *Id*.

66. *Ellerth*, 524 U.S. at 760. The purpose of the additional requirement was explained in light of the fact that most workplace harassers are aided in accomplishing their tort by the

that an employer would be strictly liable under the "aided-in-the-agency-relation" standard when a supervisor subjects a subordinate to a "tangible employment action."[67] As the Court emphasized,

> Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors . . . .
>
> For these reasons, a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer.[68]

Because the Court had classified Slowik's harassment of Ellerth as hostile working environment harassment, (harassment which did *not* involve a tangible employment action), the Court announced a two-tiered system of liability.[69] First, the Court found an employer would be vicariously liable to a victimized employee when a supervisor "with immediate (or successively higher) authority" creates a hostile working environment.[70] When a tangible employment action has been taken against the employee, the employer is strictly liable.[71] When the supervisor has taken no tangible employment action, the employer will have the right to raise a reasonable care defense.[72] The affirmative defense consist of two parts: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[73] The Court also held that proof of an enforced antiharassment policy with a complaint procedure, although not necessary, could be relevant to the successful assertion of the employer's defense.[74] Similarly, the Court said that proof the employee's failure to utilize the complaint procedure would normally suffice to satisfy the second element of the defense.[75]

existence of the agency relationship alone through close proximity and regular contact with a captive pool of victims at work. *Id.* If the employment relationship itself were enough to make an employer strictly liable, employers would be subject to liability not only for supervisory harassment, but for all coworker harassment. *Id.*

67. *Ellerth*, 524 U.S. at 760.
68. *Id*. at 762.
69. *Id*. at 764-65.
70. *Id*.at 765.
71. *Id*.
72. *Ellerth*, 524 U.S. at 765.
73. *Id*.
74. *Id*.
75. *Id*. at 765.

2. *Faragher v. City of Boca Raton*

Faragher differs from *Ellerth* only in its depth of analysis. In this case, the United States Supreme Court explained in more detail the rationale for holding employers liable in limited circumstances for the unauthorized actions of supervisory agents. In addition, the Court discussed employer liability on the basis of a "proxy" or "alter ego" theory. Although this theory was not the basis for liability in *Faragher*, the discussion is significant in light of the Court's subsequent decision in *Kolstad.*

Beth Ann Faragher worked as a lifeguard for the City of Boca Raton while attending college.[76] Throughout her employment, she was the subject of a "sexually hostile environment," created by the lewd comments and offensive touching of her immediate supervisors, Bill Terry and David Silverman.[77] Faragher eventually resigned from her job and sued the supervisors and the city.[78] She alleged that the supervisors were agents of the city and that their conduct amounted to discrimination in violation of Title VII.[79]

In a decision written by Justice Souter, the Supreme Court reversed the Eleventh Circuit's judgment in favor of the city, relying on the same standard used in *Ellerth*.[80] One issue that the Court explored more expansively than it had in *Ellerth*, was the idea that employers are strictly liable when the individual creating the abusive atmosphere is a high-echelon manager, such as the president of the company.[81] The Court noted that such an individual is "indisputably within that class of an employer organization's officials who may be treated as the organization's proxy."[82]

76. *Faragher*, 524 U.S. at 780.

77. *Id.* The complaint included allegations that Silverman had told Faragher that she could date him or "clean the toilets for a year." Faragher also alleged that Terry had said a woman would never be promoted to the ranks of lieutenant under his supervision. *Id.* The city had a sexual harassment policy, but the policy was never circulated to Terry, Silverman or several of the lifeguards. *Id.* at 781-82.

78. *Id. at* 780.

79. *Faragher*, 524 U.S. at 781. Terry's supervisory authority included hiring lifeguards, supervising work assignments, engaging in counseling, delivering oral reprimands, and making disciplinary records. *Id.* Silverman had the authority to make daily assignments. In addition, he supervised the lifeguards' work and fitness training. *Id.*

80. *Id.* at 807.

81. *Id.* at 789.

82. *Faragher*, 524 U.S. at 789-90 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993)) (noting that the standards for binding the employer were not in issue because the harasser was the corporate president); *see also* Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 564 (8th Cir. 1992) (finding employer automatically liable for harassment perpetrated by the owner); Torres v. Pisano, 116 F.3d 625, 634-635 (2d Cir. 1992), *cert. denied*, 118 S. Ct. 563 (1997) (when a supervisor holds a sufficiently high position in the company's management hierarchy, his actions may be automatically imputed to the employer)).

In addition, the Court found that employers have been routinely held liable for discriminatory employment actions by supervisors with tangible results, such as firing, withholding promotions, and assigning unfavorable job duties.[83] The Court discussed several theories set forth by the lower courts that supported employer liability in this context.[84] One such theory was the "proxy theory."[85] Under this theory, when a supervisor makes decisions with tangible job effects, the supervisor merges with the employer, and the acts become those of the employer.[86]

The *Faragher* Court then discussed the theories for finding an employer vicariously liable for the discriminatory acts of mid-level supervisors.[87] As it had in *Ellerth*, the Court rejected the idea that an employer becomes liable under section 219(1) of the Restatement (Second) of Agency for torts committed by a supervisor in the scope of employment when the tort is sex discrimination.[88] The Court was guided by two principles.[89] First, the Court discussed the distinction between actions that are within the scope of employment and acts amounting to "frolics" or "detours" from the ordinary course of employment.[90] It concluded that there was no reason to believe Congress sought to ignore the distinction.[91] Next, the Court noted that in assessing employer liability for coworker harassment under a negligence standard, the circuit courts had uniformly found acts of harassment to be outside the scope of common employees' duties.[92]

The Court next turned to the "aided-in-the-agency-relation" principle found in section 219(2)(d).[93] As in *Ellerth*, the Court found that this section provided a basis for vicarious liability when a supervisor uses his authority to harass a subordinate.[94] The Court, nevertheless, gave deference to *Meritor*'s holding that employers are not "automatically" liable for harassment by a supervisor.[95] To counter the tension created by an imposition of liability based on the aided-in-the-agency-relation standard where the "aid" was an unspoken threat of retaliation, the Court applied the same standard that was employed in *Ellerth*.[96] This would make the employer strictly liable only if the supervisor

83. *Faragher*, 524 U.S. at 790.
84. *Id*. at 790-91.
85. *Id*. at 790.
86. *Id*.
87. *Id.* at 792.
88. *Faragher*, 524 U.S. at 798.
89. *Id*.
90. *Id*. at 799.
91. *Id*.
92. *Id*.
93. *Faragher*, 524 U.S. at 801.
94. *Id*. at 802.
95. *Id.* at 805.
96. *Id*. at 807.

committed an affirmative act of retaliation.[97] Otherwise, the employer would have available the affirmative defense that the employer exercised reasonable care to avoid harassment and the employee failed to take advantage of the employer's safeguards to prevent the harm.[98]

3. Policy Underlying *Ellerth* and *Faragher*

A compelling policy rationale underlies the Supreme Court's decisions in these companion cases. In both cases, the Court stressed that the underlying purpose of Title VII is to encourage forward thinking by employers as demonstrated by the creation of antiharassment policies and effective grievance methods.[99] The Court believed that analyzing an employer's effort to implement and enforce such procedures as a means of determining liability would effect Congress' intent to promote conciliation, as opposed to litigation.[100] The Court also anticipated that its decisions would have a deterrent effect, as they would encourage employees to report harassing conduct before the conduct became severe or pervasive.[101] As summed up in *Faragher*, "[I]t . . . implement[s] clear statutory policy and complement[s] the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit . . . to employers who make reasonable efforts to discharge their duty."[102]

IV. EMPLOYER LIABILITY & PUNITIVE DAMAGES

At the time the Supreme Court rendered its decisions in *Faragher* and *Ellerth*, a circuit split over yet another Title VII issue had developed.[103] This time, the courts were struggling to determine the burden of proof plaintiffs had to meet in order to receive punitive damages awards from employers pursuant to the Civil Rights Act of 1991.[104] The Supreme Court granted certiorari in *Kolstad v. American Dental Ass'n* to clarify the precise requirements of the punitive damages standard set forth in 42 U.S.C. § 1981a(b)(1) of the 1991 Act.[105]

97. *Id*.

98. *Faragher*, 524 U.S. at 807-08.

99. *See Ellerth*, 524 U.S. at 764; *Faragher*, 524 U.S. at 805.

100. *See Ellerth*, 524 U.S. at 764.

101. *Id*.

102. *Faragher*, 524 U.S. at 806.

103. *See* Baty v. Williamette Indus., Inc., 172 F.3d 1232, 1244 & n.6 (10th Cir. 1999) (identifying the circuit split); *see also discussion infra* Part IV.B.

104. *Id*. at 1244.

105. *Kolstad*, 527 U.S. at 533.

A. The Civil Rights Act of 1991

Prior to 1991, only equitable remedies, including reinstatement and back pay, were available for violations of Title VII and the ADA.[106] Under the terms of the Civil Rights Act of 1991, compensatory and punitive damages were made available for actions arising under these statutes.[107] Presently, these damages awards are limited to cases of "intentional discrimination."[108] The expansion of monetary relief was largely a response to the argument that it was unfair to deny compensatory and punitive damages for sex or disability discrimination when these damages could be recovered in race discrimination cases arising under 42 U.S.C. § 1981.[109] However, in promulgating the 1991 Act, Congress also expressed a goal of deterrence.[110] The congressional findings state that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace."[111] Nevertheless, the monetary relief made available by the 1991 Act is limited.[112] Congress capped the amount of compensatory and punitive damages for Title VII and ADA violations.[113] The damages cap ranges from $50,000 to $300,000, depending on the size of the employer.[114]

106. *See* 42 U.S.C. § 2000e-5(g).

107. *See* 42 U.S.C. § 1981a(a)(1)-(2). Before the 1991 Amendment, compensatory and punitive damages were available under 42 U.S.C. § 1981 only to those who had suffered race or ethnic discrimination. David A. Cathcart & Mark Snyderman, *ALI-ABA Continuing Legal Education, The Civil Rights Act of 1991*, SB36 ALI-ABA 277, 291-92 (1997); *see also* Johnson v. Ry. Express, Inc., 421 U.S. 454, 460 (1975) (finding that the legal relief for an employment discrimination case arising under 42 U.S.C. § 1981 includes compensatory and punitive damages).

108. 42 U.S.C. § 1981a(1)-(2). The two basic theories of employment discrimination law are disparate treatment and disparate impact. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). "Disparate treatment" discrimination occurs when an employer treats one group of individuals less favorably based on their race, color, sex, religion or national origin. *Id*. Subjective intent to discriminate is essential in disparate treatment cases. *Id*. "Disparate impact" discrimination refers to "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." *Id.*

109. BELTON & AVERY, *supra* note 21, at 807.

110. 42 U.S.C § 1981 (note) (1994).

111. *Id*.

112. 42 U.S.C. § 1981a(b)(3).

113. *Id*.

114. *Id*. The cap is $50,000 for employers with more than 14 and fewer than 101 employees; $100,000 for employers with more than 100 and fewer than 201 employees; $200,000 for employers with more than 200 and fewer than 501 employees; and $300,000 for employers with more than 500 employees. *Id.* The Act also states that these caps do not apply to race discrimination claims arising under § 1981. 42 U.S.C. § 1981a(b)(4).

B. Divergent Standards Emerge for Awarding Punitive Damages

The Civil Rights Act of 1991 was a quickly adopted compromise, without committee hearings or reports, and with only limited floor debate on the final provisions of the Act.[115] For this reason, there were few traditional legislative sources to give meaning to the Act.[116] With little to guide their interpretations, the circuit courts struggled to define the precise burden of proof a plaintiff was required to meet to receive a punitive damages award.[117]

The confusion arose from the language of the 1991 Act, which begins by making compensatory and punitive damages available in cases of "intentional discrimination."[118] The Act then provides that complainants may recover punitive damages when they prove that a defendant has engaged in a discriminatory practice "with malice or with reckless indifference to . . . federally protected rights."[119] Many courts interpreted this to mean that the plaintiff's punitive damages burden under 42 U.S.C. § 1981a required something more than mere proof of "intentional discrimination." While the 1991 Act itself does not, on its face, condition punitive damage awards on evidence of "egregious" or "outrageous" discrimination, many circuits formulated standards that required evidence of such conduct."[120] These courts

115. Cathcart & Snyderman, *supra* note 107, at 295-97.

116. *See id.* The only sources of guidance relevant to the punitive damages inquiry include (1) the vetoed Civil Rights Act of 1990, and H.R.1, which the House passed before Senator Danforth presented the bill that became the 1991 Act; and (2) Interpretive memoranda entered into the Congressional Record by Senators and Representatives. *See id.*

117. *See Baty*, 172 F.3d at 1244 & n.6 (discussing the circuit split); s*ee also* Ngo v. Reno Hilton Resort Corp., 104 F.3d 1299, 1304 n.9 (9th Cir. 1998) (same).

118. 42 U.S.C. § 1981a(a)(1)-(2).

119. *Id.* § 1981a(b)(1).

120. *See Baty*, 172 F.3d at 1244-45 (declining to determine comprehensively what burden a plaintiff must carry in order to prove "malice or reckless indifference to . . . federally protected rights"). The Tenth Circuit upheld the punitive damages award against Baty's employer for sexual harassment that had been committed primarily by coworkers. *Id.* The court said even if more than merely intentional discrimination was required in order to recover punitive damages under Title VII, this burden was met by evidence that management didn't respond to the plaintiff's complaints of harassment and had conducted a "sham" investigation of the discriminatory acts. *Id.*

See also Ngo, 140 F.3d at 1304 (finding punitive damages to be warranted only when the plaintiff makes a showing beyond the threshold level of intent required for compensatory liability and only where the acts giving rise to liability "are willful and egregious, or display reckless indifference to the plaintiff's federal rights."); Harris v. L & L Wings, Inc., 132 F.3d 978, 982 (4th Cir. 1997) ("Punitive damages are 'an extraordinary remedy,' to be reserved for egregious cases."); Emmel v. Coca-Cola Bottling, Co., 95 F.3d 627, 636 (7th Cir. 1996) (characterizing the punitive damages standard as a "higher hurdle than merely proving the underlying unlawful discrimination."); McKinnon v. Kwong Wah Restaurant, 83 F.3d 498, 508 (1st Cir. 1996) (noting that unlike compensatory damages, punitive damages "are never awarded as a matter of right no matter how egregious the defendant's conduct."); Turic v. Holland Hospitality, Inc., 85 F.3d 1211, 1216 (6th Cir. 1996) (despite sufficiency of evidence for liability, evidence held

were guided by statements extracted from the legislative history,[121] and by the policy that punitive damages are designed to punish and deter outrageous conduct.[122] After determining the plaintiff's burden under 42 U.S.C. § 1981a, many of these courts went on to assess the punitive damages liability of the employers for the discriminatory conduct of their employees.[123]

The minority view rejected the idea that the plaintiff's burden of proof included proof of "extraordinarily egregious" discrimination.[124] In support of this position, the United States Court of Appeals for the Second Circuit looked to the plain language of the statute, which does not explicitly require evidence of "egregious" acts.[125] In addition, the Second Circuit was able to find support for its minority position in the legislative history of the Civil Rights Act of 1991.[126]

insufficient for punitive damages); Karcher v. Emerson Elec. Co., 94 F.3d 502, 509 (8th Cir. 1996) (same).

121. *See Ngo*, 140 F.3d at 1303 (citing H.R. REP. NO. 91-40(I), at 72 (1991), which states that "[p]laintiffs must first prove intentional discrimination . . . and must meet an even higher standard . . . to recover punitive damages.") (also citing interpretive memo of Sen. Dole, 137 CONG. REC. S15472-01 (Oct. 30, 1991), which states, "Punitive damages are to be awarded only in extraordinarily egregious cases.").

122. *McKinnon*, 83 F.3d at 508 ("Punitive damages are assessed as punishment or as an example and warning to others. They are therefore not favored in the law and are allowed only with caution and within normal limits."); *see also Harris*, 132 F.3d at 983 (noting that the "provision was enacted against a backdrop of prevailing doctrine that punitive damages are to be awarded only in cases where the twin aims of punishment and deterrence are paramount.").

123. *See, e.g.*, *Harris*, 132 F.3d at 984. Harris involved the harassment of two employees by a coworker. *Id*. at 980-81. The employees repeatedly complained to their managers about the harassment so as to put the employer on notice of the improper conduct. *Id*. The court first found that punitive damages were to be reserved for egregious cases. It then said in order for a plaintiff to reach a jury on the issue of punitive damages, a plaintiff must generally make a "'heightened showing' of the culpable state of mind of the employer, not just of the harasser." *Id*. at 983. The court found that the employer's failure to implement a sexual harassment or grievance policy, and its utter failure to respond in any way to repeated complaints of pervasive sexual harassment were sufficient to show the culpability of the employer. *Id*.

In *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, the Fifth Circuit also found the employer liable in punitive damages by applying the *Ellerth/Faragher* vicarious liability analysis. 156 F.3d 581, 592-94 (5th Cir. 1998), *reh'g* en banc *granted, opinion vacated sub nom* Williams v. Wal-Mart Stores, Inc., 169 F.3d 215 (5th Cir. 1999), *and opinion reinstated on reh'g*, 182 F.3d 333 (5th Cir. 1999), *and opinion vacated*, 188 F.3d 278, 286 (5th Cir. 1999) (en banc) (reinstating the jury verdict awarding punitive damages in light of Supreme Court's decision in *Kolstad*).

124. *See, e.g.*, Luciano v. Olsten Corp., 110 F.3d 210, 219-20 (2d Cir. 1997).

125. *Id*.

126. *Luciano*, 110 F.3d 220 (citing Rep. Edwards' statement in 137 CONG. REC. H9527 (1991), which provides "[p]unitive damages are available under [Section 1981a] to the same extent and under the same standards that they are available to plaintiffs under 42 U.S.C. § 1981.") (also citing H.R. REP. NO. 40(II), at 24 (1991), which provides, "It is the Committee's intention that damages should be awarded under Title VII in the same circumstances in which such awards are now permitted under [42] U.S.C. § 1981 in intentional race discrimination cases.").

The United States Court of Appeals for the District of Columbia Circuit was faced with these alternative standards when it first reviewed the district court's decision in *Kolstad v. American Dental Ass'n.*[127] A panel of the court initially followed the minority approach when it found that evidence of intentional discrimination was sufficient to support a punitive damages award.[128] However, upon rehearing the case en banc, the circuit court vacated the panel decision, finding that punitive damages could be imposed in a Title VII action only upon proof of "egregious" conduct.[129] The Supreme Court granted certiorari.

C. Kolstad v. American Dental Ass'n

1. Facts and Procedural History

A summary of the lower court decisions, culminating with the Supreme Court's decision in June 1999, follows. This section is especially significant in light of the elaborate procedural history. A close analysis reveals that the Court's rationale with respect to imputing employer liability in punitive damages reflects much of the insight set forth by Circuit Judge Tatel in his dissent from the en banc opinion.[130]

In the fall of 1992, Carol Kolstad, an employee of the American Dental Association (ADA), learned of Jack O'Donnell's upcoming retirement from his positions as Director of Legislation and Legislative Policy and Director of the Council on Government Affairs of the ADA.[131] O'Donnell was the second-highest ranking officer in the ADA's Washington office.[132] Kolstad, who had been serving as Director of Federal Agency Relations for four years, expressed an interest in filling O'Donnell's vacancy.[133] A lawyer herself, Kolstad had handled federal regulatory matters for the ADA in her then-current position. She consistently received "distinguished" performance evaluations from Leonard Wheat, the director of the ADA's Washington office.[134] Tom Spangler, Legislative Counsel for the ADA, also expressed an interest in

127. 108 F.3d 1431 (D.C. Cir. 1997).

128. *Kolstad*, 108 F.3d at 1438.

129. 139 F.3d 958, 969 (D.C. Cir. 1998) (en banc).

130. *See* discussion of Circuit Judge Tatel's en banc dissent *infra* notes 163-75 and accompanying text.

131. *Kolstad*, 108 F.3d at 1434.

132. *Id*. The ADA is a Chicago-based professional association. The Washington branch exists to represent the Association's interests before Congress and the federal agencies. *Id*.

133. *Id*.

134. *Kolstad*, 108 F.3d at 1434. Kolstad had previously spent six years with the Office of the General Counsel of the Department of Defense. In that capacity, she drafted proposed legislation, prepared testimony for congressional hearings, and represented the Department's interests on Capitol Hill. *Id.* at 1434.

succeeding to O'Donnell's positions.[135] Spangler had been with the ADA for less than two years.[136] He had also received favorable work evaluations from Wheat.[137]

Despite his authority to make the appointment, Wheat requested that Executive Director William Allen make the final promotion decision.[138] Subsequently, Wheat set to work revising the "Position Description Questionnaire" for the upcoming vacancy. The revised questionnaire included verbatim several of the same responsibilities that had been listed in the job description that was used to hire Spangler for his then-current position.[139] In addition, three months prior to O'Donnell's retirement, Wheat completed a performance evaluation of Spangler.[140] The evaluation stated that one of Spangler's "goals" was to "provide management and administrative support . . . for the Council on Government Affairs."[141] At the time, this specific task was being performed by O'Donnell.[142] After the job was formally posted, Kolstad and Spangler applied for the position.[143] Ultimately, Allen promoted Spangler based on Wheat's recommendation.[144]

After exhausting administrative remedies, Kolstad brought a Title VII action against the ADA for sex and gender discrimination, seeking equitable remedies and damages.[145] She alleged that the application process was a sham, and that Spangler was chosen before the formal selection process even began.[146] The United States District Court for the District of Columbia Circuit found that the stated reasons for promoting Spangler were pretextual and awarded Kolstad back pay in the amount of $52,718.[147] The district court denied Kolstad's motion for instatement and the payment of attorney's fees.[148]

135. *Kolstad*, 108 F.3d at 1434.

136. *Id*.

137. *Id*. His prior work experience included five years of lobbying on behalf of the National Treasury Employees Union. *Id*.

138. *Id*.

139. *Kolstad*, 108 F.3d at 1434.

140. *Id*. at 1434-35.

141. *Id*.

142. *Id*.

143. *Kolstad*, 108 F.3d at 1435. Kolstad applied only after Wheat had refused to meet with her to discuss her interest in the position. *Id*. Kolstad also introduced evidence that Wheat had told sexually offensive jokes and had referred to prominent professional women in derogatory terms. *Kolstad*, 527 U.S. at 531.

144. *Kolstad*, 108 F.3d at 1435.

145. *Kolstad*, 527 U.S. at 531.

146. *Id*.

147. Kolstad v. Am. Dental Ass'n, 912 F. Supp. 13, 15 (D.C. 1996).

148. *Kolstad*, 912 F. Supp. at 16.

Most significantly, the district court refused to instruct the jury regarding punitive damages.[149]

The United States Court of Appeals for the District of Columbia Circuit found that the district court erred in refusing to instruct the jury on punitive damages.[150] This court first determined that the jury could have reasonably concluded that Kolstad proved intentional sex discrimination by the ADA.[151] Next, the court noted that the damages remedies were added to Title VII as a means of deterring "unlawful harassment and intentional discrimination in the workplace."[152] To advance this congressional goal, the court looked to the plain language of the statute.[153] It pointed out that this language tracked the standard courts had formulated to sustain punitive damages awards under other civil rights statutes, including 42 U.S.C. §§ 1981 and 1983.[154] The court

149. *Kolstad*, 108 F.3d at 1435.

150. *Id*. at 1437.

151. *Id*.

The allocation of burdens and order of proof in Title VII discriminatory treatment cases was set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 793 (1973). Under the *McDonnell Douglas* standard, the plaintiff has the initial burden of proving a prima facie case of discrimination. *Id*. at 802. If the plaintiff succeeds in establishing the prima facie case, an inference of discrimination is raised. The employer may rebut the discrimination with evidence of legitimate, nondiscriminatory reasons for rejecting the plaintiff. *Id.* The plaintiff bears the ultimate burden of persuading the jury of intentional discrimination. *Id.* at 802-05. "[R]ejection of the defendant's proffered [nondiscriminatory] reasons, *will* permit the trier of fact to infer the ultimate fact of intentional discrimination . . . ." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (emphasis added).

Because the district court found that Kolstad had met her prima facie case of discrimination, the ADA had the burden of presenting evidence of nondiscriminatory reasons for denying her the promotion. *Kolstad*, 108 F.3d at 1436. The ADA argued that even if Spangler had been preselected for the promotion, a reasonable jury could not have found that Kolstad was a victim of sex discrimination, because evidence supported other nondiscriminatory reasons for her rejection. *Id*. The district court, however, found that Kolstad had presented sufficient evidence for a jury to conclude that these "proffered nondiscriminatory reasons" were actually pretexts. *Id*. at 1437. The fact finder could therefore infer discrimination. *Id*. at 1436.

152. *Kolstad*, 108 F.3d at 1437 (citing 42 U.S.C. § 1981 (note) (1994)).

153. *Id*.

154. *Id*. Section 1981 provides: "All person within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts" and "to the full and equal benefit of all laws . . . as is enjoyed by all white citizens." 42 U.S.C. § 1981(a). This statute was originally section 1 of the Civil Rights Act of 1866. BELTON & AVERY, *supra* note 21, at 29. Today, § 1981 is an integral part of employment law regime, as it prohibits discrimination on the basis of race in public and private employment. *Id*. Section 1983 is unlike § 1981 in that rather than providing substantive rights, it gives individuals a cause of action for the deprivation of substantive rights guaranteed by other federal laws and the Constitution. *Id*. at 29-30.

In *Smith v. Wade*, the United States Supreme Court set forth the standard for awarding punitive damages under 42 U.S.C. § 1983. 461 U.S. 30, 56 (1983). The case involved an inmate who sued a prison guard, alleging that the guard had failed to protect him from violent physical

explained that in actions brought pursuant to these sections, evidence sufficient to establish an intentional violation of protected civil rights may also support a punitive damages award.[155] The court adopted this standard of proof for claims arising under 42 U.S.C. § 1981a as well.[156] The circuit court therefore concluded that because Kolstad could have proved intentional discrimination, the jury should have been instructed that it could also consider a punitive damages award if it found that the employer acted with malice or reckless indifference to Kolstad's federally protected rights.[157]

Subsequently, the United States Court of Appeals for the District of Columbia Circuit granted en banc review.[158] In a 6-5 decision, the court reversed the panel and affirmed the district court's denial of a jury instruction on punitive damages.[159] Looking at the two-tiered structure of the damages standard in 42 U.S.C. § 1981a, the court noted that there was "one standard for basic liability" and "another for the exceptional remedy of punitive liability."[160] Therefore, before the punitive damages issue could go to the jury, the court said evidence of the defendant's culpability must exceed what is necessary to show intentional discrimination.[161] Based on statements in the legislative history of the 1991 Act, as well as the Supreme Court's discussion of the punitive damages standard for violations of 42 U.S.C. § 1983 in *Smith v. Wade*, the court concluded that an award of punitive damages under 42 U.S.C. § 1981a(b)(1) also required evidence of "egregious conduct."[162]

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and sexual abuse and had therefore violated his Eighth Amendment rights. *Id*. at 32. The language of 42 U.S.C. § 1983 does not include a punitive damages remedy, so the Court looked to the common law. *Id*. at 34-35. The Court held that punitive damages are available in an action brought pursuant to § 1983, when the defendant's conduct is "motivated by evil motive or intent, or when it involve[d] reckless or callous indifference to the federally protected rights of others." *Id*. at 56.

155. *Kolstad*, 108 F.3d at 1438.

156. *Id*.

157. *Id*.

158. *Kolstad*, 139 F.3d at 960.

159. *Id*.

160. *Id*. at 962.

161. *Kolstad*, 139 F.3d at 962. The majority based this finding partially on the fact that Congress had included a "special standard" in a separate provision for the imposition of punitive damages. *Id*. at 961.

162. *Kolstad*, 139 F.3d at 965. The majority referenced many of the same statements in the legislative history of the 1991 Act that the lower courts had referenced in interpreting 42 U.S.C. § 1981a to include an element of "egregiousness" in the punitive damages standard. *Id*. at 962. *See also supra* discussion accompanying note 121.

Although the panel majority interpreted the language and interpretations of §§ 1981 and 1983 to mean that a jury instruction on punitive damages should be available in a § 1981a action upon the mere proof of the intentional discrimination, the en banc court, noted that there were mixed interpretations of the punitive damages standard under § 1981. *Kolstad*, 139 F.3d at 962-63. It pointed out that four courts have construed § 1981 to require proof of egregious conduct

Circuit Judge Tatel, who had written the panel's majority opinion, dissented from the en banc decision.[163] He found the majority's decision "nullifie[d] the plain language of section 1981a(b)(1)'s reckless indifference standard," and conflicted with the punitive damages standard set forth in *Smith v. Wade*.[164] Judge Tatel read *Smith v. Wade* as requiring that the defendant have "subjective consciousness of risk . . . of unlawfulness."[165] He concluded that 42 U.S.C. § 1981a(b)(1) allows a punitive damages award if "the employer knew of Title VII's prohibitions and acted regardless or disregarded a substantial risk of violating the statute."[166] Judge Tatel explained that to determine liability, the court should ask, "Did the employer intentionally take account of sex?"[167] To determine if the reckless indifference standard has been met, the court should then ask, "When the employer discriminated, was it aware of its legal obligations?"[168] The imposition of these two separate inquiries, Judge Tatel said, would give employers the opportunity to introduce evidence "to demonstrate that they did everything they could to comply with the law and were therefore not recklessly indifferent to their legal obligations."[169]

Judge Tatel said that there were two categories of cases in which employers might not meet the reckless indifference standard. The first category included cases where the employer did intend the discriminatory act, but did not know that the act violated the law.[170] The second category included cases where an agent used his or her position to commit an intentional act of discrimination.[171] Judge Tatel noted that the emphasis in the latter category of cases is on the employer's awareness of its legal obligations.[172] If the person discriminating is "the same as the employer" or is "the employer's entire decision-making apparatus," there would be "no difference between the

beyond mere discrimination, while others have found proof of intentional discrimination to be sufficient for a punitive damages instruction. *Id*. at 963. The en banc court also noted that the text of § 1981a was distinguishable from the text of § 1981, which does not include a separate provision for punitive damages. *Id*. *See also* discussion of *Smith v. Wade supra* note 154.

163. *Kolstad*, 139 F.3d at 970 (Tatel, J., dissenting). Chief Judge Edwards and Circuit Judges Wald, Rogers and Garland joined his dissent. The Supreme Court majority adopted the views expressed in Tatel's dissent in large part, although ultimately it found that something more than intentional discrimination was required before a plaintiff would be eligible for a punitive damages award. *See* discussion *infra* Part IV.C.2.a-b.

164. *Kolstad*, 139 F.3d at 971.

165. *Id*. at 971 (citing *Smith v. Wade*, 461 U.S. at 38 n.6).

166. *Id*.

167. *Kolstad*, 139 F.3d at 973.

168. *Id*.

169. *Id*.

170. *Id*. at 973-74.

171. *Id*. at 974.

172. *Kolstad*, 139 F.3d at 974.

employer's awareness of its legal obligations and the employee's."[173] "But where a gap exists in the agency relationship between the agent and the entity being held liable," an employer could argue that it should not be liable in punitive damages because it "had undertaken good-faith efforts to comply with Title VII."[174]

Judge Tatel applied the reckless indifference standard to the case and found that the jury should have been allowed to consider punitive damages because (1) the ADA was found to have intentionally discriminated against Kolstad, (2) the ADA never argued that it made good-faith efforts to comply with the law, (3) the case did not involve complex or novel issues of liability, and (4) the decision to deny the promotion was made by the ADA's executive director, rather than a low-level employee.[175]

2. The Majority Opinion—Justice O'Connor

a. Punitive Damages May be Imposed Absent a Showing of "Egregious" or "Outrageous" Discrimination.[176]

In a 7-2 decision written by Justice O'Connor, the United States Supreme Court vacated the D.C. Circuit's en banc decision.[177] Justices Stevens, Scalia, Kennedy, Souter, Ginsburg and Breyer joined this part of the opinion.[178] Although the Court found that Title VII requires plaintiffs to present more than proof of intentional discrimination, which is the standard for receiving compensatory damages, it rejected the idea that proof of "egregious" conduct is necessary.[179] The terms "malice" and "reckless indifference" were found not to pertain to the employer's awareness that it is discriminating, but to its knowledge that it may be acting in violation of federal law.[180]

The Court noted that its emphasis on the employer's state of mind was consistent with the 1991 Act's distinction between equitable and compensatory relief as well, because compensatory damages are limited to cases of

173. *Id*.

174. *Id*. at 974. Judge Tatel noted that some of these "good-faith efforts" might include, hiring "staff and managers sensitive to Title VII responsibilities, . . . requiring effective EEO training, or . . . developing and using objective hiring and promotion standards." *Id*.

175. *Kolstad*, 139 F.3d at 975.

176. This section correlates with Part II-A of the majority opinion. *Kolstad*, 527 U.S. at 533. Part I-A of the majority opinion set forth the facts of the case. *Id.* at 530. Part II-B set forth the procedural posture of the case. *Id*. at 531.

177. *Kolstad*, 527 U.S. at 546.

178. *Id*. at 528.

179. *Kolstad*, 527 U.S. at 534-35 ("We credit the en banc majority's effort to effectuate congressional intent, but, in the end, we reject its conclusion that eligibility for punitive damages can only be described in terms of an employer's 'egregious' misconduct.").

180. *Id*. at 535.

"intentional discrimination."[181] In addition, the Court explained that the further qualification placed on punitive damages in 42 U.S.C. § 1981a(b)(1) was representative of Congress' intent to narrow the class of cases for which punitive damages are available to a subset of those involving intentional discrimination.[182]

The Court looked to its decision in *Smith v. Wade* to assist in determining the meaning of the terms "malice" and "reckless indifference" as used in 42 U.S.C. § 1981a(b)(1).[183] In *Smith v. Wade*, the Court found that proof of "evil motive or intent" or "reckless or callous indifference to federally protected rights" would support a punitive damages award.[184] The Supreme Court also found in *Smith v. Wade* that the "intent standard" required "a 'subjective consciousness' of a risk of injury or illegality and 'a criminal indifference to civil obligations.'"[185] Applying this standard to 42 U.S.C. § 1981a, the Court concluded that "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages."[186] It noted that although egregious conduct is evidence of the requisite mental state, 42 U.S.C. § 1981a(b)(1) does not limit plaintiffs to this form of evidence.[187]

The Court also noted that because this interpretation of the language of 42 U.S.C. § 1981a requires employers to know they are violating federal law, there will be circumstances in which intentional discrimination will not give rise to punitive damages liability.[188] Such circumstances include those where the employer is not familiar with the federal prohibition or discriminates with the belief that such discrimination is lawful.[189] Other circumstances might include those in which the underlying theory of discrimination is novel or the employer reasonably believes that the discrimination satisfies a bona fide occupational qualification defense.[190]

181. *Id*.

182. *Id*.

183. *Kolstad*, 527 U.S. at 535-36.

184. *Id*. at 536.

185. *Id*.

186. *Id.*

187. *Id.* at 538-39 (citing the EEOC's *Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991*, which lists "the degree of egregiousness and nature of the respondent's conduct" as one piece of evidence tending to show malice or reckless disregard).

188. *Kolstad*, 527 U.S. at 536-37 (adopting a position similar to that taken by Circuit Judge Tatel in his dissent from the en banc decision).

189. *Id*.

190. *Id*. at 536-37. The Bona Fide Occupational Qualification is set forth in § 703(e)(1) of Title VII, and provides:

> [I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of religion, sex, or national origin in those certain instances

b. Imputing Acts of Managerial Agents to Employers & the "Good-Faith Efforts" Defense[191]

After explaining the burden of proof that a plaintiff must carry in order to receive punitive damages under the 1991 Act, Justice O'Connor went on to set forth a standard for imputing vicarious liability to employers.[192] Chief Justice Rehnquist and Justices Scalia, Kennedy and Thomas joined this part of the opinion.[193] In support of its decision to address the vicarious liability issue, the majority referenced the en banc dissent and majority opinions, which had discussed the limits that agency principles place on vicarious liability for punitive damages.[194] The majority also cited the Solicitor General's amicus brief and responses during oral argument.[195] The majority viewed the legal

> where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

42 U.S.C. § 2000e-2(e)(1). This defense has been construed as an "extremely narrow exception" to Title VII, which cannot be based upon "stereotypical characterizations." Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).

191. This section correlates with Part II-B of the majority opinion; *see Kolstad*, 527 U.S. at 535.

192. *Kolstad*, 527 U.S. at 535.

193. *Id*. at 528.

194. *Id.* at 540.

In the en banc dissent, Judge Tatel cited *Meritor* for the proposition that employers are generally held liable in traditional Title VII cases for injuries caused by employees acting within the scope of employment. Therefore, juries attribute the employee's discrimination on the basis of a prohibited criterion to the employer. *See Kolstad*, 139 F.3d at 974. However, Tatel noted that "attribution of an employee's state of mind differs when the jury turns to the question of punitive damages." *Id*. This is because punitive damages are intended to punish employers for their employees' discriminatory acts. *Id*. Noting that the emphasis is on the employer's knowledge of its legal obligations, the dissenting opinion found it necessary for a jury to examine the employer's awareness of the law where the employee making the hiring or firing decision does not constitute the employer's "entire decision-making apparatus." *Id*. The en banc dissent also noted that a jury determination is not necessary when the person discriminating is "the same as the employer." *Id.*

195. *Kolstad*, 527 U.S. at 540-41.

Solicitor General Seth Waxman addressed the applicability of such agency principles during oral argument in response to a series of questions posed by the Court. The Court's initial question was whether a company had to be conscious of the wrongful activity, or if knowledge by some lesser employee would suffice for punitive damages liability under Title VII and the ADA. General Waxman noted that the lower courts were unanimous in the view that individuals may not be sued for Title VII violations, and therefore the defendant will always be the employer. He then said the question as to who had to be "conscious" of the wrongdoing was "not really presented." General Waxman attempted to voice his agreement with the petitioner's attorney, who had noted that the culpable officers were highest-ranking officials of the respondent's association. After being asked to enunciate a principle, he referenced the agency principle in the Restatement (Second) of Agency, section 217C(c), which provides that an employee's conduct may be imputed to the employer if the agent is employed in a managerial capacity and acts within the scope of his employment. He advocated the position that an employer should be liable in

standard for imputing liability to an employer to be "subsumed" by the question presented.[196] Nevertheless, the Court refrained from applying the vicarious liability principles to the facts of the case.[197]

The Court began its analysis by looking to the limits that common law agency principles place on the imposition of vicarious liability for punitive damages awards.[198] As it had in *Meritor*, *Ellerth* and *Faragher*, the Court stated it would interpret Title VII according to these agency principles.[199] In support of its decision to impose limits on vicarious liability in punitive damages, the Court stated that Congress had formulated the Civil Rights Act of 1991 in such a way as to leave intact the limits on employer liability that were established in *Meritor*.[200] Recognizing that jurisdictions had advanced different views with respect to this issue, the majority said it would look to the general common law of agency, as opposed to any individual state's law.[201]

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punitive damages when an employee meets the requirements of subsection (c) and engages in an action that results in tangible employment consequences. United States Supreme Court Official Transcript, Kolstad v. Am. Dental Ass'n, 527 U.S. 526 (1999) (No. 98-208), 1999 WL 130627.

196. *Kolstad*, 527 U.S. at 540.

197. *Id*.

198. *Kolstad*, 527 U.S. at 541.

Nearly a century before Congress passed the Civil Rights Act of 1991, differing views regarding the propriety of holding principals liable in punitive damages for the acts of servants had divided American courts into two opposing camps. CHARLES T. MCCORMICK, LAW OF DAMAGES § 80, at 282-83 (1935). On one side was the view that personal fault should exist in cases seeking to impose liability in punitive damages. *Id.* Those opposing the imposition of punitive damages on employers for the unauthorized acts of their agents believed that so far as the idea of punishment included the purposes of "vengeance or retribution," there would be little justification for punishing the master for the willful or wanton conduct of the agent. *Id*. In the opposing camp were those advocating the doctrine of legal equivalence, which imputes liability for the acts of the agent to the master as a means of deterrence. *Id.* at 284. Ultimately, those courts opposing liability formulated a rule that punitive damages may not be assessed against a principal for the acts of his subordinate agent, unless the principal has participated in or ratified the "subordinate" agent's wrongdoing. This rule was adopted by the Supreme Court in *Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101, 107 (1893).

199. *Kolstad*, 527 U.S. at 541-42.

200. *Id.* at 542. In *Meritor*, the Court found that employers would not always be held "strictly liable" for acts of sexual harassment by supervisors. *Meritor*, 477 U.S. at 77. *See* discussion *supra* Part III.A.

201. *Kolstad*, 527 U.S. at 542. For many years, the prevailing view among the states has been that an employer who is liable for actual damages may also be liable for punitive damages. In other words, if an employee commits a malicious act while acting within the scope of employment then punitive damages may be imputed. 1 LINDA L. SCHLUETER, PUNITIVE DAMAGES § 4.4(B)(2)(a), at 179 (3d. ed. 1995) (noting that the view adopted in the Restatement of Agency is more conservative). *But cf.* 2 JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES L & PRAC § 24.02 (1999) (noting that a large number of jurisdictions require more than proof that an agent was acting within the "course of employment" at the time of the wrongful act in order to impose vicarious liability).

The Court looked to the Restatement (Second) of Agency, section 217C, which strictly limits the circumstances under which an agent's misconduct may be imputed to the principal for the purposes of awarding punitive damages.[202] Section 217C makes it proper for punitive damages to be awarded against an employer because of an act by an employee if:

> (a) the principal authorized the doing and the manner of the act, or
>
> (b) the agent was unfit and the principal was reckless in employing him, or
>
> (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
>
> (d) the principal or a managerial agent of the principal ratified or approved the act.[203]

The majority focused on subsection (c), briefly discussing what it may mean to work in a "managerial capacity" and what actions may be considered "in the scope of employment."[204] The Court found "no good definition of what constitutes a 'managerial capacity.'"[205] It only stated that a fact-intensive inquiry must be used in determining whether an employee meets this description.[206] The fact-intensive inquiry should include review of the type of authority an employee is given and the amount of discretion the employee has in executing his or her authority.[207] Referencing the examples provided in the Restatement, the Court noted that in order to be acting in "a managerial capacity," employees must be "important," but they do not have to be the "top management, officers, or directors."[208]

As it had one year earlier in *Ellerth* and *Faragher*, the Court looked to sections 228 and 230 of the Restatement (Second) of Agency to gain an understanding of what conduct is considered to be within the "scope of employment."[209] These sections provide that even intentional, "specifically forbidden" torts are within the "scope of employment" if the conduct is "the kind [the employee] is employed to perform," "occurs substantially within the authorized time and space limits," and "is actuated, at least in part, by a

202. *Kolstad*, 527 U.S. at 542-43.

203. RESTATEMENT (SECOND) OF AGENCY § 217C (1958).

204. *Kolstad*, 527 U.S. at 543.

205. *Id*. (citing 2 GHIARDI & KIRCHER, *supra* note 201, § 24.05, at 14).

206. *Id*. (citing 1 SCHLUETER, *supra* note 201, § 4.4(B)(2)(a), at 182).

207. *Id*. *at* 543.

208. *Id*. at 543 (citing 2 GHIARDI & KIRCHER, *supra* note 201, § 24.05, at 14). The cases discussed in the referenced portion found employees to be working in a "managerial capacity" based on such factors as (1) possession of supervisory or decision-making authority and (2) responsibility for running a business or department. 2 GHIARDI & KIRCHER, *supra* note 201, § 24.05, at 14-15. The title conferred on an agent, however, is not important to this analysis. *Id*.

209. *Kolstad*, 527 U.S. at 543-44.

purpose to serve" the employer.[210] The majority found that a strict application of these "scope of employment" principles would conflict with the principle that it is "improper . . . to award punitive damages against one who himself is personally innocent and therefore liable only vicariously."[211] Furthermore, the Court feared that the application of the Restatement's scope of employment rule would deter employers from taking a proactive approach to the prevention of sexual harassment.[212] It would generate concern that the "malice" or "reckless indifference" standard in 42 U.S.C. § 1981a penalized employers who educated themselves and their employees on Title VII prohibitions.[213] The Court found this would be contrary to Title VII's underlying purposes.[214] The majority cited its 1998 decision in *Faragher* for the proposition that Title VII's prophylactic goal is to avoid harm, not to provide redress.[215] Similarly, the Court cited its 1998 decision in *Ellerth* for the idea that "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms."[216] As urged by Circuit Judge Tatel in the en banc dissent, the Court concluded that the "good-faith efforts" taken by employers to prevent discrimination should be viewed as evidence of the fact that they had not acted with a "reckless" or "malicious" state of mind.[217]

With these concerns in mind, the majority adopted a modified meaning of what it means to be acting within the "scope of employment," and formulated a new rule for holding employers vicariously liable in punitive damages.[218] The majority held, "[A]n employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good-faith efforts to comply with Title VII.'"[219] The goal behind this rule is to "motivat[e] employers to detect and deter Title VII violations."[220] The Court remanded the case for a determination of whether Kolstad could identify facts sufficient to support an inference that the requisite mental state could be imputed to the ADA.[221]

210. *Id*. at 543 (citing RESTATEMENT (SECOND) OF AGENCY §§ 228(1), 230 cmt. b (1958)).

211. *Id*. at 544 (citing RESTATEMENT (SECOND) OF TORTS § 909 cmt. b (1979)).

212. *Id*.

213. *Id*. at 544-45; *see also* Brief of Amicus Curiae of the Equal Employment Advisory Council in Support of Respondent, Kolstad v. Am. Dental Ass'n, 527 U.S. 526 (1999), No. 98-208, 1999 WL 21283 ("[I]f an employer had made efforts to familiarize itself with Title VII's requirements, then any violation of those requirements by the employer can be inferred to have been committed 'with malice or with reckless indifference to the law's requirements.'").

214. *Kolstad*, 527 U.S. at 545.

215. *Id*.

216. *Id*.

217. *Id*. at 544.

218. *Id*. at 545.

219. *Kolstad*, 527 U.S. at 545 (citing Circuit Judge Tatel's dissent from the en banc opinion).

220. *Id*. at 546.

221. *Id*.

3. The Concurring and Dissenting Opinions

a. Chief Justice Rehnquist and Justice Thomas

Dissenting as to the standard of liability; Concurring as to the standard for imputing vicarious liability in punitive damages to the employer

Chief Justice Rehnquist issued a separate dissenting opinion with respect to the first part of the majority opinion, which Justice Thomas joined.[222] The dissent argued that the two-tiered scheme of Title VII monetary liability indicated that there was an egregiousness requirement that reserved punitive damages for the worst cases of intentional discrimination.[223] However, because the Court had rejected their interpretation of 42 U.S.C. § 1981a(b)(1), the Justices joined the second part of the majority opinion, which they viewed as placing "a significant limitation, and in many foreseeable cases a complete bar, on employer liability for punitive damages."[224]

b. Justices Stevens, Souter, Ginsburg and Breyer

Concurring as to the standard of liability; Dissenting as to the standard for imputing vicarious liability in punitive damages to the employer

Although Justice Stevens joined the first part of the majority's opinion, which addressed the standard of liability intended by 42 U.S.C. § 1981a, he also wrote a separate concurrence addressing this issue. Most significant, however, was Justice Stevens' dissent with respect to the standard for imputing vicarious liability in punitive damages to employers. Justices Souter, Ginsburg and Breyer joined in his concurrence and dissent.

In his concurrence, Justice Stevens noted that the number of Title VII and ADA violations committed unknowingly should be declining, as the mandates of the federal laws become ingrained in employers' minds.[225] In light of this increasing awareness of discrimination laws, he thought it would have been perverse for Congress to require more than a willful violation of the law to

222. *Id*. at 547.

223. *Id*.

224. *Kolstad*, 527 U.S. at 547.

225. *Id*. at 550.

> As more employers come to appreciate the importance and the proportions of those statutes' [Title VII & the ADA] mandates, the number of federal violations will continue to decrease accordingly. But at the same time, one could reasonably believe, as Congress did, that as our national resolve against employment discrimination hardens, deliberate violations of Title VII and the ADA become increasingly blameworthy and more properly the subject of 'social condemnation' . . . in the form of punitive damages.

Id.

trigger the punitive damages remedy for Title VII violations.[226] However, unlike the majority, Justice Stevens applied this "intentional violation" test to the ADA's acts of discrimination against Kolstad. He found that the evidence in the record would have supported a jury decision that the ADA had "willfully violated" Title VII.[227]

The supporting evidence included Kolstad's testimony that the ADA had taken a "tangible employment action" against her by denying her the job promotion.[228] The record also indicated that Kolstad was the more qualified candidate for the job and that the ADA's "decisionmakers" were senior executives who were known for their sexually offensive jokes and derogatory treatment of professional women.[229] Furthermore, Justice Stevens said, the record supported inferences that the executives deliberately refused to consider Kolstad's application, manipulated the job description, and conducted a "sham selection procedure."[230] Justice Stevens found there to be no bar on the ADA's liability for a number of reasons.[231] First, the ADA did not claim that the decisionmakers violated company policy or were not acting within the scope of employment, nor did the Association disavow the conduct of its executives.[232] In addition, neither the ADA, nor its decisionmakers, claimed ignorance of Title VII requirements or offered a "'good-faith reason' for believing that being a man was a legitimate requirement for the job."[233]

The dissent further criticized the majority's decision to discuss the applicability of agency principles in imputing punitive damages liability to employers.[234] Justice Stevens expressed strong disagreement with the Court's decision to "volunteer an opinion" on an issue that the parties did not brief and the facts of the case did not present.[235] He stressed that the respondent "expressly disavowed" the relationship of agency principles to the issue before the Court.[236] Upon questioning during oral argument, the respondent's counsel stated twice, "[W]e all agree here . . . that that precise issue is not before the Court."[237]

226. *Id*. at 550-51.
227. *Id*. at 551.
228. *Kolstad*, 527 U.S. at 551.
229. *Id*.
230. *Id.* at 551-52.
231. *Id*. at 552.
232. *Id*.
233. *Kolstad*, 527 U.S. at 552.
234. *Id*.
235. *Id*. at 553.
236. *Id*. at 552.
237. *Id*. at 552.

The petitioner's counsel, Eric Schnapper, was similarly reluctant to discuss the application of agency principles during oral argument. Schnapper pointed out that the consideration of such agency principles was not relevant due to the fact that "the culpable

Justice Stevens pointed to the fact that the two executives who made the decision not to promote Kolstad were the executive director of the ADA and the acting head of the Association's Washington office.[238] He reasoned that perhaps neither the parties, nor the eleven circuit judges, found the vicarious liability issue to be relevant because "promotion decisions are quintessential 'company acts.'"[239] Furthermore, the dissent pointed out a weakness in the majority's implication that Judge Tatel raised the agency issue in the circuit court. Justice Stevens noted that Judge Tatel also concluded that the case did not present circumstances where the vicarious liability arguments would be relevant.[240]

The dissent found the majority's decision to consider an "alternative defense[] of the judgment under review . . . not presented in the brief in opposition to the petition for certiorari," to conflict with the Supreme Court's own Rule 15.2, which provides the stipulations for filing a brief in opposition to a petition for certiorari.[241] The dissent also called into doubt the majority's reference to the Solicitor General's oral argument as support for its decision to address the vicarious liability issue.[242] Justice Stevens noted that the Solicitor General did not brief the agency issue and stated in oral argument that the issue "is not really presented here."[243] Upon further questioning, the Solicitor General stated that when a tangible employment consequence has occurred, 42 U.S.C. § 1981a incorporates the "managerial capacity" principles set forth in the Restatement (Second) of Agency.[244] The dissent thus found that because the majority had "tinkered" with the principles espoused by the Restatement, it had rejected the Government's interpretation of its own standard without giving it an opportunity to be heard.[245]

officials included the executive director of the defendant, the highest ranking official they had." Some members of the Court appeared to disagree, asserting their belief that under normal agency principles, where a corporation had a nondiscrimination policy in place and an employee violated that policy, the company would not be punished. Schnapper reminded the Court that the majority view is that punitive damages are not available against individuals for violations of Title VII. Therefore, the only avenue of relief is through the employer. United States Supreme Court Official Transcript, Kolstad v. Am. Dental Ass'n, 527 U.S. 526 (1999) (No. 98-208), 1999 WL 130627.

238. *Kolstad*, 527 U.S. at 552-53 (citing Circuit Judge Tatel's en banc dissent in *Kolstad*, 139 F.3d at 979).

239. *Id*.

240. *Id*. at 553 (citing the D.C. Circuit's panel decision in *Kolstad*, 108 F.3d at 1439).

241. *Id*. at 553.

242. *Id*. at 553.

243. *Kolstad*, 527 U.S. at 553; *see also* discussion of the Solicitor General's oral argument, supporting the dissenting opinion, *supra* note 195.

244. *Id*.

245. *Id*.

D. Application of Kolstad

Following is a discussion of the circuit court decisions that have most thoroughly discussed and attempted to apply the punitive damages standard set forth in *Kolstad*. These interpretations have occurred in cases arising under both Title VII and the ADA.[246]

1. *Blackmon v. Pinkerton Security & Investigative Services*, 8th Circuit, June 30, 1999[247]

Connie Blackmon was employed as a security guard for Pinkerton Security.[248] Her coworkers, an all-male group, constantly used lurid, sexual language in her presence.[249] Blackmon complained repeatedly to her coworkers and three successive levels of officers, including her shift supervisor, the supervisor of security personnel, and the district manager.[250] Rather than responding to her complaints, the officers retaliated against Blackmon.[251] When she finally took her complaints to the district manager,

246. *See also* Henderson v. Simmons Foods, Inc., 217 F.3d 612, 619 (8th Cir. 2000) (finding that the employer exhibited deliberate indifference to the plaintiff's rights when the plaintiff reported several incidents of verbal abuse and sexual assault to supervisors and the employer nevertheless placed the plaintiff in close proximity to the harasser and ignored her repeated requests for transfer); Weissman v. Dawn Joy Fashions, Inc., 214 F.3d 224, 235 (2d Cir. 2000) (vacating a punitive damages award, where the court found that the employer fired the plaintiff after his heart attack due to the need to keep up with business and not out of "malice or with reckless indifference" to federal law); United States v. EEOC, 213 F.3d 600, 610-11 (11th Cir. 2000) (affirming the award of punitive damages to three waitresses who were forced to stop waiting tables in their fifth month of pregnancy pursuant to a company policy, which certain managers knew to be in violation of federal law); EEOC v. Indiana Bell Tel. Co., Inc., 214 F.3d 813, 820-22 (7th Cir. 2000) (finding that the evidence supported a reasonable basis for a jury to find in favor of the Commission, where the employer received approximately 14 complaints of sexual harassment against one employee in a 20-year period and nevertheless failed to appropriately discipline the employee); Gile v. United Airlines, Inc., 213 F.3d 365, 375 (7th Cir. 2000) (vacating the punitive damages award because the employer lacked the culpable state of mind when it wrongly believed that the plaintiff's condition was not a disability and therefore neglected to respond to the plaintiff's request for a reasonable accommodation under the ADA) (dissenting judge arguing that the Regional Medical Director, who was responsible for handling accommodation requests, was aware of the employer's ADA policy and nevertheless responded with "callousness" to the plaintiff's request for an accommodation).

247. Blackmon v. Pinkerton Sec. and Investigative Serv., 182 F.3d 629 (8th Cir. 1999).

248. *Id*. at 631.

249. *Id*.

250. *Id*.

251. *Blackmon*, 182 F.3d at 631-34. In response to Blackmon's complaints about the demeaning conduct of her coworkers, several officers subjected Blackmon to additional unacceptable harassment. *Id.* For example, her shift supervisor told that she was upset because "she wasn't getting any sex." *Id.* at 631. The supervisor of all security personnel at her site told Blackmon he "did not promote women on his account, he got rid of them." *Id.* The retaliatory acts taken against the plaintiff are too numerous to set forth fully. On one particular occasion,

the officials conducted a "sham investigation," during which they actually began investigating Blackmon.[252] Blackmon was eventually fired for missing a training session.[253] She sued for sexual harassment and retaliation in violation of Title VII.[254] Among other relief, the jury awarded her $100,000 in punitive damages.[255] The district court withdrew the punitive damages award.[256]

On appeal, Circuit Judge McMillian remanded for reinstatement of punitive damages.[257] The court found that the company had acted with malice and reckless indifference to Blackmon's Title VII rights when it: (1) failed to investigate and attempt to promptly remedy her grievances, even after she had complained to three levels of supervisors; (2) repeatedly retaliated against her by reprimanding and demoting her, fostering a hostile environment, and ultimately firing her; (3) conducted a sham investigation during which it solicited information against her; and (4) tried to escape liability for retaliating against her by firing another worker simultaneously.[258] The court also noted that at least two of Blackmon's supervisors were active participants in the harassment.[259] Judge McMillian concluded that the actions taken by the respondent to address Blackmon's concerns were "clearly inadequate" and "disproportionate" to the seriousness of the employee's complaints.[260]

2. *EEOC v. Wal-Mart Stores, Inc.*, 10th Circuit, Aug. 23, 1999[261]

Wal-Mart hired Eduardo Amaro knowing he was hearing-impaired and would require the aid of an interpreter to fulfill certain job functions.[262] In

Blackmon was reprimanded by her shift supervisor for not completing certain job tasks that her male coworkers had also failed to complete without criticism. *Id*. In addition, the supervisor of security personnel demoted Blackmon after she missed a day of work due to a migraine headache. *Blackmon*, 182 F.3d at 632. Blackmon had tried to contact the supervisor according to company policy, but was unable to reach him. *Id.* As a last resort, she had left a message with another supervisor. *Id*.

252. *Blackmon*, 182 F.3d at 633.

253. *Id*. at 634. In order to protect Pinkerton Security from liability, the district manager and supervisor also fired a male employee who had missed the meeting. *Id.*

254. *Id.* at 635.

255. *Id*. at 635.

256. *Blackmon*, 182 F.3d at 635.

257. *Id.* at 637.

258. *Blackmon*, 182 F.3d at 636. The court noted that it is not always improper to include information about the complaining employee in the investigation, and said that such information can be helpful in even an even-handed, good-faith investigation. *Id.* The problem here was that this investigation consisted almost exclusively of gathering unfavorable information about the plaintiff. *Id.*

259. *Blackmon*, 182 F.3d at 636.

260. *Id.* at 637.

261. EEOC v. Wal-Mart Stores, Inc., 187 F.3d 1241 (10th Cir. 1999).

262. *Id.* at 1243.

1993, Amaro refused to attend a mandatory training session where neither closed-captioning nor an interpreter was available to help him understand a video presentation.[263] After this incident, Amaro was demoted.[264] The store manager provided two reasons for this "job transfer," including (1) payroll cuts and (2) the belief that a maintenance job would involve "less communications" and would be "more simple" for Amaro.[265] Amaro was temporarily suspended when he requested that an interpreter explain the job transfer to him.[266] When the store manager did provide an interpreter one week later, it was in a meeting held to fire Amaro.[267] Amaro intervened in a suit filed by the EEOC and was awarded $75,000 in punitive damages in addition to other remedies.[268]

Wal-Mart appealed the award of punitive damages in light of *Kolstad*.[269] The Court of Appeals for the Tenth Circuit upheld the award.[270] The court found the store supervisor's testimony that he was familiar with the accommodation requirements of the ADA to support a conclusion that Wal-Mart intentionally discriminated in the face of a perceived risk that its action would violate federal law.[271] The court next found that, based on the amount of authority the assistant manager and store supervisor had over certain personnel matters, both were "managerial agents."[272] By their own admission, both of these employees had the ability to influence suspension, hiring and firing decisions.[273] Based on this authority, the court also found the employees to have been acting within the scope of their authority when they suspended and then terminated Amaro.[274] The court then addressed the "good-faith efforts" defense raised by Wal-Mart.[275] Although Wal-Mart had a written policy about discrimination, the court found the company had not educated its employees about the requirements of the ADA.[276] The assistant manager who originally reprimanded Amaro testified that she had received no training with

263. *Id.*
264. *Id.*
265. *Id.* at 1244.
266. *Wal-Mart*, 187 F.3d at 1244.
267. *Id.*
268. *Id.*
269. *Wal-Mart*, 187 F.3d at 1244. Wal-Mart argued that (1) the evidence was insufficient to support a finding that the suspension and termination were in willful disregard of Amaro's rights; (2) the supervisors who were responsible for the discriminatory conduct did not exercise sufficient corporate control to be agents; and (3) even if the supervisors were managerial agents, their conduct was contrary to company policy. *Id.*
270. *Wal-Mart*, 187 F.3d at 1249.
271. *Id.* at 1246.
272. *Id.* at 1247.
273. *Id.*
274. *Id.* at 1248.
275. *Wal-Mart*, 187 F.3d at 1248.
276. *Id.* at 1249.

respect to reasonable accommodations required under the ADA until years after the incident.[277] In addition, the personnel manager testified that she had never received training with respect to employment discrimination, did not have a copy of the ADA handbook, and had never discussed the ADA with any employees.[278] Finding a "broad failure" on the part of Wal-Mart to educate its employees, the court upheld the punitive damages award.[279]

3. *Deffenbaugh-Williams v. Wal-Mart Stores, Inc*., 5th Circuit, Aug. 31, 1999[280]

Julie Deffenbaugh, a white female sales associate of the Wal-Mart Hypermart in Arlington, Texas, began dating Truce Williams, a black Wal-Mart sales associate, in 1992.[281] After the store manager saw Deffenbaugh and Williams together, he invited Deffenbaugh to a meeting, in which she was told that she "would never move up with the company being associated with a black man."[282] This comment was made in the presence of the store manager and Deffenbaugh's then-current supervisor.[283] Deffenbaugh's performance evaluations had been favorable up to that point, but subsequently her supervisor accused her of "shopping on the clock."[284] Believing the reprimand to be pretextual, Deffenbaugh complained to the regional manager.[285] On January 14, 1994, the day after Deffenbaugh married Williams, she was terminated by her direct supervisor after being accused again of shopping during work hours.[286] In fact, it was Williams who had made a purchase using Deffenbaugh's discount card, but he was not working at the time.[287] Deffenbaugh sued Wal-Mart alleging that she had been discriminated against

277. *Id.*

278. *Id.*

279. *Id*.; *see also* Julie Brienza, *News & Trends: Wal-Mart Found Vicariously Liable in ADA Case*, 35 TRIAL 96 (Nov. 1999) (quoting appellate attorney for the EEOC who argued the case before the Tenth Circuit) ("Good-faith isn't promulgating a manual and then putting it on a shelf so it will get dusty . . . . We just hope it's [the decision] . . . going to clear things up in the future, and we won't have to deal with these arguments about who can impute liability and who cannot. Simply taking some prophylactic measures like promulgating a manual is not enough. You really have to train the employees.").

280. Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 188 F.3d 278 (5th Cir. 1999).

281. Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 585 (5th Cir. 1998), *reh'g* en banc *granted, opinion vacated sub nom* Williams v. Wal-Mart Stores, Inc., 169 F.3d 215 (5th Cir. 1999), *and opinion reinstated on reh'g*, 182 F.3d 333 (5th Cir. 1999), *and opinion vacated*, 188 F.3d 278, 286 (5th Cir. 1999) (en banc) (reinstating the jury verdict awarding punitive damages in light of Supreme Court's decision in *Kolstad*).

282. *Id.*

283. *Id.*

284. *Id*.

285. *Id.*

286. *Deffenbaugh-Williams*, 156 F.3d at 585.

287. *Id.* at 586.

for her decision to date and marry a black man.[288] A jury awarded her $100,000 in punitive damages.[289] The district court subsequently granted Wal-Mart's motion for judgment as a matter of law on the punitive damages issue.[290]

Both parties appealed, and in light of the Supreme Court's June 1998 decisions in *Faragher* and *Ellerth*, the Fifth Circuit upheld liability and reinstated the punitive damages award, ordering remittitur to $75,000.[291] Shortly after the Supreme Court had granted certiorari in *Kolstad*, the Fifth Circuit granted rehearing.[292] After *Kolstad* was decided, the en banc court reinstated the panel opinion, except as to punitive damages, and remanded to the panel to consider the impact of the Supreme Court's decision.[293] In this case, the Fifth Circuit determined that remand was unnecessary, and further found that, in light of *Kolstad*, judgment as a matter of law should not have been granted to Wal-Mart.[294] The Fifth Circuit determined that the district court had erred in finding that only the regional manager was "sufficiently high in the Wal-Mart hierarchy" to impute the actions to the employer.[295] The court found that Deffenbaugh's immediate supervisor, who had the authority to terminate her and was in charge of departments at six stores, was also a "managerial agent."[296] The court did not disturb its en banc decision that the supervisor's pretextual reprimands, which began after he learned of Deffenbaugh's interracial relationship, were motivated by malice or reckless disregard of her rights to engage in such a relationship.[297] The Fifth Circuit concluded by finding evidence that Wal-Mart encouraged employees to contact upper management with problems to be insufficient to prove that the employer had made "good-faith efforts" to comply with Title VII.[298] The court noted that Wal-Mart did not present evidence that it had responded to the employee's complaint.[299] In addition, Wal-Mart did not explain why one manager's statement on corporate disapproval of interracial dating went uncorrected by the other two managers present at the meeting.[300] The court remanded for reinstatement of punitive damages in the amount of $75,000.[301]

288. *Id.*
289. *Deffenbaugh-Williams*, 188 F.3d at 281.
290. *Id.*
291. *Id.*
292. *Id*.
293. *Id.*
294. *Deffenbaugh-Williams*, 188 F.3d at 286.
295. *Id.* at 285.
296. *Id.*
297. *Id.* at 286.
298. *Id.*
299. *Deffenbaugh-Williams*, 188 F.3d at 286.
300. *Id*.
301. *Id*.

4. *Ogden v. Wax Works, Inc.*, 8th Circuit, June 6, 2000[302]

As the sales manager for a Disk Jockey store in Sioux City, Iowa, Kerry Ogden reported directly to the district manager, Robert Hudson.[303] One of Hudson's job duties was the completion of sales manager evaluations, which were used for the purpose of awarding annual raises.[304] Ogden alleged that she was sexually harassed by Hudson, from June 1994 until September 1995.[305] Specifically, she presented evidence that Hudson had made three physical advances toward her, in addition to incessant propositions to accompany him on various romantic excursions.[306] Coworkers corroborated Ogden's testimony that her rejection of Hudson's sexual advances resulted in mistreatment in the form of constant criticism, verbal berating, and refusal to complete an evaluation in 1995 so that she could receive her annual raise.[307]

In August 1995, the plaintiff reported to the regional manager that Hudson had threatened her for refusing his advances.[308] The regional manager dismissed the Plaintiff's complaint as a "personality conflict," and subsequently investigated the Plaintiff's conduct, rather than that of Hudson.[309] After the investigation, Ogden was told that she could not continue working for Hudson.[310] Prior to her departure in September 1995, Ogden placed two calls to a vice president of the corporation regarding her complaints.[311] Neither call was returned. A jury awarded Ogden $260,000 in punitive damages and the district court denied the employer's motion for judgment as a matter of law.[312]

The United States Court of Appeals for the Eighth Circuit held that the evidence supported the punitive damages award.[313] The court noted that, based on the record, a reasonable jury could have found the district manager's conduct to be "sufficiently abusive" so as to manifest "malice or reckless disregard" for the plaintiff's rights.[314] Furthermore, Hudson testified that he

302. Ogden v. Wax Works, Inc., 214 F.3d 999 (8th Cir. 2000).

303. *Id.* at 1003.

304. *Id.*

305. *Id.*

306. *Id.*

307. *Ogden*, 214 F.3d at 1003.

308. *Id.* at 1004.

309. *Id.* at 1004-05.

310. *Id.* at 1005.

311. *Id.*

312. *Ogden*, 214 F.3d at 1002. The jury also awarded Ogden compensatory damages, and pre- and post-termination back pay. *Id.*

313. *Id.* at 1009.

314. *Id.* at 1009-10. It is meaningful to note that in this case, the court applied the standard of liability set forth in the Civil Rights Act of 1991 to the *harasser* rather than to the *employer*. As discussed *supra* in Part IV.B, the 1991 Act provides that punitive damages may be recovered if the "complaining party demonstrates that the *respondent* engaged in a discriminatory practice . . . with malice or with reckless indifference to . . . federally protected rights." 42 U.S.C. § 1981a(1)

not only was familiar with the company's sexual harassment policy, but he had also received "extensive training on sexual harassment issues."[315] The court therefore concluded that a jury could reasonably find that Hudson had "acted in the face of a perceived risk that his actions would violate federal law."[316]

With respect to the employer's vicarious liability, the court found that there was "substantial evidence" that Hudson was serving in a "managerial capacity and acted within the scope of his employ[ment]."[317] In support of its conclusion that Hudson was acting within the scope of his authority when he harassed Ogden, the court noted that he was responsible for setting the schedules and conducting performance evaluations for employees in several stores.[318] Furthermore, the court noted that the conduct was performed at least partially to serve the employer.[319] The court rejected the employer's argument that its sexual harassment policy and custom of encouraging employees to contact the home office with grievances was sufficient evidence that it had made "good-faith efforts to comply with Title VII."[320] Rather, the court emphasized the fact that the company "minimized" the plaintiff's complaints, performed a sham investigation that focused on the victim rather than the harasser, and forced the plaintiff to resign, while taking no disciplinary action toward the defendant.[321]

V. ANALYSIS

In the aftermath of *Kolstad*, the Supreme Court's discussion of the circumstances under which discriminatory managerial acts will be imputed to employers for the purpose of awarding punitive damages has been criticized for its lack of guidance and clarity. Evaluating the Court's discussion of agency principles, one practitioner has said, "This part of the opinion really raises more questions than it answers. The Court went off on an adventure of its own and came up with the vicarious liability part. It's shameful in a way

(emphasis added). In *Kolstad*, the Supreme Court interpreted this language as meaning that the "*employer* must at least discriminate in the face of a perceived risk that its actions will violate federal law." *Kolstad*, 527 U.S. at 536 (emphasis added). Therefore, while the outcome would have undoubtedly been the same if the court had looked to the employer's state of mind, the decision is arguably analytically flawed.

315. *Ogden*, 214 F.3d at 1010.

316. *Id.*

317. *Id.* (noting that Hudson's abusive conduct commonly occurred during working hours and on the employer's premises).

318. *Id.* (noting that by withholding performance evaluations, Hudson had the ability to deny raises).

319. *Id.*

320. *Ogden*, 214 F.3d at 1010.

321. *Id.*

because the Supreme Court was not really properly educated on this issue."[322] Other practitioners have expressed similar views. One commented, "[A]lthough the Court removed one bright-line objective screen against punitive damages, it added additional filters without explaining the details of their application."[323] Another said, "[T]he result of the Supreme Court's precipitous ruling is a decision analytically flawed and inconsistent with its own precedent."[324]

A. Vicarious Liability—An Issue Not Before the Court

The above criticisms are in line with the views of the dissenting Justices who criticized the majority's choice to address an issue that was neither briefed to the Court, nor relevant to the factual situation at hand.[325] The official transcript clearly indicates that both parties and the Solicitor General believed the vicarious liability issue to be irrelevant because the discriminatory conduct was committed by the two top-ranking officers of the ADA.[326] In other words, neither a lower-level manager, nor a mid-level supervisory agent had violated the plaintiff's Title VII rights. To understand this position, it is helpful to look back to the period following the Supreme Court's 1986 decision in *Meritor*.

After *Meritor*, commentators distinguished the discriminatory acts of supervisors from acts committed by certain managers and high-level officials.[327] The view was that top managers and high-level officials would exercise sufficient authority that their actions necessarily could be characterized as acts of the "employer."[328] In this environment, an examination of agency principles was not necessary.[329] This concept was extensively discussed in *Faragher* as the "proxy" theory.[330] In addition, in both *Faragher* and *Ellerth*, the Court found nothing "remarkable" about the fact that employers had been routinely held liable for discriminatory

322. Julie Brienza, *Supreme Court Makes Punitive Damages for Job Bias Harder to Get*, 35 TRIAL 16 (Sept. 1999) (quoting Jeffrey Needle, Chair of the Employment Rights Section of the Association of Trial Lawyers of America (ALTA), who also prepared the amicus brief submitted to the Supreme Court on behalf of the ALTA).

323. Donald M. Falk, *In Focus: Supreme Court Review*, NAT'L L.J., Aug. 16, 1999, at B9.

324. John A. Beranbaum, *Supreme Court Establishes New Defense to Punitive Damages Claims*, 7 No. 6 EMPLOYMENT L. STRATEGIST 1 (Oct. 1999).

325. *Kolstad*, 527 U.S. at 553; *see also* discussion of the dissenting opinion *supra* Part IV.C.3.b.

326. *See* discussion of statements made during Oral Argument by Solicitor General *supra* note 195; discussion of statements made during Oral Argument by petitioner's attorney *supra* note 237; discussion of the Justice Stevens' dissenting opinion *supra* Part IV.C.3.b.

327. MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 254 (1988).

328. *Id.*

329. *Id.*

330. *Faragher*, 524 U.S. at 789-90; *see also* discussion of the "proxy theory" *supra* Part III.B.2.

employment actions by supervisors in such quintessential company acts as firing, withholding promotions and assigning unfavorable job tasks.[331] In *Faragher*, the Court said when such tangible employment actions are taken, the supervisor "merges" with the employer.[332] In *Ellerth*, the Court said it is through these acts that supervisors bring "the official power of the enterprise to bear on subordinates."[333]

While neither *Meritor,* nor the 1998 companion cases, involved a punitive damages claim arising under 42 U.S.C. § 1981a, the idea that employers should be held liable for the intentional wrongs of certain high-level officials was advanced more than a century ago in *Lake Shore & Michigan Southern Railway Co. v. Prentice*.[334] In *Lake Shore*, the Supreme Court formulated its first rule for imputing the intent of subordinate agents to employers for the purpose of holding corporations liable in punitive damages.[335] Although the Court limited the circumstances in which a subordinate agent's intent would be imputed to the employer, it noted that a different rule would apply where a top-ranking officer committed the intentional tort.[336] The Court stated,

> The president and general manager, or, . . . vice president in his place, actually wielding the whole executive power of the corporation, may well be treated as so far representing the corporation and identified with it that any wanton, malicious, or oppressive intent of his . . . may be treated as the intent of the corporation itself.[337]

Thus, *Lake Shore* supports the idea that the "proxy" or "alter ego" theories of liability discussed in *Faragher* and *Ellerth* should also apply in the punitive damages context.

Applying these ideas to *Kolstad*, the two individuals who violated Title VII through their discriminatory actions were the top two executives of the ADA. If the Supreme Court had followed precedent, it would have concluded that the discriminatory intent of these two high-ranking officers was to be treated as that of the ADA, without regard to a discussion of vicarious liability principles. Even Circuit Judge Tatel, whose en banc dissent is relied upon by the majority, noted that if the person discriminating is "the employer's entire decision-making apparatus," there is no difference between the employer's awareness of its legal obligations and the employee's awareness.[338] Furthermore, according to the Court's decisions in *Faragher* and *Ellerth*, the two officers were

331. *See Ellerth*, 524 U.S. at 761; *Faragher*, 524 U.S. at 790.

332. *Faragher*, 524 U.S. at 790.

333. *Ellerth*, 524 U.S. at 762.

334. 147 U.S. 101, 114 (1893). *See* discussion of *Lake Shore supra* note 198.

335. *Lake Shore*, 147 U.S. at 107.

336. *Id.* at 114.

337. *Id.*

338. *Kolstad*, 139 F.3d at 974; *see also* discussion of Tatel's en banc dissent *supra* Part IV.C.1.

engaging in a quintessential corporate act—a promotion decision. Therefore, regardless of the officers' rank in the ADA's hierarchy, their decision not to promote Kolstad would have made the ADA strictly liable. This analysis supports the unanimous view of the petitioner, respondent and Solicitor General that the vicarious liability issue was not before the Supreme Court.

B. A Comparison of Vicarious Liability Standards

In all respects, the policies underlying the *Kolstad* decision are the same as those underlying the Court's 1998 decisions in *Faragher* and *Ellerth*.[339] The vicarious liability standards set forth in each of these cases were designed to encourage forethought and planning on the part of employers. So important were these policy goals, that in each case, the Supreme Court disregarded Title VII's statutory language and created an affirmative defense to aid employers in escaping liability.[340] The Court purported to base its decisions on agency principles, but in each case the Court modified the language in the Restatement (Second) of Agency to advance these underlying policy goals.[341] For example, in *Ellerth*, the Court determined that employers would not be vicariously liable when supervisors sexually harassed subordinates under the section 219(1), which extends liability for torts committed in the "scope of employment."[342] Although the Restatement provides that even specifically forbidden acts may be within the scope of an agent's employment, the Court rejected the idea that acts of sexual discrimination fit into this category. Instead, the Court found an alternative method for finding employers liable under the aided-in-the-agency-relation theory in section 219(2)(d). The Court modified this principle to provide an affirmative defense when no tangible employment action has been taken.[343] When the Court decided *Kolstad*, just one year later, it was again faced with the "scope of employment" language in section 217C(c).[344] Again, the Court found that the "scope of employment" rules would reduce the incentive for employers to implement antidiscrimination provisions. The Court thus modified these principles creating a "good-faith efforts" defense for employers."[345]

339. *See* discussion of policy goals in *Faragher* & *Ellerth supra* Part III.B.1-2. *See* majority's discussion of policy goals in *Kolstad supra* Part IV.C.2.b.

340. *See* discussion *supra* Part IV.C.2.b (explaining the "good-faith efforts" defense set forth in *Kolstad*)*; see also* discussion *supra* Part III.B.1-2 (explaining the "reasonable care defense" set forth in *Ellerth* and *Faragher).*

341. *See* discussion of Supreme Court's modification of agency principles in *Kolstad supra* Part IV.C.2.b; *see also* discussion of Supreme Court's modification of agency principles in *Ellerth* and *Faragher supra* Part III.B.1-2.

342. *Ellerth*, 524 U.S. at 756-57; *see also* discussion of *Ellerth supra* in Part III.B.1.

343. *Ellerth*, 524 U.S. at 765.

344. *Kolstad*, 527 U.S. at 543-44; *see also* discussion of *Kolstad supra* Part IV.C.2.b.

345. *Kolstad*, 527 U.S. at 544.

Unfortunately, in the Court's attempts to maximize its policy goals, it failed to tie together the 1998 and 1999 decisions, thereby overlooking some inconsistencies. The first inconsistency arose from the Court's varied interpretations of the "scope of employment" language in section 228 of Restatement (Second) of Agency. As discussed above, in *Ellerth* and *Faragher*, the Court adopted the general rule that sexual harassment by a supervisor is not conduct within the "scope of employment." In doing so, the court reasoned that sex discrimination was the result of one's own "gender-based animus" or "sexual urges" and was a "detour" from the ordinary course of employment.[346] However, in *Kolstad*, the Court "modified" the "scope of employment" principles only to provide that employers will not be liable for discriminatory acts by managerial agents if they are using "good-faith efforts" toward Title VII compliance.[347]

In applying the *Kolstad* punitive damages standard, the lower courts have first determined whether the discriminating employee is working in a managerial capacity. The courts have then looked to whether the employee was executing responsibilities within the scope of his or her job description.[348] If these conditions are met, the courts have next considered the employer's "good-faith efforts" defense. For example, in *Deffenbaugh-Williams*, the store manager and direct supervisor engaged in discriminatory conduct motivated by their own bias toward interracial dating. Nevertheless, the United States Court of Appeals for the Tenth Circuit found these employees to be acting within the scope of their authority.[349] The court then considered and rejected the employer's "good-faith efforts" defense.[350] A test that yields this result seems inconsistent with the Supreme Court's determination in *Ellerth* and *Faragher* that harassment motivated by one's own "bias" does not fall within the "scope of employment."

The Court's next oversight in *Kolstad* was its failure to explain how the key concepts in its 1998 decisions might affect vicarious liability in punitive damages. For example, in *Faragher* and *Ellerth*, the Court's decision as to when an employer would be held liable for the harassing acts of its supervisors, turned on the determination of whether the subordinate employee had experienced a "tangible employment action," i.e. hiring, firing or failing to promote.[351] Both of these cases involved plaintiffs who had experienced

346. *Ellerth*, 524 U.S. at 756-57; *Faragher*, 524 U.S. at 799; see *also* discussion of *supra* Part III.B.1-2.

347. *Kolstad*, 527 U.S. at 544; *see also* discussion of *Kolstad supra* Part IV.C.2.b.

348. *See, e.g.*, *Wal-Mart*, 187 F.3d at 1248; *Deffenbaugh-Williams*, 188 F.3d at 285-86; *see also* discussion of cases *supra* Part IV.D.

349. *Deffenbaugh-Williams*, 188 F.3d at 285-86; *see also* discussion of cases *supra* Part IV.D.

350. *Deffenbaugh-Williams*, 188 F.3d at 286.

351. *See Ellerth*, 524 U.S. at 761; *see also* discussion of "tangible employment actions" or "tangible job detriments" *supra* Part III.B.1-2.

harassment, which they construed as threats to deny tangible job benefits. On the other hand, *Kolstad* involved a plaintiff who had experienced a "tangible employment action"—the withholding of a promotion—based on her sex. Nevertheless, the Justice Stevens was the only party who even gave lip service to this key phrase.[352] The Supreme Court's position, therefore, appears to be that employers will not be liable in punitive damages for any discriminatory acts, including tangible employment actions, as long as they have made good-faith efforts toward Title VII compliance.

This conclusion is problematic for two reasons. First, it directly conflicts with the position expressed in *Faragher* and *Ellerth*, that that these particular acts of discrimination become the acts of the employer. Second, because the Court failed to address this issue, the "good-faith efforts" defense has routinely failed in cases where managerial agents discriminated by firing subordinates (a tangible employment action).[353] These cases indicate that the lower courts are scrutinizing the employers' "good-faith efforts" more closely in cases when such efforts are insufficient to stop "tangible employment actions" from occurring.

The final weak link between the 1998 decisions and the *Kolstad* decision results from the Court's use of different language to define the affirmative defenses. In *Ellerth* and *Faragher*, the Court set forth a "reasonable care defense," while in *Kolstad*, the Court created a "good-faith efforts" defense. Because these defenses are likely to be applied very similarly, it would have been prudent for the Court to use the same terminology and definition in order to avoid confusing the lower courts.

C. Inadequacies of the Kolstad *Punitive Damages Standard*

In light of the Court's decision to authorize punitive damages when an employer has "discriminate[d] in the face of a perceived risk that its actions will violate federal law," it makes no sense for the Court to have set forth a separate standard for imposing vicarious liability. It is even more difficult to understand that the Court established a different standard than that set forth in *Faragher* and *Ellerth* and completely failed to give meaning to the new standard. As discussed in Part IV, the *Kolstad* majority left several key terms undefined. The Court gave very vague guidance as to what it means to act in a "managerial capacity," and as to what types of employer activities will constitute "good-faith efforts to comply with Title VII."[354] Further

352. *Kolstad*, 527 U.S. at 551 (weighing the evidence against the ADA, and noting that that Kolstad had alleged a that the ADA had taken a tangible employment action against her); *see also* discussion of Justice Stevens' dissent *supra* Part IV.C.3.b.

353. *See* cases discussed *supra* Part IV.D.1-4.

354. *See* discussion of "managerial capacity" and "good-faith efforts" defense *supra* Part IV.C.2.b.

complicating the situation, was the fact that after setting forth the new standard for imputing liability in punitive damages, the Court opted not to apply it to the case. Perhaps this was in response to the dissent's adamant stance opposing addressing the issue at all. On the other hand, perhaps the majority itself did not want to attempt to apply the ambiguous standard it was setting forth.

Only two vague guidelines were provided to assist the courts in determining who will be found to be acting in a "managerial capacity."[355] Furthermore, the Court's statement that there was "no good definition of what constitutes 'managerial capacity,'" is ironic, considering the fact that the Court was formulating a new standard that was inconsistent with the Restatement of Agency view and not mentioned at all by Congress in § 1981a of the Civil Rights Act of 1991. Considering the leap the Court was already taking, it could have formulated a definition for this ambiguous term to assist the lower courts in applying the vicarious liability standard. The cases applying *Kolstad* have found a variety of managers and supervisors, including: district managers, store managers and immediate supervisors, to be acting in a "managerial capacity." In making these decisions, the courts have looked to (1) the employee's authority over certain personnel matters, including suspension, hiring and firing decisions, and (2) the employee's responsibility in running various departments or business outlets.[356]

An equally high hurdle for the lower courts to overcome will be determining what constitutes "good-faith efforts to comply with Title VII." Basically, the only "good-faith efforts" discussed by the majority was the adoption of nondiscrimination policies and education of employees on these policies. In his en banc dissent, Circuit Judge Tatel discussed additional "good-faith" measures including: (1) hiring staff managers sensitive to Title VII responsibilities; (2) requiring EEOC training; and (3) using objective hiring and promotion standards.[357] The first place employers should look for additional instruction is to a set of guidelines issued by the EEOC on June 18, 1999, titled "Enforcement Guidelines: Vicarious Employer Liability for Unlawful Harassment."[358] These guidelines were designed to clarify the affirmative defense set forth in *Faragher* and *Ellerth*.[359] The guidelines state that employers should establish, distribute to all employees, and enforce a written policy prohibiting harassment and setting out a procedure for making

355. *See* discussion of these guidelines *supra* Part IV.C.2.b.

356. *See Wal-Mart*,187 F.3d at 1247; *Deffenbaugh-Williams*, 188 F.3d at 278; *see also* discussion of cases *supra* Part IV.D.

357. *Kolstad*, 139 F.3d at 974; *see also* discussion *supra* note 174.

358. *Enforcement Guidelines: Vicarious Employer Liability for Unlawful Harassment*, No. 915.002 (visited August 27, 2000) <*http://www.eeoc.gov/docs/harassment*.html>.

359. *Id.; see also* Lang Rutkowski, *The Stakes Just Went Up: You Need a Complete Harassment Policy that is Vigorously Enforced*, 14 No. 7 EMPLOYMENT L. UPDATE 1 (July 1999).

complaints.[360] The following elements should be included in an antidiscrimination policy: (1) a clear explanation of the prohibited conduct; (2) assurance that employees who make complaints or provide information will not suffer retaliation as a result; (3) a clearly explained complaint procedure with accessible avenues; (4) a complaint procedure that provides a prompt, thorough and impartial investigation; (5) assurance that employers will take immediate corrective action upon determining that harassment has occurred; and (6) confidentiality.[361] Because the Supreme Court perceived its decision in *Kolstad* to be consistent with its *Faragher* and *Ellerth* decisions, these EEOC Guidelines should be helpful to employers in formulating their "good-faith efforts" defenses as well. Another place employers may wish to look is to a report issued by the EEOC in 1998.[362] The Report sets forth the "best practices" employed in order to achieve equal employment opportunity in the workplace.[363] These practice guidelines address such areas as: recruitment and hiring; promotion and career advancement; terms and conditions of employment and termination of employment.[364]

VI. CONCLUSION

In a 7-2 decision, the Supreme Court started out on the right track with its *Kolstad* decision. It carefully scrutinized the precise language in 42 U.S.C. § 1981a of the Civil Rights Act of 1991, clarifying that Congress intended a higher burden of proof for the imposition of punitive damages than for liability in compensatory damages. Furthermore, the Court properly concluded that this higher burden of proof focused not on additional evidence of egregious conduct, but rather on knowledge that particular acts violate an employee's federally protected rights. It was at this point that the majority should have followed the view expressed by Justice Stevens in his dissenting opinion. Justice Stevens applied the majority's interpretation of 42 U.S.C. § 1981a and determined that there was sufficient evidence to remand to the trial court for a determination of punitive damages liability.

Instead, a 5-4 majority dove into an analysis of vicarious liability. Unlike the threshold issue in the case, the vicarious liability issue was not briefed to the Court and was not relevant to the facts of the case at hand. Therefore, the Court created a standard for imputing punitive damages liability to an employer in a case where the standard could not be applied. In light of Court's

360. *Enforcement Guidelines*, *supra* note 358.

361. *Id.*

362. *Task Force Report on "Best" Equal Employment Opportunity Policies, Programs and Practices in the Private Sector* (last modified Dec. 22, 1997) <http://www.eeoc.gov/task/prac2.html>.

363. *Id.*

364. *Id.*

scrutiny of the precise language in 42 U.S.C. § 1981a in the first part of the majority opinion, its creation of a "good-faith efforts" defense, that was supported neither by the Restatement (Second) of Agency principles, nor the statutory language of 42 U.S.C. § 1981a, was especially imprudent.

Furthermore, the resulting standard makes no sense because if it were properly applied, courts would first have to find that the *employer* had acted with "malice or reckless indifference" to the plaintiff's rights as required by the Civil Rights Act of 1991. Only after making this determination could the courts consider whether the employer had made "good-faith efforts" to comply with Title VII. It is impossible to comprehend that an employer who exhibits "reckless indifference" could simultaneously be making "good-faith efforts" to comply with federal antidiscrimination laws. Therefore, the lower courts have been left to grapple with a standard that is more ambiguous than the one with which they began.

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