

KOLSTAD V. AMERICAN DENTAL ASS'N: THE OPPORTUNITY FOR PUNITIVE DAMAGES IN EMPLOYMENT DISCRIMINATION CASES

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The Civil Rights Act of 1991 (the "1991 Act") enables victims of employment discrimination who bring claims under either Title VII of the Civil Rights Act of 1964 or the Americans with Disabilities Act of 1990 ("ADA") to receive compensatory and punitive damages.¹ Although the 1991 Act caps damages based on the number of employees within an organization, and stipulates that a litigant may receive a maximum of \$300,000, the availability of punitive damages in employment discrimination cases has been hotly contested. Traditionally, employees who brought claims under Title VII were awarded only equitable remedies, including reinstatement and back pay, which often did not result in a large monetary awards. By enacting the 1991 Act, Congress sought to create greater incentives for victims of discrimination to initiate cases by providing them with additional remedies. Congress also passed the 1991 Act as a preventative measure, to force employers to address the potential consequences of large liability and to create more effective mechanisms for eliminating discriminatory conduct.²

This transformation of available remedies was met with tremendous opposition by employers, who have attempted through litigation to limit the situations in which compensatory and punitive damages are awarded. When the Supreme Court decided *Kolstad v. American Dental Ass'n*³ in June 1999, many employers cheered that the Court had created a formidable obstacle that would prevent most employees who brought suits alleging discrimination from receiving punitive damages. In *Kolstad*, the

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1. Civil Rights Act of 1991, 42 U.S.C. § 1981a(a) (1994). Previously, only equitable remedies were available under Title VII of the Civil Rights Act of 1964.

2. *Kolstad v. Am. Dental Ass'n*, 108 F.3d 1431, 1437 (D.C. Cir. 1997) (stating that, when analyzing the passage of the 1991 Act, Congress made findings that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace") (citation omitted).

3. 527 U.S. 526 (1999).

Supreme Court held that in order to obtain punitive damages, a plaintiff needed to show that the defendant had engaged in intentional discrimination “with malice or with reckless indifference to the federally protected rights of an aggrieved individual.”⁴ In repudiating several courts of appeals, the Court emphasized that a plaintiff did not need to show an egregious act separate from a defendant’s culpable state of mind. However, the Court also modified the agency principles that allowed an employee to impute the discriminatory actions of an employee agent to his or her employer. The Court stated that “[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.’”⁵

Many employers have been eager to praise *Kolstad*, and many commentators have predicted that the Supreme Court’s decision will vastly reduce punitive damage awards against employers in employment discrimination cases. In its analysis of the previous Supreme Court term’s prominent cases, the Harvard Law Review (the “Review”) stated that, “[b]y allowing employers to avoid punitive liability for their agents’ unlawful behavior without establishing a clear good-faith-effort standard, the Court rendered Title VII’s most powerful deterrent mechanism—punitive damages—ineffectual.”⁶ The Review argued that the Supreme Court’s decision would hinder Congress’ primary goal in passing the 1991 Act, deterrence of discrimination in the workplace. The article stated that since “individuals are generally not personally liable for punitive damages and employer vicarious liability for punitive damages has been limited by *Kolstad*, few people will be deterred by the threat of punitive damages.”⁷ The piece cited several employment law newsletters written by law firms which promoted the positive effect that *Kolstad* would have on reducing employer liability for punitive damages. One of the newsletters asserted that “[a]s an employer, you can breathe a bit easier—you don’t have to worry quite as much about large punitive damage awards if you’ve adopted and implemented antidiscrimination policies.”⁸

The Federal Litigator agreed with the Review’s assessment that the *Kolstad* decision would vastly reduce employer liability for punitive damages. In its analysis of *Equal Employment Opportunity Commission v.*

4. *Id.* at 530 (quoting 42 U.S.C. § 1981a(b)(1) (1994)).

5. *Id.* at 545 (quoting *Kolstad v. Am. Dental Ass’n*, 139 F.3d 958, 974 (D.C. Cir. 1998) (Tatel, J., dissenting)).

6. *Leading Cases, Civil Rights Act of 1991—Employer Liability for Punitive Damages in Title VII Claims*, 113 HARV. L. REV. 359, 359-60 (1999) (concluding that the Court’s decision in *Kolstad* failed to take into account Congress’ desire to create “alternative preventative measures” in addition to the adoption of employer anti-discrimination policies).

7. *Id.* at 365.

8. *Id.* at 366 (citations omitted).

Wal-Mart Stores, Inc.,⁹ a Tenth Circuit case that applied the new *Kolstad* standard but affirmed the trial court's award of punitive damages,¹⁰ the article stated that "[i]n commenting on *Kolstad*, we said that the 'good-faith effort' defense is likely to make punitive damages more difficult to obtain in Title VII (and ADA actions). It didn't here, but this doesn't persuade us to change our prediction."¹¹

Although most commentators have touted the *Kolstad* standard as the answer to employers' concerns about punitive damage liability, most of the cases decided by the federal courts of appeals have not utilized it to bar punitive damages. Of the eleven circuit courts of appeals that have applied the *Kolstad* standard, only the First and Second Circuits have applied it to limit punitive damage liability in a very narrow set of circumstances.¹² In addition, some of the courts of appeals have utilized the *Kolstad* standard to reverse the limitations that lower courts have placed on punitive damages.¹³

This comment examines the impact of the new standard for punitive damages in employment discrimination cases established by the Supreme Court in *Kolstad*. Although the long-term impact of the *Kolstad* decision is not completely clear, this comment argues that the Supreme Court's limitation on employers' vicarious liability will not, as many commentators have predicted, vastly reduce employers' liability for punitive damages. The majority of courts that have interpreted *Kolstad's* good faith standard have looked beyond whether an employer has a grievance procedure or anti-discrimination policy in place, and have analyzed whether these mechanisms were actually effective in redressing and preventing harassment and discrimination in the workplace.

This comment begins with an analysis of the 1991 Act and then discusses the various litigation phases of the *Kolstad* case and the detailed standard developed by the Supreme Court. The comment then examines Title VII cases which have applied the *Kolstad* standard, with an emphasis on the impact of the new standard on the cases discussed. The piece also examines the effect of this new standard on the enforcement of other civil

9. 187 F.3d 1241 (10th Cir. 1999).

10. *Id.* at 1245.

11. *Punitive Damages—Employment Discrimination—"Good Faith Effort" Defense*, 14 No. 12 FED. LITIGATOR 308, 309 (1999) (suggesting that employers can successfully raise the good faith effort defense when they have implemented specific anti-discrimination policies that focus on the requirements of Title VII or the ADA, rather than the general anti-discrimination policy that Wal-Mart had in place).

12. *See* Weissman v. Dawn Joy Fashions, Inc., 214 F.3d 224, 224 (2d Cir. 2000) (upholding the district court's refusal to award punitive damages in an ADA case); Iacobucci v. Boulter, 193 F.3d 14, 25 (1st Cir. 1999) (holding that plaintiff's § 1983 false arrest claim did not provide sufficient evidence to support an award of punitive damages).

13. *See* Knowlton v. Teltrust Phones, Inc., 189 F.3d 1177, 1186 (10th Cir. 1999) (reversing the district court's dismissal of plaintiff's punitive damages claim and remanding "for the specific purpose of submitting to a jury the issue of punitive damages").

rights laws and the ability of anti-discrimination laws to achieve their objectives of deterring discrimination in the workplace.

I. PUNITIVE DAMAGES: THE CIVIL RIGHTS ACT OF 1991

Congress borrowed the wording for the punitive damages provision of the 1991 Act from the Supreme Court's opinion in *Smith v. Wade*.¹⁴ In that case, the plaintiff, Daniel Wade, an inmate in a youth offender facility, brought suit under § 1983¹⁵ against reformatory guards and correctional officials.¹⁶ Wade alleged that the guards violated his Eighth Amendment right to be free from cruel and unusual punishment.¹⁷ The District Court awarded Wade both compensatory and punitive damages against one of the guards.¹⁸ The Supreme Court in *Smith* decided that, "a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others."¹⁹ The standard articulated in *Smith* has been used by Congress not only to develop the standard for punitive damages in the 1991 Act, but it also has been used by federal courts²⁰ to analyze whether punitive damages should be awarded under other anti-discrimination statutes such as § 1981.²¹

The 1991 Act only allows compensatory and punitive damages in cases of intentional discrimination.²² While the 1991 Act allows plaintiffs bringing suit under Title VII of the Civil Rights Act of 1964 and the ADA to receive compensatory and punitive damages, the maximum amount of damages is capped based on the number of workers employed in the current or preceding calendar year.²³ The Act states:

14. 461 U.S. 30, 34 (1983).

15. 42 U.S.C. § 1983 (1999) (providing an opportunity for individuals to bring civil actions for the deprivation of their rights under color of state law).

16. *Smith*, 461 U.S. at 32.

17. *Id.*

18. *Id.* at 33.

19. *Id.* at 56.

20. See *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535-36 (1999).

21. See 42 U.S.C. § 1981(a) (1994) (stating that all persons shall have the equal right "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens"). Section 1981 was passed in the wake of the Civil War in order to provide the newly emancipated slaves with federal protection of their civil rights.

22. 42 U.S.C. § 1981a(a)(1) (1994) (stating that compensatory and punitive damages are not available in disparate impact Title VII cases where the discrimination takes the form of a neutral policy, and therefore, the employer did not intentionally discriminate).

23. *Id.* § 1981a(b)(3) (stating that the total amount of compensatory and punitive damages a plaintiff can receive if an employer employs more than 14 and fewer than 101 employees is \$50,000; more than 100 and fewer than 201 employees is \$100,000; more than

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.²⁴

Congress passed the 1991 Act in order to “strengthen and improve Federal civil rights laws” by providing additional remedies to civil rights plaintiffs.²⁵ Although many courts of appeals have interpreted the punitive damages standard in the 1991 Act, the Supreme Court’s first analysis of this issue came during its October 1998 term when it decided *Kolstad*.

II. *KOLSTAD V. AMERICAN DENTAL ASS’N*

Carole Kolstad was working as the Director of Federal Agency Relations at the American Dental Association (the “Association”) when in September 1992, Jack O’Donnell announced that he was retiring as both the Director of Legislation and Legislative Policy and the Director of the Council on Government Affairs and Federal Dental Services at the end of the year.²⁶ Both Kolstad and Tom Spangler, the Association’s Legislative Counsel for the previous twenty months, expressed interest in O’Donnell’s position.²⁷ Kolstad and Spangler had both received “distinguished” performance evaluations, and had worked directly with O’Donnell.²⁸

Although Leonard Wheat, the current head of the Washington office, had the authority to name O’Donnell’s replacement, he requested that Dr. William Allen, the Association’s Executive Director in the main office in Chicago, make the appointment.²⁹ After a discussion with Wheat, Allen revised the Position Description Questionnaire for O’Donnell’s job to incorporate many of the job responsibilities included in the questionnaire used to hire Spangler.³⁰ In addition, one month after O’Donnell announced his retirement, Wheat signed Spangler’s performance evaluation which listed “to ‘provide management and administrative support . . . for the Council on Government Affairs’” as one of Spangler’s goals for 1993.³¹ These duties included work that was then performed by O’Donnell.

200 and fewer than 501 employees is \$200,000; and more than 500 employees is \$300,000).

24. *Id.* U.S.C. § 1981a(b)(1).

25. H.R. Res. 270, 102nd Cong. (1991).

26. *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 530 (1999).

27. *Kolstad v. Am. Dental Ass’n*, 108 F.3d 1431, 1434 (D.C. Cir. 1997).

28. *Kolstad*, 527 U.S. at 530.

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

30. *Kolstad v. Am. Dental Ass’n*, 139 F.3d 958, 960 (D.C. Cir. 1998).

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

Spangler formally applied for the position in November 1992.³² After communicating to Allen that Wheat had refused to meet with her for several weeks to discuss her interest in the position, Kolstad also applied.³³ Following interviews with both Spangler and Kolstad, Wheat recommended Spangler for the position.³⁴ Allen then offered the position to Spangler and he accepted.³⁵ Thereafter, Allen informed Kolstad that she did not receive the position due to her lack of experience in health care reform and because she was too valuable in her current position.³⁶ Subsequently, Kolstad filed a complaint with the Equal Employment Opportunity Commission (“EEOC”); and after exhausting her administrative remedies, filed suit in the District Court for the District of Columbia.³⁷ Kolstad alleged unlawful employment discrimination under Title VII of the Civil Rights Act of 1964 and the 1991 Act.³⁸ She sought equitable relief including back pay, reinstatement to the positions of Director of Legislation and Legislative Policy and Director of the Council on Government Affairs and Federal Dental Services, attorneys’ fees, and compensatory and punitive damages.³⁹

Kolstad tried her claim of back pay to an advisory jury, and her claim of reinstatement to the judge. Although the district court denied defendant’s motion for judgment as a matter of law, it dismissed Kolstad’s compensatory and punitive damages claims due to insufficient evidence.⁴⁰ The jury found that the Association had unlawfully discriminated against Kolstad on the basis of sex and awarded her \$52,718 in damages, exactly the amount she sought in back pay.⁴¹ Judge Thomas Penfield Jackson of the district court entered judgment against the Association in the amount of the advisory jury verdict, but refused to grant Kolstad reinstatement or award her attorneys’ fees.⁴²

Kolstad appealed, challenging both the district court’s dismissal of her compensatory and punitive damages claims and the court’s denial of reinstatement and attorneys’ fees.⁴³ Writing for the Court of Appeals for the District of Columbia Circuit, Judge David Tatel reversed the district court’s decision that denied Kolstad’s request for an instruction on punitive

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Kolstad v. Am. Dental Ass’n*, 912 F. Supp. 13, 13 (D.D.C. 1996).

41. *Id.* at 14.

42. *Id.* at 16.

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

damages.⁴⁴ The court held that the jury could have reasonably found intentional discrimination and therefore it should have been permitted to consider awarding punitive damages.⁴⁵ The court, citing the 1991 Act's legislative history, held that a plaintiff need only show malice or reckless indifference, rather than egregious conduct, in order to receive punitive damages.⁴⁶ However, the court did acknowledge that not every case of intentional discrimination supports a punitive damages award.⁴⁷ The court of appeals remanded the case to the district court for a trial on punitive damages.⁴⁸

Judge Stephen Williams wrote a separate opinion, in which he concurred in part and dissented in part.⁴⁹ Citing the decisions of five other circuits, Williams argued that the 1991 Act required a more culpable state of mind for punitive damages than the "ordinary intent" required to sustain a violation of Title VII.⁵⁰ Judge Williams also relied on the legislative history of the 1991 Act and "other measures taken to constrain the award of punitives" to show that a plaintiff needs to prove more than intentional discrimination in order to be awarded punitive damages.⁵¹ Therefore, Williams did not support the remand to the district court for a trial on punitive damages.⁵²

The Court of Appeals for the District of Columbia Circuit granted en banc review of the decision by the panel.⁵³ In a divided opinion (six to five), Judge Williams, this time writing for the majority, concluded that "before the question of punitive damages can go to the jury, the evidence of the defendant's culpability must exceed what is needed to show intentional discrimination."⁵⁴ The court held that a plaintiff must prove egregious misconduct before the jury is allowed to consider a claim for punitive

44. *Id.* at 1440.

45. *Id.* at 1438.

46. *Id.* at 1437 (stating that Congress concluded that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace") (citation omitted).

47. *Id.* at 1438 (asserting that "[b]y our decision today, we do not suggest that evidence sufficient to establish liability under Title VII for intentional discrimination will always sustain an award of punitive damages under section 1981a").

48. *Id.* at 1440.

49. *Id.*

50. *Id.* at 1440-41 (Williams, J., concurring in part, dissenting in part) (disagreeing with the proposition that "the minimum standard of evidence for punitive damages is . . . no higher than the standard for liability").

51. *Id.* at 1441-44 (Williams, J., concurring in part, dissenting in part) (discussing the RESTATEMENT (SECOND) OF TORTS and various state law restrictions on punitive damages, which require proof of egregious conduct).

52. *Id.* at 1446.

53. *Kolstad v. Am. Dental Ass'n*, 139 F.3d 958, 961 (D.C. Cir. 1998).

54. *Id.* at 960-61 (rejecting *Kolstad's* proposed rule which would allow every plaintiff with a case strong enough to get to the jury to receive punitive damages).

damages.⁵⁵ The en banc majority affirmed the decision of the district court and held that punitive damages should not have been an issue at trial.⁵⁶

Writing for the en banc dissent, Judge Tatel argued that the majority opinion nullified the plain language of the 1991 Act by requiring egregious misconduct beyond the culpable state of mind required under the Act.⁵⁷ Judge Tatel also discussed the potential problems that his proposed standard could create because of the vicarious liability of employers under general agency principles.⁵⁸ Tatel proposed that an employer might be able to avoid punitive damages liability if it alleged that it had “undertaken good-faith efforts to comply with Title VII.”⁵⁹

The Supreme Court granted certiorari.⁶⁰ In a split decision, the Supreme Court disagreed with the en banc majority of the District of Columbia Circuit and held that in order to be eligible for punitive damages, plaintiffs need not show egregious conduct, but must demonstrate a culpable state of mind, as required by the 1991 Act.⁶¹ However, Justice O’Connor’s majority opinion limited the vicarious liability of employers for punitive damages when the employer has made a good faith effort to comply with Title VII.⁶²

In its analysis of what is required in order to receive punitive damages, the Court relied on the standard established by Congress in the 1991 Act.⁶³ A plaintiff must prove intentional discrimination by an employer who engaged in discriminatory practices with malice or reckless indifference to

55. *Id.* at 965 (finding that the issue of punitive damages should reach the jury when “the defendant engaged in a pervasive pattern of discriminatory acts, or manifested genuine spite and malevolence, or otherwise evinced a ‘criminal indifference to civil obligations’”) (citations omitted).

56. *Id.* at 970.

57. *Id.* at 971 (Tatel, J., dissenting).

58. *Id.* at 974 (Tatel, J., dissenting); *see also* RESTATEMENT (SECOND) OF AGENCY § 219 (1958) (stating that “[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment”).

59. *Kolstad*, 139 F.3d at 975 (providing several examples of good faith efforts made by employers in order to comply with Title VII, including “hiring staff and managers sensitive to Title VII responsibilities . . . , requiring effective EEO training, or . . . developing and using objective hiring and promotion standards,” which would demonstrate that the employer “never acted in reckless disregard of federally protected rights”).

60. *Kolstad v. Am. Dental Ass’n*, 525 U.S. 960 (1998).

61. *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 538 (1999). Justice O’Connor wrote the majority decision in *Kolstad*. Six justices (Justices Scalia, Breyer, Stevens, Ginsburg, Souter and Kennedy) signed the part of the opinion that did not require a showing of egregious conduct. *Id.* at 526, 547. Chief Justice Rehnquist and Justice Thomas dissented from this part of the opinion. *Id.* at 547.

62. *Id.* at 545. Justice O’Connor was joined by Justices Kennedy and Scalia in this part of the opinion. Chief Justice Rehnquist and Justice Thomas concurred. *Id.* at 547. Justice Stevens dissented, and was joined by Justices Breyer, Ginsburg, and Souter. *Id.* at 552.

63. *Id.* at 534.

the plaintiff's federally protected rights.⁶⁴ The Court determined that Congress' intent was to impose two standards of liability: one for establishing a claim for compensatory damages and another, higher standard in order to qualify for punitive damages.⁶⁵ The Court emphasized that the focus of the malice and reckless indifference standard should be on the intent and mental state of the employer.⁶⁶ The Court stated that "[t]he terms 'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination."⁶⁷

Since the wording used by Congress to create a punitive damages remedy in the 1991 Act was developed by the Supreme Court in *Smith v. Wade*,⁶⁸ the Court analyzed the requirements of that case.⁶⁹ In *Smith*, the Supreme Court stated that "a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others."⁷⁰ In *Kolstad*, the Court adopted the subjective recklessness requirement of *Smith* which required 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."⁷¹ The Court also stated that there are circumstances when intentional discrimination will not give rise to punitive damages liability under its malice or reckless indifference standard.⁷² For example, an employer may be unaware of a federal prohibition or may think that the discrimination is lawful. The underlying theory of discrimination also may be novel or poorly recognized. In addition, an employer may reasonably believe that its discrimination satisfies a bona fide occupational qualification defense ("BFOQ") or another statutory exception.⁷³

Justice O'Connor, joined by six other justices, rejected the District of Columbia Circuit's en banc decision that eligibility for punitive damages required a showing of egregious misconduct.⁷⁴ The Court stated that "[w]hile egregious misconduct is evidence of the requisite mental state, [the Civil Rights Act of 1991] does not limit plaintiffs to this form of

64. *Id.*; see also 42 U.S.C. § 1981a (1994).

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

66. *Id.* at 535.

67. *Id.*

68. 461 U.S. 30, 56 (1983) (providing the standard for an award of punitive damages).

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

70. *Smith*, 461 U.S. at 56.

71. *Kolstad*, 527 U.S. at 536 (interpreting the meaning of the terms "malice" and "reckless indifference" in a Title VII action).

72. *Id.* at 536-37.

73. *Id.* at 537; see also 42 U.S.C. § 2000e-2(e)(1) (describing the Title VII defense "where religion, sex, or national origin is a bona fide occupational qualification").

74. *Kolstad*, 527 U.S. at 534-39.

evidence, and the section does not require a showing of egregious or outrageous discrimination independent of the employer's state of mind."⁷⁵ However, the Court recognized that "egregious or outrageous acts may serve as evidence supporting an inference of the requisite 'evil motive.'"⁷⁶

A slim five member majority of the Court held that a plaintiff must be able to impute liability for punitive damages to a defendant.⁷⁷ The Court stated that "in 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.'"⁷⁸

The Court limited the applicability of the common law rules of agency in Title VII cases.⁷⁹ The common law had long recognized agency principles that limited vicarious liability for punitive damages awards.⁸⁰ The *Kolstad* decision placed additional limitations on the awarding of punitive damages. The Court held that if the acts of an employee were contrary to the employer's good faith efforts to comply with Title VII, an

75. *Id.* at 535 (citation omitted).

76. *Id.* at 538. The Court emphasized that "the reprehensible character of the conduct is not generally considered apart from the requisite state of mind." *Id.*

77. *Id.* at 545.

78. *Id.* (quoting *Kolstad v. Am. Dental Ass'n*, 139 F.3d 958, 974 (Tatel, J., dissenting)). The Court addressed this issue even though it was not briefed by either party. *Id.* at 553 (Stevens, J., dissenting). Justice O'Connor argued that this issue was integral to the decision, stating that "[t]his issue is intimately bound up with the preceding discussion on the evidentiary showing necessary to qualify for a punitive award, and it is easily subsumed within the question on which we granted certiorari." *Id.* at 540. However, the Court did not apply the modified agency standards to *Kolstad's* case and instead vacated and remanded the decision so that the lower courts could apply the standard articulated by the Court in *Kolstad*. *Id.* at 546. The Court of Appeals for the District of Columbia Circuit remanded the case back to the district court for further proceedings and provided the parties with an opportunity to expand the record in summary judgment proceedings, and if summary judgment was not granted, at trial. *Kolstad v. Am. Dental Ass'n*, Nos. 96-7030, 96-7047, 1999 WL 825555, at *1 (D.C. Cir. Sept. 8, 1999).

79. *Kolstad*, 527 U.S. at 542-45.

80. *Id.* at 542-43. 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.

Id. (quoting RESTATEMENT (SECOND) OF AGENCY § 217 C (1958)).

employer should not be liable for punitive damages for those acts.⁸¹

The decision set out several policy reasons for modifying the common law agency principles to conform with the goals of discrimination laws. First, the Court emphasized that it is improper to award punitive damages against an employer who is personally innocent and only vicariously liable.⁸² Second, the Court emphasized that applying the common law rules of agency, which allow an employer to be vicariously liable when employees act in managerial capacities within the scope of employment, would reduce the incentive for employers to implement anti-discrimination programs.⁸³ Third, the Court pointed out that the malice and reckless indifference standard penalizes those employers who educate themselves and their employees about Title VII's prohibitions.⁸⁴ The Court then concluded that "[d]issuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII," since the primary goal of the statute is to prevent discrimination from occurring in the first place.⁸⁵ The Court remanded the case in order to provide Kolstad an opportunity to introduce evidence to support the inference that the court can impute the required mental state to the Association, which would allow Kolstad to receive punitive damages.⁸⁶

Chief Justice Rehnquist and Justice Thomas concurred in part of the decision and dissented in part of the decision.⁸⁷ Writing for the two Justices, Chief Justice Rehnquist stated that he would adopt the egregiousness test developed by Judge Randolph in his concurrence to the District of Columbia Circuit Court's en banc majority decision.⁸⁸ Chief Justice Rehnquist agreed that agency principles placed a "significant limitation", and in many cases a complete bar, on employer liability for punitive damages.⁸⁹ The Chief Justice's concurrence in part provided Justice O'Connor with the five votes needed to limit the vicarious liability of employers when they have made a good faith effort to comply with Title VII.⁹⁰

Justices Stevens, Souter, Ginsburg, and Breyer also concurred in part of the decision and dissented in part of the decision.⁹¹ Justice Stevens,

81. *Id.* at 545.

82. *Id.* at 544.

83. *Id.* at 544-45.

84. *Id.*

85. *Id.* at 545.

86. *Id.* at 546.

87. *Id.* at 547.

88. *Id.*

89. *Id.*

90. *Id.* at 547.

91. *Id.*

writing for the four Justices, agreed that the Court should not adopt the District of Columbia Circuit Court's en banc egregiousness standard, but disagreed with the portion of Justice O'Connor's opinion which held that agency principles should limit employers' vicarious liability for punitive damages.⁹² The four-member dissent would have remanded the case for a trial on the punitive damages issue without addressing the limitations of vicarious liability regarding punitive damages under Title VII because the issue was not briefed or raised by the parties.⁹³ Justice Stevens stated that it was unnecessary to reach the issue of vicarious liability in this case because a promotional decision by two high-ranking members of a company is a "quintessential 'company act.'"⁹⁴

In *Kolstad*, the Supreme Court articulated a two-part standard for punitive damages that likely will expand the availability of punitive damages to plaintiffs in employment discrimination cases. Justices Stevens, Souter, Ginsburg, and Breyer—the four justices on the left of the Court—joined Justices O'Connor, Scalia, and Kennedy in rejecting the theory that plaintiffs must show egregious conduct, and emphasized that under the 1991 Act, plaintiffs need only show that an employer had a culpable state of mind.⁹⁵ However, against the strong dissent of Justices Stevens, Souter, Ginsburg, and Breyer, the majority circumscribed the vicarious liability of employers for punitive damages when the employer can demonstrate that it has made a good faith effort to comply with Title VII.⁹⁶

By only requiring a culpable state of mind and not an independent showing of egregiousness, the Supreme Court made it easier for plaintiffs to receive punitive damages. An analysis of the employer's state of mind in order to determine whether the employer knew that it might have been acting in violation of federal law likely will be a very fact-intensive inquiry that will often preclude summary judgment on the issue of punitive damages.⁹⁷ However, in its second holding, the Supreme Court attempted to restrict a plaintiff's opportunity to receive punitive damages by

92. *Id.* at 547-53.

93. *Id.* at 552-53.

94. *Id.* at 552 (citations omitted); *see also* *Dodoo v. Seagate Tech., Inc.*, No. 99-6352, 2000 WL 1843245, at *7 (10th Cir. Dec. 15, 2000) (finding *Kolstad's* agency analysis inapplicable in a failure to promote case because "its agency principles do not bear on the situation here, where punitive damages are imposed on the basis of direct liability").

95. *Id.* at 551.

96. *Id.* at 528.

97. *See* David Borgen, *Major Recent Developments in Employment Law from the Perspective of a Plaintiffs' Attorney*, 614 PRAC. L. INST. LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES 151, 163 (1999). The Supreme Court has addressed the difficulty of granting summary judgment when a court must analyze the actor's state of mind within the official immunity context. *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982) (stating that "questions of subjective intent so rarely can be decided by summary judgment").

providing a defendant with the ability to demonstrate that it made a good faith effort to comply with Title VII.⁹⁸ Although it seemed as though the Court's good faith effort defense might affect plaintiffs' opportunities to obtain punitive damages, thus far the courts have looked beyond whether an employer had a grievance procedure or an anti-discrimination policy, and analyzed whether these mechanisms were actually utilized, and whether they were effective in addressing the discrimination and harassment that occurred. Therefore, *Kolstad* has not limited plaintiffs' opportunities for punitive damages, as many commentators suggested it would.

III. CASES ANALYZED UNDER THE *KOLSTAD* STANDARD

A. *Title VII of the Civil Rights Act of 1964*

Although many commentators argued that the restrictions the Supreme Court placed on punitive damages would limit employer damages, most courts that have applied this new standard continue to permit punitive damage awards.⁹⁹ This has certainly been the case in actions brought under Title VII of the Civil Rights Act of 1964.

In *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*,¹⁰⁰ the district court granted the defendant judgment as a matter of law on the issue of punitive damages after the jury awarded the plaintiff \$100,000 in punitive damages and \$19,000 in compensatory damages.¹⁰¹ The court then entered a verdict for Deffenbaugh-Williams only on her compensatory damages claim.¹⁰²

Before the Supreme Court's ruling in *Kolstad*, the Fifth Circuit

98. Often a court's analysis of whether an employer has made a good faith effort to comply with discrimination laws will be a fact-intensive inquiry which precludes summary judgment. *See Romano v. U-Haul Int'l*, 233 F.3d 655, 655 (1st Cir. 2000) (finding that "[a]lthough a written non-discrimination policy is one indication of an employer's efforts to comply with Title VII," it was insufficient without a showing by the employer that it had made an effort to implement the policy by creating "an active mechanism for renewing employees' awareness of the policies through either specific education programs or periodic re-dissemination or revision of their written materials").

99. *See Molnar v. Booth*, 229 F.3d 593, 604 (7th Cir. 2000) (affirming the jury's \$25,000 punitive damages award in a Title VII and § 1983 sexual harassment case); *Conner v. Schrader-Bridgeport Int'l, Inc.*, 227 F.3d 179, 202 (4th Cir. 2000) (affirming the lower court's punitive damages award in a Title VII hostile environment case, but remanding the award for remittitur because it was over the statutory maximum); *Alexander v. Fulton County*, 207 F.3d 1303, 1344 (11th Cir. 2000) (affirming the district court's award of punitive damages in a Title VII race discrimination action).

100. 188 F.3d 278 (5th Cir. 1999).

101. *Id.* at 281.

102. *Id.*

affirmed in part and reversed in part the decision of the district court, and ordered remittitur of the punitive damages award to \$75,000.¹⁰³ When the Fifth Circuit granted a rehearing en banc, the court ordered additional briefing and additional oral argument on the potential effect of the Supreme Court's decision in *Kolstad*.¹⁰⁴ Once *Kolstad* was decided, the Fifth Circuit reinstated the prior panel opinion of the court, except for the punitive damages issue, and remanded it for further consideration in light of *Kolstad*.¹⁰⁵ The court allowed the parties, and invited the EEOC, to brief the effect of *Kolstad*, specifically whether a new trial on punitive damages was required.¹⁰⁶ On remand, the court of appeals held that the *Kolstad* decision did not require a new trial on the issue of punitive damages and reduced the punitive damages award from \$100,000 to \$75,000.¹⁰⁷

In *Deffenbaugh-Williams*, the plaintiff, a white woman, brought suit under Title VII and § 1981 alleging that she had been discriminated against because she was dating an African-American male.¹⁰⁸ Deffenbaugh-Williams alleged that her district manager made remarks that she would never be promoted because of her interracial relationship.¹⁰⁹ Dale Gipson, the plaintiff's supervisor, pursued a series of allegedly pretextual disciplinary actions against the plaintiff and ultimately terminated her.¹¹⁰ Since signs posted at Wal-Mart encouraged employees with grievances to contact higher management, Deffenbaugh-Williams complained to regional manager David Norman.¹¹¹ Although Norman told Deffenbaugh-Williams that he would investigate the claim, he never contacted her about any actions he took to resolve her complaint.¹¹²

In its analysis of whether the court should grant a new trial on punitive damages, the Fifth Circuit examined the impact of the *Kolstad* case. The court stated that when the law changes in "unanticipated ways" during the course of an appeal, the Fifth Circuit usually will remand for a new trial to provide the parties with both the benefit of the new law and a measure of

103. *Id.*; see also *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 598 (5th Cir. 1998) (applying the three-factor analysis developed by the Supreme Court in the tort case of *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), as to the reasonableness of punitive damages).

104. *Deffenbaugh-Williams*, 188 F.3d at 281; see also *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 169 F.3d 215, 215 (5th Cir. 1999) (ordering additional oral argument).

105. *Deffenbaugh-Williams*, 188 F.3d at 281; see also *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 182 F.3d 333, 333 (5th Cir. 1999) (reinstating the prior panel opinion except as to the issue of punitive damages).

106. *Deffenbaugh-Williams*, 188 F.3d at 281.

107. *Id.* at 280. The plaintiff stipulated to the reduced damages award. *Id.* at 281.

108. *Id.* at 280.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

fairness.¹¹³ However, in *Deffenbaugh-Williams* the court declined to remand because “*Kolstad’s* imputation holding [of punitive damages liability to employers] was *not such a sudden shift* as to require, *in fairness*, giving Wal-Mart an opportunity to present additional evidence.”¹¹⁴ The Fifth Circuit emphasized the continuity between *Kolstad* and the prior law of the circuit. The court also stated that the authorities on which *Kolstad* relied “had been available long earlier [sic].”¹¹⁵ After a close examination of the standard established by the Supreme Court in *Kolstad*, the Fifth Circuit reinstated its prior panel opinion and allowed the jury’s punitive damages verdict to stand.¹¹⁶

The Fifth Circuit’s opinion and holding in *Deffenbaugh-Williams* illustrates that *Kolstad* has not dramatically changed and constricted a plaintiff’s claim for punitive damages. To the contrary, the court’s decision in *Deffenbaugh-Williams* to uphold the jury’s decision to award punitive damages shows that *Kolstad* has not heralded the end of employer liability for punitive damages in employment discrimination cases.¹¹⁷

In the Tenth Circuit case *Knowlton v. Teltrust Phones, Inc.*,¹¹⁸ the

113. *Id.* at 282.

114. *Id.* at 284 (emphasis added). Two Eighth Circuit cases arrived at the same conclusion—that a new trial was not required on the issue of punitive damages, even though the jury considered the issue before the Supreme Court’s decision in *Kolstad*. See *Kimbrough v. Loma Linda Dev., Inc.*, 183 F.3d 782, 786 (8th Cir. 1999) (affirming the punitive damages award); *Blackmon v. Pinkerton Sec. & Investigative Servs.*, 182 F.3d 629, 637 (8th Cir. 1999) (reversing the district court’s grant of judgment as a matter of law on the issue of punitive damages and remanding the case to the district court with instructions to reinstate the jury’s punitive damages award). *But see* *Passantino v. Johnson & Johnson Consumer Prod., Inc.*, 212 F.3d 493, 514 (9th Cir. 2000) (stating that “[a]lthough we conclude that the evidence was unquestionably sufficient and that the form of the jury’s verdict properly supported a punitive damages award, we remand so that the district court may apply the Supreme Court’s decision in *Kolstad v. Am. Dental Ass’n*” in order to allow the defendant an opportunity to assert a good faith defense).

115. *Deffenbaugh-Williams*, 188 F.3d at 283. The court cited several sources. See RESTATEMENT (SECOND) OF AGENCY §§ 219-37 (1958); *Smith v. Wade*, 461 U.S. 30 (1983); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (citing the Court’s discussion of agency principles). The court also noted the application of punitive damages principles in various § 1981 cases. *Deffenbaugh-Williams*, 188 F.3d at 283-84.

116. *Deffenbaugh-Williams*, 188 F.3d at 286. However, the court also reinstated the remittitur, which reduced the punitive damages jury award from \$100,000 to \$75,000. *Id.*

117. The Fifth Circuit has applied the *Kolstad* standard in two additional cases. One upheld the punitive damage award and the other reversed the lower court’s punitive damages award. See *Rubinstein v. Adm’r of the Tulane Educ. Fund*, 218 F.3d 392, 406-07 (5th Cir. 2000) (upholding the lower court’s award of punitive damages because the plaintiff proved that the university’s agent was motivated by malice or reckless indifference, and the university had not presented evidence of good faith efforts to comply with Title VII); *Williams v. Trader Publ’g Co.*, 218 F.3d 481, 487-88 (5th Cir. 2000) (reversing the lower court’s award of punitive damages because the employee who discriminated against the plaintiff could not be considered a “managerial employee” under *Kolstad*).

118. 189 F.3d 1177 (10th Cir. 1999).

Kolstad decision influenced the court to reverse a directed verdict for the defendant that dismissed plaintiff's punitive damages claim.¹¹⁹ Plaintiff Knowlton worked as a sales representative for the defendant when her supervisor, Mark Neihart, began to sexually harass her.¹²⁰ Previously, another employee had complained to management about Neihart's harassing conduct.¹²¹ However, management was not responsive to that complaint and Neihart continued to harass women in the workplace.¹²² After plaintiff complained to management about Neihart's conduct, Neihart was transferred to another position within the company.¹²³ Since Knowlton would still be forced to interact with Neihart in his new position, she resigned and filed a complaint with both the EEOC and the Utah Anti-Discrimination Division.¹²⁴ After exhausting her administrative remedies, plaintiff was awarded \$75,000 in compensatory damages at trial.¹²⁵ However, Knowlton was unable to receive punitive damages because the district court granted a directed verdict dismissing her punitive damages claim.¹²⁶ The district court found that Knowlton had failed to prove actual malice or reckless indifference to her federally protected rights.¹²⁷

The Tenth Circuit, applying *Kolstad*, reversed and found that the defendant's liability regarding punitive damages was an issue for the jury.¹²⁸ The court asserted that "our previous cases are consistent with *Kolstad's* admonition that malice or reckless indifference relates to the employer's state of mind and not necessarily to its actions."¹²⁹ The Tenth Circuit stated that the lower court erred when it found that there was no evidence from which a reasonable jury could have found the requisite intent required under the 1991 Act to sustain a punitive damages claim.¹³⁰ The *Knowlton* court stated that the defendant was "unmistakably aware" that Neihart's behavior was "rife with foul language, sexual innuendo, and sexual advances which could reasonably be labeled as sexual harassment."¹³¹ In addition, the court found that the defendant's transfer of Neihart to another department, where Knowlton would remain in contact

119. *Id.* at 1180.

120. *Id.*

121. *Id.* at 1186-87.

122. *Id.*

123. *Id.* at 1187.

124. *Id.* at 1181.

125. *Id.*

126. *Id.* at 1186.

127. *Id.*

128. *Id.* at 1187-88.

129. *Id.* at 1186 (citation omitted). Although the court did not explicitly address the issue of vicarious liability, the court commented that the defendant did not act in good faith to remedy the Title VII discrimination.

130. *Id.* at 1187.

131. *Id.*

with him, was unresponsive.¹³²

The Tenth Circuit's decision in *Knowlton* illustrates that *Kolstad* will not restrict the opportunity for plaintiffs to receive punitive damages, and that it may even broaden the availability of punitive damages.¹³³ In applying the *Kolstad* standard, the Tenth Circuit in *Knowlton* reversed the district court's grant of a directed verdict on the issue of punitive damages and remanded the issue of punitive damages to the district court to be decided by a jury.¹³⁴ Since the first part of the *Kolstad* analysis requires a fact-intensive inquiry, the *Knowlton* court found that the issue of employer intent was for a jury to decide.¹³⁵ In addition, although the Tenth Circuit in *Knowlton* did not explicitly apply *Kolstad's* good faith effort test, it made clear that Teltrust Phones had not attempted in good faith to address Knowlton's sexual harassment claim.

The Tenth Circuit analyzed what constitutes good faith compliance with Title VII in *Cadena v. The Pacesetter Corp.*¹³⁶ Lynn Cadena sued her former employer, alleging that she was sexually harassed by her supervisor.¹³⁷ The defendant attempted to prove that it had acted in good faith because it maintained a sexual harassment policy and trained its employees to comply with Title VII.¹³⁸ In rejecting the defendant's contention, the Tenth Circuit emphasized that the "good-faith-compliance standard requires the employer to make 'good faith efforts to enforce an antidiscrimination policy.'"¹³⁹ Therefore, even though a defendant in a Title VII discrimination suit "maintains on paper a strong non-discrimination policy and makes good faith efforts to educate its employees about that policy and Title VII, a plaintiff may still recover punitive damages if she demonstrates the employer failed to adequately address Title VII violations of which it was aware."¹⁴⁰ Since Cadena had presented

132. *Id.*

133. In *Powell v. COBE Lab., Inc.*, No. 98-1350, 98-1363, 2000 WL 235241, at *1 (10th Cir. Mar. 2, 2000), the Tenth Circuit also broadened the scope of punitive damages in Title VII cases. After a jury awarded the plaintiff \$200,000 in punitive damages, the district court granted defendant's motion for judgment as a matter of law and struck the punitive damages award. *Id.* at *2. The Tenth Circuit then vacated the district court's decision and remanded it for consideration in light of the Supreme Court's pronouncement in *Kolstad*. *Id.* at *3.

134. *Knowlton*, 189 F.3d at 1186.

135. The Tenth Circuit has also applied the first prong of the Supreme Court's *Kolstad* test in *Deters v. Equifax Credit Info. Serv., Inc.*, 202 F.3d 1262, 1269 (10th Cir. 2000) (stating that malice or reckless indifference refers to an employer's knowledge that it may be acting in violation of federal law).

136. 224 F.3d 1203 (10th Cir. 2000).

137. *Id.* at 1207.

138. *Id.* at 1210.

139. *Id.* (quoting *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 546 (1999) (emphasis added)).

140. *Id.*

evidence demonstrating that the defendant knew about the harassing conduct and failed to take action to end it, the Tenth Circuit affirmed the lower court's award of \$300,000 in compensatory and punitive damages.¹⁴¹ In implementing *Kolstad's* good faith effort defense, the Tenth Circuit looked beyond the existence of an anti-discrimination policy to determine whether that policy effectively functioned as a means of eliminating discrimination in the workplace.¹⁴²

In *EEOC v. Wal-Mart Stores, Inc.*,¹⁴³ the Tenth Circuit again determined that a district court should not have dismissed a plaintiff's punitive damages claim.¹⁴⁴ The case was brought by the EEOC on behalf of Christa Gurule, a former Wal-Mart employee who claimed that defendant subjected her to a hostile environment and sexual harassment.¹⁴⁵ The trial court decided as a matter of law that the EEOC was not entitled to punitive damages under the 1991 Act.¹⁴⁶ The Tenth Circuit remanded the case for an analysis in light of *Kolstad* because the record was "not sufficient to decide the issues of intent and agency laid out in *Kolstad*."¹⁴⁷ The court extensively quoted the test established by the Supreme Court in *Kolstad*.¹⁴⁸ The Tenth Circuit suggested that the EEOC might have enough

141. *Id.* at 1216.

142. Several other circuits have also held that the mere existence of an anti-discrimination policy does not satisfy the good faith effort defense set forth in *Kolstad*. See *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1010 (8th Cir. 2000) (affirming the lower court's punitive damages award and holding that the mere existence of a sexual harassment policy:

does not suffice, as a matter of law, to establish 'good faith efforts' in the face of substantial evidence that the company 'minimized' [plaintiff's] complaints; performed a cursory investigation which focused upon [plaintiff's] performance, rather than [her manager's] conduct; and forced [plaintiff] to resign while imposing no discipline upon [her supervisor] for his behavior.

(quoting *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 286 (5th Cir. 1999)); *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 446 (4th Cir. 2000) (affirming the lower court's award of punitive damages and holding that "an employer's institution of a written policy against race discrimination" is not "automatically a bar to the imposition of punitive damages").

143. Nos. 97-2229, 97-2252, 1999 WL 1032963, at *1 (10th Cir. Nov. 15, 1999).

144. *Id.* at *2.

145. *Id.* at *1.

146. *Id.* at *2.

147. *Id.* at *4.

148. The court stated that a plaintiff must show:

(1) the employer acted with malice or reckless indifference, a state of mind which can be shown with evidence that the employer discriminated against the employee with the knowledge that it might be violating federal law; (2) an employee serving in a managerial capacity committed the wrong; (3) the managerial agent was acting in the scope of employment; and (4) the agent's action was not contrary to the employer's good-faith efforts to comply with Title VII.

Id. at *3 (citing *Kolstad v. Am. Dental Ass'n*, 526 U.S. 526, 535-536, 544 (1999)).

evidence to create a triable issue of fact as to punitive damages.¹⁴⁹

The *Knowlton*, *Cadena*, and *Wal-Mart* cases illustrate that *Kolstad* has not erected a barrier to plaintiffs obtaining punitive damages. On the contrary, the Supreme Court's decision provided an opportunity for the courts to both remand the district courts' decisions and allow the plaintiffs a trial on the issue of punitive damages. One commentator has suggested that this is the impact *Kolstad* will have on future employment discrimination cases.¹⁵⁰ David Borgen argues that *Kolstad's* subjective intent test will make the district court's inquiry very fact-intensive, thus making it more difficult for courts to grant summary judgment for defendants on the issue of punitive damages.¹⁵¹ Since analyzing whether a defendant had a culpable state of mind is subjective and fact-based, defendants will likely lose summary judgment on the issue of punitive damages. The *Kolstad* case might surprise the legal community by allowing more, rather than fewer, plaintiffs to receive punitive damages for discrimination in the workplace.

The Sixth Circuit utilized the *Kolstad* standard and upheld a jury award of punitive damages in *EEOC v. EMC Corp. of Massachusetts*.¹⁵² In *EMC*, the EEOC brought a Title VII gender discrimination suit on behalf of Patricia Boyton.¹⁵³ Even though Boyton, a sales representative, had performed better than two male sales representatives in her office, the area manager instructed the supervisor to "put her on a program to be terminated."¹⁵⁴ When she was terminated, Boyton was ranked first among thirty-four salespeople nationwide in revenue.¹⁵⁵ At trial, the jury found EMC liable for gender discrimination and awarded plaintiff \$300,000 in punitive damages.¹⁵⁶ The Sixth Circuit, applying the *Kolstad* standard, upheld the award of punitive damages. The court stated that firing Boyton while continuing to employ male workers who had performed more poorly showed "reckless disregard for [Boyton's] right to be free from discrimination based on gender."¹⁵⁷ Similar to the other circuits that have applied the *Kolstad* standard, the Sixth Circuit did not restrict the availability of punitive damages. Even though the EEOC could not definitively prove that EMC possessed the requisite mental state, the court reviewed EMC's actions and determined that, under *Kolstad*, punitive

149. *Id.* at *4.

150. *See* Borgen, *supra* note 97, at 163.

151. *Id.*

152. No. 98-1517, 2000 WL 191819, at *1 (6th Cir. Feb. 8, 2000).

153. *Id.* at *2.

154. *Id.*

155. *Id.*

156. *Id.* at *3.

157. *Id.* at *7.

damages could be awarded.¹⁵⁸

B. Section 1983

Kolstad also has been applied to another civil rights statute, § 1983.¹⁵⁹ In *Smith v. Peppersack*,¹⁶⁰ the plaintiff brought an action against former sheriff Robert Peppersack and former undersheriff J. Patrick Ogle of Anne Arundel County, Maryland as well as the county itself, alleging both gender discrimination and sexual harassment.¹⁶¹ Smith alleged that the defendants discriminated against her by denying her a promotion because of gender and by sexually harassing her.¹⁶² The district court dismissed the claims against the county, and the jury awarded plaintiff \$5,100 in compensatory damages and \$25,000 in punitive damages against Peppersack and Ogle.¹⁶³ The Fourth Circuit affirmed the jury's award under *Kolstad*. The court stated that, "because the jury's finding of a constitutional violation under § 1983 necessarily encompasses a finding of intentional discrimination, Smith need not also demonstrate, as defendants suggest, that the conduct was particularly egregious or malicious."¹⁶⁴ The Fourth Circuit held that because Smith presented sufficient evidence to satisfy the standard under the 1991 Act, it would uphold the jury's award of punitive damages.¹⁶⁵

In *Smith*, the Fourth Circuit applied the *Kolstad* standard to uphold the jury's award of punitive damages. In fact, the Supreme Court's decision in

158. In another Title VII case, the Sixth Circuit reversed a district court's grant of a Rule 50(b) motion on a jury's punitive damages award and remanded the case for reconsideration of the award. The jury had awarded the plaintiff \$1.1 million, of which \$300,000 were punitive damages. See *Patton v. Sears, Roebuck & Co.*, Nos. 97-2310, 98-1621, 98-1004, 2000 WL 1681017, at *7 (6th Cir. Nov. 1, 2000).

159. Section 1983 was enacted in 1871 to protect the newly emancipated slaves from attempts by state officials to restrict their rights. Section 1983 states that:

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.

See 42 U.S.C. § 1983 (1999).

160. No. 98-1842, 98-1843, 1999 WL 760218 (4th Cir. Sept. 24, 1999).

161. *Id.* at *1.

162. *Id.*

163. *Id.* at *3.

164. *Id.* at *5. Before *Kolstad*, the Fourth Circuit required an independent showing of malice in order to award punitive damages. See *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 765-66 (4th Cir. 1998), *vacated by*, 527 U.S. 1031 (1999) (stating that punitive damages are recoverable under Title VII only for conduct that exhibits malice, an evil motive, recklessness, or callous indifference to a federally protected right).

165. *Smith*, 1999 WL 760218, at *5.

Kolstad made punitive damages easier to receive in the Fourth Circuit by removing the previous requirement that plaintiffs need to prove independent egregious conduct separate from the defendants' intentional discrimination.

However, the First Circuit has applied *Kolstad* to uphold a denial of punitive damages. In *Iacobucci v. Boulter*,¹⁶⁶ the plaintiff was arrested by the defendant after he attempted to videotape a meeting of the Pembroke Historic District Commission.¹⁶⁷ The district court conducted a trial on plaintiff's claims under both § 1983 alleging false arrest and excessive force, and state law, alleging intentional infliction of emotional distress.¹⁶⁸ The jury found for the plaintiff on his false arrest claim and awarded him \$75,000 in compensatory damages and \$135,000 in punitive damages.¹⁶⁹ The district court struck down the jury's award of punitive damages and the First Circuit affirmed.¹⁷⁰ The court discussed *Kolstad* and reasoned that the plaintiff in this case did not prove that the defendant arrested him because of an improper motive.¹⁷¹

Although the First Circuit applied *Kolstad* to uphold a denial of punitive damages, the *Iacobucci* case likely will not have a substantial effect on the interpretation of *Kolstad*. The context of that case is very different from most cases brought under federal anti-discrimination law. As the First Circuit's decision illustrated, it is extremely difficult to prove intent in a false arrest case. In *Iacobucci*, the defendant decided to arrest the plaintiff quickly, which did not provide a sufficient opportunity to prove evidence of intent. In contrast, evidence of intent is often readily available in employment discrimination cases. Cases brought under Title VII, § 1981, or § 1983 for workplace discrimination usually involve allegations that the defendant either discriminated against plaintiff over a period of time or did not effectively prevent or remedy discrimination that a plaintiff faced. Various decisions made by employers are often documented and there is usually evidence of how an individual's complaint was handled and to what degree an anti-discrimination policy has been implemented. For example, in a Title VII case, a defendant typically makes numerous decisions over the course of several months or years from which a judge or jury may be able to infer intent. Therefore, because the intent analysis in *Iacobucci* was more difficult and the available evidence

166. 193 F.3d. 14, 26 (1st Cir. 1999).

167. *Id.* at 17-18.

168. *Id.* at 18.

169. *Id.*

170. *Id.* at 26.

171. *Id.* at 26-27. The court held that the plaintiff needed to provide evidence that defendant "determined to effectuate the arrest knowing that he lacked probable cause to do so, or, at least, with conscious indifference to the possibility that he lacked probable cause." *Id.* at 26.

was much more limited than the evidence in employment discrimination cases, the First Circuit's decision will have a minimal impact on how the *Kolstad* standard is applied in employment discrimination cases.

C. *Americans with Disabilities Act*

The courts of appeals have examined Americans with Disabilities Act ("ADA") cases under the *Kolstad* standard.¹⁷² The Eighth Circuit has applied the *Kolstad* standard to expand the opportunity for plaintiffs in ADA cases to receive punitive damages. In *Otting v. J.C. Penney Co.*,¹⁷³ defendant J.C. Penney Co. terminated plaintiff from her sales position because, as a result of her epilepsy, she could not use a ladder.¹⁷⁴ Although the jury awarded Otting both compensatory and punitive damages, the district court granted defendant's motion for judgment as a matter of law on plaintiff's \$100,000 punitive damages award.¹⁷⁵ The Eighth Circuit reversed the district court's grant of judgment as a matter of law and reinstated the jury's punitive damages award.¹⁷⁶ The court of appeals found sufficient evidence to support the jury's finding of malice or reckless indifference, including defendant's policy that prevented employees with restrictions from returning to work, as well as its failure to consider that Otting could return to work even with her ladder-climbing restriction.¹⁷⁷ In addition, the defendant refused to consider transferring Otting after she specifically suggested this possibility at her termination meeting.¹⁷⁸ The store manager testified at trial that he was aware of the obligation under federal law to accommodate workers with disabilities.¹⁷⁹ Therefore, according to the Eighth Circuit, the plaintiff had proven that defendant acted with malice or reckless indifference.¹⁸⁰ The Eighth Circuit's broadening of punitive damages liability illustrates that, in many instances, *Kolstad* has enlarged, rather than restricted, the availability of punitive damages.¹⁸¹

172. See *Marcano-Rivera v. Pueblo Int'l, Inc.*, 232 F.3d 245 (1st Cir. 2000); *Otting v. J.C. Penney Co.*, 223 F.3d 704 (8th Cir. 2000); *Weissman v. Dawn Joy Fashions, Inc.*, 214 F.3d 224 (2d Cir. 2000); *Gile v. United Airlines, Inc.*, 213 F.3d 365 (7th Cir. 2000); *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241 (10th Cir. 1999).

173. 223 F.3d 704, 711 (8th Cir. 2000).

174. *Id.* at 711.

175. *Id.* at 708.

176. *Id.* at 712.

177. *Id.* at 711-12.

178. *Id.* at 712.

179. *Id.* at 711-12.

180. *Id.* at 712.

181. However, as *Kolstad* makes clear, when a theory of discrimination is novel or otherwise poorly recognized, a defendant's intentional discrimination will not give rise to punitive damages because the defendant did not act with the requisite malice or reckless

In *EEOC v. Wal-Mart Stores, Inc.*,¹⁸² the Tenth Circuit upheld a lower court's grant of punitive damages in an ADA case.¹⁸³ The plaintiff, Eduardo Amaro, was hired by Wal-Mart with the knowledge that he was hearing-impaired and would need an interpreter in certain circumstances, including training sessions and meetings.¹⁸⁴ After working at Wal-Mart for almost two years, Amaro attended a mandatory training session that required the viewing of a videotape.¹⁸⁵ Amaro left the training session because the video was not close-captioned and the defendant did not provide an interpreter.¹⁸⁶ Although Amaro's supervisor requested that he return to watch the video, he refused.¹⁸⁷ The next day Amaro was transferred to the janitorial department.¹⁸⁸ When he met with his supervisor and the store manager, without an interpreter, Amaro was informed that the transfer was due to payroll reductions and that janitorial duties required less communication.¹⁸⁹ Amaro believed that the transfer was a demotion and did not want to accept the downward move.¹⁹⁰ He requested an interpreter to help explain the transfer and a week later the store manager brought an interpreter to facilitate discussion.¹⁹¹ After Amaro refused the transfer, he was fired.¹⁹² The EEOC brought a complaint on behalf of Amaro, alleging disability discrimination and retaliation in violation of the ADA.¹⁹³ Amaro intervened, and asserted ADA claims as well.¹⁹⁴ At trial, the jury returned a verdict for Amaro, awarding him \$3,527.79 in compensatory damages and \$75,000 in punitive damages.¹⁹⁵ Defendant appealed the verdict.¹⁹⁶

The court of appeals analyzed whether the trial court's award of punitive damages should be affirmed under the *Kolstad* standard.¹⁹⁷ The

indifference. The Seventh Circuit reversed a lower court's award of punitive damages in such a case. *Gile v. United Airlines, Inc.*, 213 F.3d 365, 375-76 (7th Cir. 2000) (finding that the employer's failure to change plaintiff's shift because she was suffering from depression "amounted to negligence because it misunderstood [plaintiff's] difficulties, did not regard her condition a disability and neglected to pursue [plaintiff] in developing an alternative accommodation").

182. 187 F.3d 1241 (10th Cir. 1999).

183. *Id.* at 1250-51.

184. *Id.* at 1243.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 1244.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 1246.

court determined that the evidence on record was “sufficient to resolve the questions of intent and agency laid out in *Kolstad*.”¹⁹⁸ The defendant argued that Wal-Mart’s preparation and dissemination of an ADA compliance manual should shield it from punitive damages liability, even though Amaro’s supervisors failed to follow the manual.¹⁹⁹

The Tenth Circuit inferred from the evidence provided at trial that the jury could have found that the defendant “intentionally discriminated against Amaro in the face of a perceived risk that its action would violate federal law.”²⁰⁰ The court also held that punitive damages were permitted under the modified agency principles established in *Kolstad*.²⁰¹ The Tenth Circuit found that Amaro’s supervisor and the store manager had acted within the scope of their employment when they terminated Amaro.²⁰² The court also emphasized that Wal-Mart’s written policy alone did not constitute a good faith effort to comply with the ADA.²⁰³ Therefore, the court of appeals affirmed the district court’s award of punitive damages.²⁰⁴

The Tenth Circuit’s decision in *Wal-Mart* illustrates that the standard articulated by the Supreme Court in *Kolstad* will not likely limit the availability of punitive damages under the ADA. In *Wal-Mart*, the Tenth Circuit applied the *Kolstad* standard and upheld a jury award of punitive damages. The court applied the good faith effort defense by examining not only whether Wal-Mart had a written policy against discrimination, but also whether the defendant had actually attempted to “educate its employees about the ADA’s prohibitions.”²⁰⁵ By engaging in this detailed analysis of company procedure, the court went beyond general pronouncements of anti-discrimination and reviewed Wal-Mart’s actual company practice. When courts engage in this type of detailed analysis they will be more likely to find that an employer has not acted in good faith and, therefore, more willing to allow punitive damages awards.

In two courts of appeals cases upholding the district courts’ refusals to award punitive damages, the *Kolstad* standard probably had little impact on the decisions. In *Marcano-Rivera*,²⁰⁶ the plaintiff brought suit under the ADA, alleging that her employer failed to provide reasonable

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 1249.

202. *Id.* at 1248.

203. *Id.* The court stated that “Wal-Mart certainly had a written policy against discrimination, but that alone is not enough. Our review of the record leaves us unconvinced that Wal-Mart made a good faith effort to educate its employees about the ADA’s prohibitions.” *Id.* at 1248-49.

204. *Id.* at 1249.

205. *Id.* at 1248-49.

206. 232 F.3d 245 (1st Cir. 2000).

accommodations for her disability.²⁰⁷ The plaintiff used a wheelchair for mobility because both of her legs had been amputated earlier in her life.²⁰⁸ After she was reassigned to several departments due to job restructuring, plaintiff's job was eliminated as part of a reduction in force.²⁰⁹ The First Circuit upheld the district court's refusal to instruct the jury on punitive damages.²¹⁰ The court held that plaintiff failed to present any evidence of malice or reckless indifference.²¹¹ In addition, the First Circuit found that the defendant had made good faith efforts to comply with the ADA by instituting policies prohibiting disability discrimination and training employees to ensure equal treatment.²¹²

Similar to the First Circuit's decision in *Marcano-Rivera*, the Second Circuit also upheld a district court's refusal to award punitive damages in *Weissman v. Dawn Joy Fashions, Inc.*²¹³ In *Weissman*, the plaintiff was terminated two weeks after he suffered a heart attack.²¹⁴ The plaintiff presented evidence that his termination was due to his heart attack, while the defendant claimed that the plaintiff was a poor worker and was scheduled to be terminated regardless of his health.²¹⁵ Although a jury awarded the plaintiff \$150,000 in punitive damages, the district court granted the defendant's motion for judgment as a matter of law and reversed the jury's punitive damages award.²¹⁶ The Second Circuit found that the defendant could not have acted with reckless disregard of Weissman's federal civil rights, because prior to plaintiff's heart attack, defendant had contacted its attorneys regarding plaintiff's possible termination.²¹⁷

Although the First Circuit in *Marcano-Rivera* and the Second Circuit in *Weissman* applied the *Kolstad* standard to deny an award of punitive damages, the decisions in both of those cases would likely have been the same under a pre-*Kolstad* analysis. Before *Kolstad*, several courts of appeals required a showing of egregious conduct independent from the defendant's malice. In *Marcano-Rivera* and *Weissman*, neither plaintiff even presented evidence of malice, a threshold much lower than the showing of egregiousness required by many circuits prior to *Kolstad*.

207. *Id.*

208. *Id.* at 248.

209. *Id.* at 252.

210. *Id.* at 254.

211. *Id.* at 253-54.

212. *Id.* at 254.

213. 214 F.3d 224 (2d Cir. 2000).

214. *Id.* at 227-28.

215. *Id.* at 229.

216. *Id.* at 228-29.

217. *Id.* at 236.

D. *Pregnancy Discrimination Act*

The 1991 Act offers women who bring actions under the Pregnancy Discrimination Act the possibility of receiving a punitive damages award.²¹⁸ The courts of appeals have applied the *Kolstad* standard in the context of pregnancy discrimination to expand the opportunity for plaintiffs to receive punitive damages. In *EEOC v. W & O, Inc.*,²¹⁹ the Eleventh Circuit affirmed the jury's award of punitive damages.²²⁰ The defendant operated a restaurant which had a policy that prohibited waitresses past their fifth month of pregnancy from waiting tables.²²¹ The policy required that these pregnant waitresses either suspend working or work as cashiers or hostesses, positions that paid significantly less than waiting tables.²²² The Eleventh Circuit concluded that there was sufficient evidence for a jury to find that the defendant acted with malice or reckless indifference to the pregnant workers' rights.²²³ In addition, the court found that each aggrieved employee represented by the EEOC in the Title VII action could receive up to the statutory cap in damages without separately filing suit or intervening in the EEOC's action.²²⁴

The Fifth Circuit also has interpreted the *Kolstad* standard to allow more opportunities for plaintiffs to receive punitive damages under the Pregnancy Discrimination Act. In *Hardin v. Caterpillar, Inc.*,²²⁵ the Fifth Circuit vacated the verdict of the lower court and remanded for reconsideration the issue of whether punitive damages should be submitted to the jury.²²⁶ Before the Supreme Court's decision in *Kolstad*, the district court had declined to submit the punitive damage issue to the jury.²²⁷ However, the Fifth Circuit held that under the Supreme Court's new standard articulated in *Kolstad*, "a reasonable juror could conclude that the representatives were either lying or consciously indifferent to the . . . legality of their acts."²²⁸ However, the court was unwilling to remand for a new trial only on the issue of punitive damages.²²⁹ Thus, the court provided the plaintiff with the opportunity to accept the damages awarded at the first

218. 42 U.S.C. § 2000e(k) (2000) (including pregnancy in Title VII's definition of sex discrimination); *Id.* § 1981a.

219. 213 F.3d 600 (11th Cir. 2000).

220. *Id.* at 614.

221. *Id.* at 607.

222. *Id.*

223. *Id.* at 612.

224. *Id.* at 614.

225. 227 F.3d 268 (5th Cir. 2000).

226. *Id.* at 273.

227. *Id.* at 269.

228. *Id.* at 270-71.

229. *Id.* at 272 (stating "[w]e are persuaded of the practical inseparability of the issues of intent, of damages for emotional injury, and of punitive damages in this case").

trial or to retry the whole case in the hope that her award, including the potential punitive damages, would increase.²³⁰ Although the Fifth Circuit's application of *Kolstad* in this case does not definitely provide plaintiff with a larger recovery, it at least provides her with an opportunity that she did not have prior to *Kolstad*—the opportunity to receive punitive damages. Both the Fifth Circuit's decision in *Hardin* and the Eleventh Circuit's decision in *W & O* apply the *Kolstad* standard to increase the chances of receiving punitive damages in cases brought under the Pregnancy Discrimination Act.

E. Fair Housing Act

The Fair Housing Amendments Act provides victims of discriminatory housing practices with an opportunity to receive punitive damages.²³¹ The Third and Eighth Circuits have applied the *Kolstad* standard to broaden the opportunity for punitive damages under the Fair Housing Amendments Act. In *Alexander v. Riga*,²³² the plaintiffs brought suit under both the Fair Housing Amendments Act and § 1981, alleging that the defendants denied them rental housing on the basis of race.²³³ Plaintiffs presented evidence that the defendants did not return phone calls of African-Americans inquiring about the apartment or informed them that the apartment was already rented.²³⁴ In addition, the plaintiffs showed that the defendants not only returned phone calls of white applicants but provided them with tours of the apartment.²³⁵ The jury found that the defendants had discriminated against the plaintiffs, but it failed to award any compensatory damages.²³⁶ After the jury's decision on liability, the district court declined to submit the issue of punitive damages to the jury.²³⁷ The Third Circuit found that the jury's determination that the plaintiffs had been discriminated against "necessarily encompass[ed] a finding of intentional discrimination," which satisfied the malice or reckless indifference requirement of *Kolstad*.²³⁸ The Third Circuit then reversed the district court and remanded the case for a new trial on the issue of punitive

230. *Id.* at 273.

231. 42 U.S.C. § 3613(c)(1) (1994).

232. 208 F.3d 419, 431 (3d Cir. 2000).

233. *Id.* at 423.

234. *Id.* at 424.

235. *Id.*

236. *Id.* at 424-25.

237. *Id.* at 425.

238. *Id.* at 431 (stating that "[r]ecklessness and malice may be inferred when a manager responsible for showing and renting apartments repeatedly refuses to deal with African-Americans about the apartment and misrepresents the apartment's availability").

damages.²³⁹

In *Badami v. Flood*,²⁴⁰ the Eighth Circuit also remanded a case for a new trial on the issue of punitive damages where the plaintiffs alleged that they were discriminated against by a realtor.²⁴¹ The Badami family brought suit under the Fair Housing Amendments Act, asserting that the defendants' real estate company and brokers discriminated against them because of the size of their family.²⁴² The plaintiffs introduced evidence illustrating that the defendants refused to assist plaintiffs in finding rental housing. Although the plaintiffs suggested several homes, the defendants informed plaintiffs that they had no properties suitable for the family's size.²⁴³ The district court refused to submit the punitive damages claim to the jury. The Eighth Circuit held that since the *Kolstad* standard applied to cases brought under the Fair Housing Amendments Act, the district court erred in refusing to submit the issue of punitive damages to the jury.²⁴⁴ The court found that the defendants falsely informed plaintiffs that a property had been rented, when, in fact, it had not.²⁴⁵ In addition, the defendants had managed property for several years and testified that they were aware that the Fair Housing Act prohibited discrimination in rental housing on the basis of family size.²⁴⁶ Just as the Third Circuit had in *Alexander*, the Eighth Circuit remanded the case for a new trial on the issue of punitive damages.²⁴⁷ The Third and Eighth Circuits both have applied the *Kolstad* standard to broaden plaintiffs' opportunities to receive punitive damages in Fair Housing Amendments Act discrimination cases.

IV. CONCLUSION

As these cases have illustrated, the *Kolstad* standard has done little to reduce punitive damage awards in employment discrimination cases. In fact, contrary to the predictions of various commentators, the Supreme Court's decision in *Kolstad* is likely to have the opposite effect. The first part of the *Kolstad* decision abrogated the egregiousness requirement that several circuits had previously adopted, and instituted a less strenuous intent standard that likely will permit many more claims of punitive damages to survive pretrial motions, and thus be tried to juries. Regarding

239. *Id.* at 435.

240. 214 F.3d 994 (8th Cir. 2000).

241. *Id.* at 997 (remanding the case to the district court because it erred in failing to submit the punitive damages claim to the jury).

242. *Id.* at 995.

243. *Id.* at 997.

244. *Id.*

245. *Id.* at 996.

246. *Id.*

247. *Id.* at 999.

the second part of the decision, it is still unclear exactly what impact the good faith standard will have on the availability of punitive damages. If courts apply the good faith standard and review the employer's actual employment practices, rather than relying on the mere articulation of an anti-discrimination policy, the good faith standard will increase the opportunity for punitive damages in employment discrimination cases. An analysis of the cases applying the *Kolstad* standard illustrates that the Supreme Court's decision has created more continuity than change and more opportunity than limitation for plaintiffs to be awarded punitive damages.