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Recent Decisions

Plaintiffs Need Not Show Egregious Conduct to Seek Punitive Damages Under Title VII of the Civil Rights Act of 1991: *Kolstad v. American Dental Association*

**EMPLOYMENT DISCRIMINATION — THE CIVIL RIGHTS ACT OF 1991 — EVIDENTIARY STANDARD REQUIRED FOR A JURY INSTRUCTION ON PUNITIVE DAMAGES UNDER TITLE VII —** The Supreme Court of the United States held that a Title VII plaintiff need not show that the employer's discriminatory conduct was egregious in order to seek punitive damages, but under principles of agency law, an employer cannot be vicariously liable for punitive damages for the discriminatory employment decisions of managerial agents when the managers' decisions are contrary to that employer's efforts to comply with Title VII.


Carole Kolstad ("Kolstad") lost a promotion because she is a woman.1 Kolstad was serving as the American Dental Association ("ADA") Director of Federal Agency Relations in September of 1992 when she learned that an ADA coworker, Jack O’Donnell ("O’Donnell"), would be retiring.2 Both Kolstad and Tom Spangler

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1. See *Kolstad v. American Dental Ass’n*, 108 F.3d 1431, 1434 (D.C. Cir. 1997). Kolstad was an employee of the American Dental Association ("ADA"), a Chicago-based professional association that maintains a Washington, D.C. office for the purpose of lobbying Congress and assorted federal agencies on behalf of the members of the association. See id. Kolstad sought a promotion to the position of Director of Legislation and Legislative Policy and Director of the Council on Government Affairs and Federal Dental Services. See id.

2. See *Kolstad v American Dental Ass'n*, 119 S. Ct. 2118, 2121 (1999). Jack O’Donnell held the position of Director of Legislation and Legislative Policy and Director of the Council on Government Affairs and Federal Dental Services. See id. His duties included managing
("Spangler"), a fellow employee in the ADA's Washington office, expressed an interest in replacing O'Donnell.\(^3\) After both had formally applied for the position, Leonard Wheat, acting head of the Washington office, requested that Dr. William Allen ("Allen"), the ADA's Executive Director, make the final decision.\(^4\) In December of 1992, Allen notified Kolstad that Spangler had been selected to replace O'Donnell.\(^5\)

Kolstad filed suit against the ADA in the United States District Court for the District of Columbia under Title VII of the Civil Rights Act of 1964,\(^6\) claiming that the decision to promote Spangler instead of Kolstad constituted an act of employment discrimination.\(^7\) The jury ultimately found that the ADA had discriminated against Kolstad on the basis of gender in violation of Title VII and awarded her $52,718 in backpay.\(^8\) The district court denied Kolstad's request for a jury instruction on punitive damages and her requests for reinstatement and attorney's fees.\(^9\)

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3. See Kolstad, 119 S. Ct. at 2122. Spangler was the ADA's Legislative Counsel, a role that required him to be involved in the Association's legislative lobbying. See id. Both Spangler and Kolstad worked with O'Donnell and both were given excellent performance ratings by Leonard Wheat, acting head of the Washington office. See id.

4. See id. Dr. Allen was in charge of the Washington office from 1986 to 1988, holding the dual position of Director of the office and Assistant Executive Director for Legislative Affairs. Id. In 1988, he was asked to become the Assistant Executive Director in the ADA's Chicago office. Despite his new position, he maintained a substantial presence in the Washington, D.C. office and retained the position of Assistant Executive Director of Legislation. Brief for Respondent at 6, Kolstad v. American Dental Ass'n, 119 S. Ct. 2118 (1999) (No. 98-208).

5. See Kolstad, 119 S. Ct. at 2122.

6. Civil Rights Act of 1964, §703(a), 42 U.S.C. §2000e-2(a) (1994). To prove a prima facie case of sex discrimination in promotion, the plaintiff must show that she is female, was refused a position for which she was qualified and for which she applied, and that the employer filled the position with a male employee. See Kolstad, 108 F.3d at 1436.

7. See Kolstad, 119 S. Ct. at 2121. Kolstad introduced evidence at trial that indicated that Allen had modified the description of O'Donnell's job in a preselection procedure designed to encourage the selection of Spangler. See id. Kolstad also introduced evidence that Wheat told sexually offensive jokes and used derogatory terms to refer to certain women. See id. In addition, Kolstad alleged that she had difficulty in gaining access to Wheat and that Wheat had refused to meet with her for several weeks to discuss her interest in O'Donnell's position. See id.

8. See Kolstad, 119 S. Ct. at 2123.

9. See id. Punitive damages are damages in excess of the amount required to compensate a plaintiff for his injuries and are designed to punish the defendant for his conduct. BLACK'S LAw DIcTIONARY 390 (6th ed. 1990) (citations omitted). The Civil Rights Act of 1991 provides for punitive damages under Title VII of the Civil Rights Act of 1964 "if the complaining party demonstrates that the respondent engaged in a discriminatory practice or
The ADA appealed the jury verdict and Kolstad cross-appealed on the district court's decision regarding punitive damages. In a split decision, a panel of the United States Court of Appeals for the District of Columbia Circuit reversed the district court's holding regarding Kolstad's request for an instruction on punitive damages. The circuit court, in an opinion written by Judge Tatel, rejected the ADA's argument that punitive damages are restricted under Title VII to those cases where the defendant's conduct is extraordinary or egregious. The panel based its decision on a "plain-meaning" interpretation of the statute, holding that "[h]aving concluded that the jury could reasonably find from the evidence that ADA intentionally discriminated against Kolstad, the district court should have instructed the jury that . . . it could consider a punitive award." The court of appeals thereafter agreed to rehear the case en banc, limiting its review to the question of punitive damages. The en banc court, in a 6-5 decision, held that in order for the jury to address the question of punitive damages, there must be a demonstration that the defendant's conduct was egregious. In an opinion written by Judge Williams, the court maintained that "by enacting a separate provision setting out a special standard for the imposition of punitive damages, Congress showed that it did not intend to make punitive damages automatically available in the standard case of intentional discrimination under Title VII."


10. See Kolstad, 108 F.3d at 1434.
11. Id. at 1431.
12. Id. at 1438. The court held that the state of mind that is necessary to impose liability for the discrimination is sufficient to make punitive damages applicable and that because the jury could reasonably have found intentional discrimination, it should have been allowed to contemplate punitive damages. Id.
13. Id. at 1438.
14. En banc "refers to a session where the entire membership of the court will participate in the decision rather than the regular quorum . . . . In the United States, the Circuit Courts of Appeal usually sit in panels of judges but for important cases may expand the bench to a larger number, when they are said to be sitting en banc." BLACK'S LAW DICTIONARY 527 (6th ed. 1990) (citations omitted).
16. Kolstad, 139 F.3d at 960. The Court found no evidence of egregious conduct in this case. Id. The Court further held that, although evidence of pre-selection may allow an inference that an employer's reasons for an employment decision were pretextual, pre-selection alone is not egregiously wrong and is relevant only insofar as it supports an inference of discriminatory intent. Id. at 969.
17. Id. at 961.
The United States Supreme Court granted Kolstad's petition for a writ of certiorari to resolve a conflict among the federal courts of appeals regarding the standard that must be met before a jury may properly consider a request for punitive damages under 42 U.S.C. § 1981a(b)(1).\(^\text{18}\) The issue before the Supreme Court was whether punitive damages may be awarded at the jury's discretion in cases of intentional discrimination under Title VII of the 1964 Civil Rights Act without a showing of egregious or outrageous conduct.\(^\text{19}\) The Kolstad Court held that, while punitive damages may be imposed in a Title VII action without a showing of egregious or outrageous discrimination independent of the employer's state of mind, there must at a minimum be a showing that the employer discriminated in the face of a perceived risk that its actions violated federal law.\(^\text{20}\) The Court further found that the employer may not be vicariously liable for the discriminatory employment decisions of managerial agents for the purposes of imposing punitive damages, provided that the decisions are contrary to the employer's good-faith efforts to comply with Title VII.\(^\text{21}\)

Writing for the majority, Justice Sandra Day O'Connor began with an analysis of the 1991 amendments to the Civil Rights Act of 1964 ("Act.").\(^\text{22}\) Compensatory and punitive damage awards are limited by the Act to cases of intentional discrimination.\(^\text{23}\) In the structure of the Act, the Court found a congressional intent to limit punitive awards to a subset of cases that involve intentional discrimination.\(^\text{24}\) Justice O'Connor further determined that Congress intended to create two standards of liability; one for compensatory damages and a higher standard for a punitive damages award.\(^\text{25}\) However, the Supreme Court rejected the court of appeals' effort to adhere to this two-tiered structure by limiting punitive awards to

\(^{18}\) Kolstad v. American Dental Ass'n, 119 S. Ct. 2118 (1999). A "writ of certiorari" is a discretionary order issued by the Supreme Court to a lower court, requesting that it certify the record of the proceeding below. BLACK'S LAW DICTIONARY 1609 (6th ed. 1990).

\(^{19}\) See Kolstad, 119 S. Ct. at 2123.

\(^{20}\) Id. at 2124-26.

\(^{21}\) Id. at 2129.

\(^{22}\) Id. at 2123-24. The 1991 Act allowed for additional remedies, including punitive damages, for certain classes of Title VII violations. See id. at 2124.

\(^{23}\) Id. A party may recover punitive damages under 42 U.S.C. § 1981a(b)(1) if she demonstrates that the employer "engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of [the employee]." 42 U.S.C. § 1981a(b)(1) (1994).

\(^{24}\) Kolstad, 119 S. Ct. at 2124.

\(^{25}\) Id.
cases of intentional discrimination of an egregious nature. The remedies that are available to a plaintiff are determined by the intent of the employer in engaging in discrimination. The Court held that, although egregious misconduct may be evidence of the necessary mental state, the Act neither restricts plaintiffs to this form of evidence nor requires a showing of egregious discrimination independent of the employer’s state of mind.

Relying on Smith v. Wade, the Court recognized that punitive damages may be considered when the defendant’s conduct has been proven to be malicious or recklessly indifferent to the federally protected rights of others. Justice O'Connor stated that the Smith Court did not find that a showing of actual malice was necessary for a punitive damages award; however, the intent standard required at least a showing of recklessness. The Court cited several cases to demonstrate that eligibility for punitive awards has consistently been determined by the defendant’s motive or intent and, while egregious misconduct may be associated with punitive damages, it is not essential that the employer engage in egregious or malicious conduct independent of a state of mind before being subject to a punitive award.

It is essential, however, that a plaintiff show that the employer knew there was a risk that its conduct violated federal anti-discrimination laws. The majority recognized that a finding of intentional discrimination will not always give rise to a jury instruction on punitive damages. This gives rise to what amounts to an ignorant employer defense. If the employer was unaware that its discriminating behavior was prohibited by federal law, the

26. Id.
27. Id.
28. Id. The Act requires only that the employer act with “malice or with reckless indifference to the aggrieved individual’s federally protected rights.” 42 U.S.C. § 1981a(b)(1) (1994). “Malice” is a state of mind that prompts a person to willfully do a wrongful act or to intentionally violate a law, the result of which is injury to another person. BLACK’S LAW DICTIONARY 956-57 (6th ed. 1990).
31. Id.
32. Id. at 2126.
33. Id. at 2125.
34. Id.
35. Kolstad, 119 S. Ct. at 2125. “The underlying theory of discrimination may be novel or otherwise poorly recognized, or an employer may reasonably believe that its discrimination satisfies a bona fide occupational qualification defense or other statutory exception to liability.” Id.
The jury would not receive an instruction on punitive damages.\(^{36}\)

The Court next addressed the issue of imputing liability\(^{37}\) for punitive damages from Allen to the ADA.\(^{38}\) Justice O'Connor observed that under the common law, agency principles have limited vicarious liability for punitive awards.\(^{39}\) Furthermore, the Court stated that Congress requires that federal courts interpret Title VII based on agency principles and, consequently, strict limits exist on the extent to which an agent's misconduct may be imputed to the principal for awarding punitive damages.\(^{40}\) The majority reasoned that holding employers liable for punitive damages when they have engaged in a good faith effort to comply with Title VII is inconsistent with the long-established common law principle of limiting vicarious liability for punitive damages.\(^{41}\) The Court consequently held that, regarding punitive damages, an employer may not be held vicariously liable for discriminatory employment decisions made by managerial agents when the agents' decisions are contrary to the employer's bona fide efforts to comply with Title VII.\(^{42}\) The decision of the court of appeals was vacated and the case remanded.\(^{43}\)

Chief Justice William Rehnquist, with whom Justice Clarence Thomas joined, concurred in part and dissented in part.\(^{44}\) Chief Justice Rehnquist would have held that the two-tiered scheme of Title VII implies the existence of an egregiousness requirement that restricts punitive damages to only the worst cases of intentional

\(^{36}\) Id.

\(^{37}\) "Imputed" means that an act is ascribed to a person not because he is responsible for the act but because he is aware of it or a person over whom he has control is responsible for the act. BLACK'S LAW DICTIONARY 758 (6th ed. 1990).

\(^{38}\) Kolstad, 119 S. Ct. at 2126.

\(^{39}\) Id. at 2127.

\(^{40}\) Id. The Restatement (Second) of Agency states that punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only 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.

\(^{41}\) RESTATEMENT (SECOND) OF AGENCY § 217C (1965).

\(^{42}\) Kolstad, 119 S. Ct. 2128-29. "Where an employer has undertaken such good faith efforts at Title VII compliance, it 'demonstra[es] that it never acted in reckless disregard of federally protected rights.'" Id. (citing Kolstad v. American Dental Ass'n, 139 F3d at 974 (D.C. Cir. 1997) (Tatel, J., dissenting)).

\(^{43}\) Id. at 2129.

\(^{44}\) Id. at 2130 (Rehnquist, C.J., concurring in part and dissenting in part).
discrimination. The Chief Justice agreed with the Court's opinion that employer liability for punitive damages is significantly limited by the principles of agency law.

Justice John Paul Stevens, with whom Justices Souter, Ginsburg, and Breyer joined, concurred in part and dissented in part. Justice Stevens agreed with the majority's decision to reject the court of appeals' holding that under Title VII, a defendant's conduct must be egregious before a jury may properly consider punitive damages. Justice Stevens maintained, however, that if the plaintiff proffers sufficient evidence for a jury to decide that an employer acted willfully, then the issue should go to the jury. With regard to imputing liability to the ADA under principles of agency law, Justice Stevens maintained that it was an issue that was not addressed by either of the parties to the litigation and therefore strongly disapproved of the Court's volunteering commentary on the agency issue; he believed the proper action would have been simply to remand the case on the issue of punitive damages without the commentary.

Dating back to ancient times, the issue of liability for damages has its foundation in the concept of vengeance. Even ancient American Indians resolved disputes by negotiating damages in the

45. Id. (Rehnquist, C.J., concurring in part and dissenting in part).
47. Id. (Stevens, J., concurring in part and dissenting in part).
48. Id. (Stevens, J., concurring in part and dissenting in part).
49. Id. at 2132. (Stevens, J., concurring in part and dissenting in part). Justice Stevens found that the record contains sufficient evidence from which a jury may find that the ADA acted with reckless indifference to Kolstad's federally protected rights. Id. at 2132 (Stevens, J., concurring in part and dissenting in part). Included in that evidence is the indication that Kolstad was the more qualified of the candidates and that the ADA's decisionmakers were known to tell sexually offensive jokes, refer to professional women in a derogatory fashion, and manipulated the job requirements in an effort to hide their misconduct. Id. (Stevens, J., concurring in part and dissenting in part).
50. Id. at 2130, 2132-33 (Stevens, J., concurring in part and dissenting in part). "The absence of briefing or meaningful argument by the parties makes this Court's gratuitous decision to volunteer an opinion on this nonissue particularly ill advised." Id. at 2133 (Stevens, J., concurring in part and dissenting in part).
51. See 1 MELVIN M. BELL, MODERN DAMAGES, 65-66 (1959). In The Common Law, Justice Holmes stated that

[It] is commonly known that the early forms of legal procedure were grounded in vengeance. Modern writers have thought that the Roman law was gestated in the "blood feud," and all authorities agree that the German law began in that way. Feud led to composition, at first optional, then compulsory, by which the feud violence was bought off. Composition recovered, then was the alternative of vengeance. Vengeance imports a feeling of blame.

Id. at 66 (quoting HOLMES, THE COMMON LAW, 3 (1881)).
form of property.\textsuperscript{52} Within the traditional judicial system, American courts have a long history of awarding punitive damages in addition to compensatory damages, as illustrated by the 1897 Supreme Court case \textit{Scott v. Donald}.\textsuperscript{53} In \textit{Scott}, James Donald sought compensatory and punitive damages from defendants Scott and Gardner, claiming that the South Carolina law under which defendants seized several packages of wines and liquors belonging to Donald was unconstitutional.\textsuperscript{54}

The Court asserted jurisdiction over the issue of exemplary damages, stating that "\textit{[i]n a case in which the law of a state is claimed to be in contravention of the Constitution of the United States . . . we have jurisdiction of the entire case, and of all questions involved in it.}"\textsuperscript{55} In an opinion delivered by Justice George Shiras, the Court held that the plaintiff, in importing wine and liquor for his own use, had exercised his legal rights guaranteed by the Constitution of the United States and that the defendants had acted knowingly, willfully, and maliciously in seizing the plaintiff's packages.\textsuperscript{56} Justice Shiras maintained that damages are said to be exemplary and allowable under common law in excess of the actual loss if the injury is the result of "evil motive, actual malice, deliberate violence, or oppression."\textsuperscript{57}

While punitive damages were generally permitted at common law when conduct was found to be egregious, plaintiffs bringing actions under Title VII of the Civil Rights Act of 1964 were limited to equitable relief.\textsuperscript{58} The Civil Rights Act of 1991 made a number of changes to Title VII, including the creation of a provision permitting compensatory and punitive damages in Title VII claims.\textsuperscript{59}

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52. \textit{See id.} at 67. The Comanches, part of the Shoshonean group of tribes until the eighteenth century, computed damages for a husband whose wife had committed adultery by having the husband and lover bargain it out for a settlement. \textit{See id.} The husband was given the option of killing the lover instead of settling for property, but if he were to take that option, the lover's family would be entitled to kill the husband. \textit{See id.}

53. 165 U.S. 58 (1897). Plaintiff sought to recover damages caused when defendants, constables of the State of South Carolina, seized and carried away several packages of wine and liquor belonging to the plaintiffs and in the possession of railroad companies which had brought the packages within the State. \textit{See id.}

54. \textit{See id.}

55. \textit{Id.} at 72-73.

56. \textit{Id.} at 78-82.

57. \textit{Id.} at 86.

58. 42 U.S.C. § 2000e (1994). Title VII of the Civil Rights Act of 1964 protected employees from discrimination on the basis of sex, race, color, national origin and religion. As originally enacted, it provided only equitable relief, not allowing for punitive damages. \textit{See id.}

Since that time, the standard which has been applied in awarding punitive damages under Title VII has been that set forth by the Supreme Court's 1983 decision in *Smith v. Wade*.

Daniel R. Wade was an inmate at Algoa Reformatory who was harassed, beaten, and sexually assaulted by his cellmates. He brought suit against William H. Smith, a guard at Algoa, alleging that his Eighth Amendment rights had been violated. The issue confronted by the Court was whether Smith could be held liable under 42 U.S.C. § 1983 for punitive damages based on a finding of reckless or callous disregard or indifference to Wade's rights or safety. In his argument, Smith maintained that the instruction to the jury that punitive damages could be awarded on a finding of reckless or callous disregard or indifference to Wade's rights was erroneous. Smith further argued that deterrence and punishment, the dual purpose of punitive damages, would be served only if the standard for punitive damages was higher than the underlying standard for liability in every case.

Writing for the majority, Justice William J. Brennan explained that the common law does not require a higher standard for determining punitive damages than for determining compensatory damages. Furthermore, the *Smith* Court held that a jury should be permitted to assess punitive damages when the defendant's conduct is shown to be motivated by evil motive or involves reckless indifference to the federally protected rights of others.

the following:

In an action brought by a complaining party under . . . the Civil Rights Act of 1964 . . . against a respondent who engaged in unlawful intentional discrimination . . . the complaining party may recover compensatory and punitive damages . . . in addition to any relief authorized by . . . the Civil Rights Act of 1964, from the respondent . . . A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

*Id.* (emphasis added).

61. *See id.*
62. *See id.*
65. *See id.* at 37.
66. *See id.* at 51.
67. *Id.* at 53.
68. *Id.* at 56. The Court further held that this measure of punitive damages applies
Now-Chief Justice Rehnquist dissented, explaining that the proper standard for an award of punitive damages under section 1983 requires a degree of bad faith or evil motive on the part of the defendant, and mere reckless disregard of the plaintiff's federally protected rights should not be enough.\(^69\)

In *Williamson v. Handy Button Machine Co.*,\(^70\) the United States Court of Appeals for the Seventh Circuit used the standards articulated in *Smith* and allowed punitive damages under Title VII upon a showing of willful wrongdoing or reckless indifference to the plaintiff's known rights.\(^71\) In *Williamson*, the Seventh Circuit addressed the issue of whether there was sufficient evidence of willful wrongdoing or reckless indifference to the plaintiff's known rights to support the submission of punitive damage instructions to the jury and to support an award of $100,000 in punitive damages for intentional discrimination.\(^72\) The court applied the *Smith* standard and held that the evidence was sufficient to permit the submission of the question to the jury, despite the open-ended nature of the jury instruction.\(^73\)

The United States Court of Appeals for the Fourth Circuit considered the issue of punitive damages under 42 U.S.C. § 1981 (“Section 1981”) in *Stephens v. South Atlantic Canners, Inc.*\(^74\) Stephens, an African American, asserted that South Atlantic had violated both Title VII and Section 1981 by firing him from his position as a truck driver for no other reason than his race.\(^75\)

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69. *Smith*, 461 U.S. at 56 (Rehnquist, J., dissenting). The dissent repeats the holding from *Scott*, 165 U.S. 58 (1897), that actual malice is a prerequisite to a recovery of punitive damages and maintains that a majority of jurisdictions take the view that the standard for an award of punitive damages includes a requirement of actual malice. *Id.* at 75 (Rehnquist, J., dissenting).

70. 817 F.2d 1290 (7th Cir. 1987).

71. *See id.*

72. *See Williamson*, 817 F.2d at 1290. Beatrice Williamson had worked at the Handy Button Machine Co. as an assembly operator for twenty-one years. *See id.* Williamson, an African-American, was kept in the plant's lowest paying job, despite her seniority, and was repeatedly passed over in favor of white employees for better jobs. *See id.* As a result of this treatment, Williamson suffered mental deterioration and was subsequently unable to work. *See id.*

73. *See id.*

74. 848 F.2d 484 (4th Cir. 1988). South Atlantic Canners, Inc. (South Atlantic), a company that makes canned soft drinks for franchisees of Coca-Cola, USA, hired Marion Stephens, Jr. in June, 1978 as a part-time truck driver and eventually promoted him to full-time driver. *See id.* South Atlantic terminated him in September 1982, maintaining that his job performance was unsatisfactory. *See id.* Stephens alleged that several white truck drivers had similar records and were not discharged. *See id.*

75. *See id.* at 488.
Although Title VII actions prior to 1991 were limited to equitable relief, an action under Section 1981 provides for equitable and legal relief, which includes compensatory and punitive damages. Following Smith, the Fourth Circuit held that punitive damages are recoverable under Section 1981 for malicious conduct, evil motive, or reckless indifference to a federally protected right. In view of the record, however, the Fourth Circuit found no evidence of malicious conduct or reckless indifference; therefore, although the court upheld the award of compensatory damages, Stephens was not entitled to punitive damages.

The United States Court of Appeals for the District of Columbia Circuit addressed the same issue seven years later in Barbour v. Merrill. Plaintiff Martin Barbour was awarded compensatory and punitive damages after a jury found that Medlantic Management Corporation and Mark Merrill had violated Barbour's rights under 42 U.S.C. § 1981 by failing to hire him as Medlantic's Director of Corporate Materials Management because he is African-American. On appeal, defendants asserted that the evidence did not support the imposition of punitive damages.

The D.C. Circuit stated that the defendants' assertion was based upon a misunderstanding of the standard expressed in Smith for awarding punitive damages. The court was one of the first circuit courts to hold that evidence sufficient to establish an intentional violation of protected civil rights may also be sufficient to permit the jury to award punitive damages.

Two years later, the Seventh Circuit reached a similar conclusion

76. See id. at 489.

77. Id. Judge Wilkins, writing for the Fourth Circuit, maintained that punitive damages are an extraordinary remedy designed to punish and deter particularly egregious conduct; therefore, not all Section 1981 cases require that punitive damages be submitted to a jury. Id. at 490.

78. Id. at 492. The court found substantial legitimate reasons for South Atlantic's decision to terminate Stephens, including the facts that Stephens was warned seventeen times that he had violated company policies, that company customers and other motorists had contacted South Atlantic to report problems with Stephens, and that he was ultimately discharged "after causing $60,000.00 damage to a company vehicle." Id. Based on these circumstances, the Fourth Circuit held that "the extraordinary remedy of punitive damages is not appropriate." Id.

79. 48 F.3d 1270 (D.C. Cir. 1995).

80. See id.

81. See id.

82. Id. at 1277.

83. Id. (citing Smith v. Wade, 461 U.S. at 53). The court further explained that should the jury find that the conduct at issue merits a punitive award, no additional evidence is required. See id.
in *Jonasson v. Lutheran Child and Family Services*.\(^8^4\) Initially, the jury awarded Jonasson $200,000 in compensatory damages and $100,000 in punitive damages.\(^8^5\) Under 42 U.S.C. § 1981(b)(3)(c), total damages are capped at $200,000; consequently, the district court reduced the award of compensatory damages to $100,000, but left the award of punitive damages at $100,000.\(^8^6\) The defendant argued that the district court erred in reducing the amount of compensatory damages and not also reducing the amount of punitive damages.\(^8^7\) The Seventh Circuit upheld the district court's decision to preserve the jury's determination that the judgment of the court should reflect both punitive damages and compensatory damages.\(^8^8\) Furthermore, the court found that the jury's decision to award punitive damages was clearly warranted and should be left undisturbed.\(^8^9\)

Finally, in a case very similar to *Kolstad v. ADA*,\(^9^0\) the United States Court of Appeals for the Eighth Circuit addressed punitive damages under Title VII in *Kimzey v. Wal-Mart Stores, Inc.*\(^9^1\) In a suit for sexual discrimination based on both federal and state law, Kimzey alleged that her supervisor and manager engaged in several incidents of offensive conduct including kicking her leg, making kissing noises at her, making sexual comments, and speaking to her using abusive language.\(^9^2\) Wal-Mart appealed from a judgment awarding Kimzey compensatory and punitive damages, claiming that Kimzey failed to produce sufficient evidence of a hostile work environment and that punitive damages were incorrectly submitted to the jury.\(^9^3\) The Eighth Circuit noted that Title VII permits punitive

\(^8^4\) 115 F.3d 436 (7th Cir. 1997). The nine plaintiffs were all employed by Lutheran Child and Family Services ("LCFS") in different capacities. See id. Louis Kingsboro was the principal of Lutherbrook School, a school run by LCFS. See id. at 436. In 1993, Annette Rops, assistant director of personnel, told her supervisor that Kingsboro was sexually harassing her daughter, also an employee of LCFS. See id. Following an investigation, others came forward with harassment complaints, which gave rise to this action. See id. Plaintiffs alleged that LCFS did not take timely action in response to the sexual harassment. See *Jonasson*, 115 F.3d at 436. A jury awarded each of the plaintiffs compensatory and punitive damages. See id. at 441.

\(^8^5\) See *Jonasson*, 115 F.3d at 441.

\(^8^6\) See id.

\(^8^7\) See id.

\(^8^8\) Id.

\(^8^9\) Id.

\(^9^0\) 119 S. Ct. 2118 (1999).

\(^9^1\) 107 F.3d 568 (8th Cir. 1997).

\(^9^2\) See *Kimzey*, 107 F.3d at 570. Kimzey further charged that this behavior upset her to such a degree that she was forced to quit her job. See id.

\(^9^3\) See id. at 572. The jury awarded Kimzey $35,000 in compensatory damages and
damages only when an employer is found to have "engaged in a discriminatory practice with malice or with reckless indifference to the federally protected rights of an aggrieved individual." Applying that standard, the court found that the necessary level of recklessness could be inferred from management's participation in the discriminatory conduct, and that "[t]here was sufficient evidence to support the [punitive damages] claim going to the jury under either state or federal law."

The issue of vicarious liability that was raised by the Kolstad majority opinion was dealt with somewhat differently in prior Supreme Court cases, including Meritor Savings Bank v. Vinson. The United States Court of Appeals for the District of Columbia in Meritor held that an employer is absolutely liable for sexual harassment practiced by supervisory personnel. The circuit court reasoned that a supervisor is an agent for Title VII purposes even if that agent lacks authority to hire, fire, or promote. The Supreme Court, although failing to set a definitive standard for vicarious liability under Title VII, disagreed with the court of appeals and held that while the mere existence of a policy against discrimination should not automatically insulate the petitioner from liability, agency principles should not be completely disregarded and absolute liability imposed on employers regardless of specific circumstances.

Twelve years later, the Supreme Court came closer to establishing a standard for vicarious liability under Title VII in Burlington Industries, Inc. v. Ellerth. Kimberly Ellerth quit her job as a salesperson at Burlington Industries, claiming that she had been subjected to continual sexual harassment by one of her.

§50,000,000 in punitive damages; "[a]fter trial the district court reduced the punitive damages award to $5,000,000." See id. at 570.
94. Id. at 575 (quoting 42 U.S.C. § 1981a(b)(1) (1994)).
95. Id. at 575-576. However, the circuit court found that the (reduced) punitive damages award of five million dollars was excessive under both federal and state law, and remanded the case for the district court to reduce the award to the "reasonable amount" of $350,000. Id. at 578.
96. 477 U.S. 57 (1986). Vinson, a female bank employee, brought a sexual harassment suit against Meritor, claiming a violation of Title VII of the Civil Rights Act of 1964, and seeking injunctive relief and damages. See id. at 60.
97. See id. at 62.
98. See Meritor, 477 U.S. at 70. Vinson contended that Title VII's definition of "employer" includes any "agent" of the employer and that the bank should therefore be liable. Id. Meritor asserted that Vinson's failure to use its established grievance procedure protected the bank from vicarious liability. Id.
99. Id.
The issue presented to the Court was whether, under Title VII of the Civil Rights Act of 1964, an employee who is subjected to unwelcome sexual advances by a supervisor, yet suffers no adverse job consequences, can recover against the employer without showing that the employer was negligent or otherwise at fault for the supervisor’s actions.

Justice Anthony M. Kennedy, writing for the majority, stated that an employer is subject to vicarious liability for an actionable hostile environment created by a supervisor with immediate or successively higher authority over the employee. Justice Kennedy relied on the “aided in the agency relation” standard, which requires that the hostile environment result in tangible employment action against the employee. Justice Kennedy further explained that when no tangible employment action has been taken against the employee, an employer may raise an affirmative defense comprised of two elements: (1) that the employer exercised reasonable care to prevent the harassment, and (2) that the plaintiff unreasonably failed to take advantage of the preventive opportunities that the employer provided.

Justice Clarence Thomas, with whom Justice Scalia joined, dissented, based upon a belief that the affirmative defense was not adequately defined. Justice Thomas maintained that the standard of employer liability should simply be that the plaintiff must prove that the employer was negligent in allowing the supervisor’s conduct to occur.

In Kolstad v. ADA, the Supreme Court struck a necessary balance between the interests of the employer and the rights of employees under Title VII. While plaintiffs no longer must prove that the discriminatory conduct was egregious, employers may not be held liable for punitive damages for the conduct of their supervisors.

101. See id.
103. See Burlington, 524 U.S. at 747.
104. Id. at 765.
105. Id. at 759. Under the “aided in the agency relation” standard for vicarious liability, more than mere presence of an employment relation is necessary. Id. The supervisor’s discriminatory act must result in a tangible employment action against the employee. Id. at 756 (citing RESTATEMENT (SECOND) OF TORTS § 219 (1965)).
106. Burlington, 524 U.S. at 765. The Court added that if a tangible employment action has been taken, such as discharge or demotion, then there is no affirmative defense available. Id.
107. Id. at 766-767 (Thomas, J., dissenting).
108. Id. at 767 (Thomas, J., dissenting).
managers when that conduct is counter to the employers' good faith effort to comply with Title VII. The effect of the new standards for punitive damages is to encourage employers to implement effective discrimination prevention programs. The Court’s use of principles of agency law to address the punitive damages issue, while creative, was not improper. In keeping with common law, punitive damages should have a higher standard than that for liability, but the plain meaning of Title VII would not allow it. The Court applied agency principles to reach a just result and correct a legislative oversight.

The Court has theoretically succeeded in limiting the cases in which punitive damages may be considered and awarded, which is in keeping with the legislative intent of Title VII. Given the extensive awareness of the existence of federal antidiscrimination laws, however, it will be difficult for employers to prove that their agents were not discriminating in the face of a perceived risk that their conduct violated a federally protected right. Furthermore, the employer's defense that the agent's conduct was inconsistent with the employer's good faith efforts to comply with the discrimination law may be difficult to establish. Ultimately, the Court's decision in Kolstad was correct and took an important first step in clarifying the award of punitive damages in a Title VII action.

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