Employment Law: The Employer Escape Chute from Punitive Liability Under *Kolstad v. American Dental Ass’n*

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NOTE

Employment Law: The Employer Escape Chute from Punitive Liability Under *Kolstad v. American Dental Ass'n*

In *Kolstad v. American Dental Ass'n,* the U.S. Supreme Court reiterated a recurring message for labor and employment attorneys — advise your clients of the necessity of preventing workplace discrimination and harassment by adopting, implementing, and enforcing strong anti-discrimination policies. Not only do such policies bring employers a multitude of nonlegal benefits, but clear anti-discrimination policies also yield employers the legal advantage of an escape chute from vicarious and punitive liability for the discriminatory and/or harassing conduct of their supervisory and managerial employees.

The Supreme Court's ruling in *Kolstad* from the 1999 Term, coupled with decisions from the 1998 Term regarding employment discrimination, demonstrates the necessity for employers to implement clear guidelines aimed at preventing harassment and discrimination within the workplace. Failure to implement and enforce these policies can lead to courts holding employers vicariously liable for the harassing conduct of their supervisory employees.

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2. Gerald L. Maatman, Jr., Compliance Programs Help Cut Bias Risk: Supreme Court Ruling Shows Good-Faith Efforts are Key for Employers in Defending Against Discrimination Suits, BUS. INS., Aug. 23, 1999, at 17, available at 1999 WL 8769146 (recognizing certain benefits of effective anti-discrimination workplace policies). These benefits include: gaining or retaining competitive industry advantage by maximizing employee productivity; solidifying company's reputation as an "employer of choice" among potential applicants and existing workforce; maintaining an optimal work environment for the company's employees; avoiding negative publicity stemming from employment discrimination problems; avoiding the drain of corporate balance sheets and the diversion of management time from company operations caused by employment-related disputes. *Id.*
3. Beverly Bryan Swallows, *Reducing Legal Risk and Avoiding Employment Discrimination Claims*, FRANCHISE L.J., Summer 1999, at 9 ("A proactive and thoughtful approach to discrimination awareness and avoidance will . . . increase the likelihood of success when defending litigation about employment decisions."); Maatman, *supra* note 2 (stating that anti-discrimination policies provide employers a sound defense against exposure to liability for punitive damages stemming from all types of employment discrimination and harassment litigation); Robert P. Lewis, *Supreme Court Sets Standard for Punitive Damages Under Title VII*, N.Y. L.J., Sept. 15, 1999, at 1 (stating that, subsequent to *Kolstad*, "employers who have not yet implemented antidiscrimination policies and programs, in spite of *Burlington* and *Faragher*, now have an additional reason to do so").
5. *Ellerth*, 524 U.S. at 763-65; *Faragher*, 524 U.S. at 807 (defining standard for holding employer liable for supervisors' conduct in sexual harassment of employees).
liability can also cost employers significant punitive damages.\(^6\) However, recent Supreme Court rulings provide an escape from these liabilities if employers develop and enact company-wide anti-discrimination policies.\(^7\)

For example, in the 1998 cases of *Burlington Industries, Inc. v. Ellerth*\(^8\) and *Faragher v. City of Boca Raton*,\(^9\) the Supreme Court provided employers an affirmative defense to vicarious liability for the harassing conduct of supervisors. To invoke the defense, the employer must show: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."\(^10\) The Equal Employment Opportunity Commission (EEOC) clarified the "reasonable care" requirement of this affirmative defense by specifying the essential elements to include in company anti-harassment policies\(^11\) and the appropriate steps to implement such policies.\(^12\)

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7. *Ellerth*, 524 U.S. at 764 (outlining employer's affirmative defense to vicarious liability for supervisor conduct); *Faragher*, 524 U.S. at 807-08 (same); see also *Kolstad*, 527 U.S. at 544 (outlining employer's good-faith-compliance defense from punitive liability). Regarding the *Kolstad* punitive damages defense, one employment law newsletter tells employers that they can now "breathe a little easier," as long as they have adopted and implemented anti-discrimination policies and educated their workforce and continue to keep an ever-vigilant eye over workplace discrimination. *High Court Ends Term with Important Rulings on ADA, Punitive Damages*, N.H. EMPLOYMENT L. LETTER (Sulloway & Hollis), Aug. 1999, at 6 [hereinafter *High Court*].
11. The guidelines suggest the following as essential elements of an anti-harassment policy:
    - A clear explanation of prohibited conduct;
    - Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;
    - A clearly described complaint process that provides accessible avenues of complaint;
    - Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
    - A complaint process that provides a prompt, thorough, and impartial investigation; and
    - Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.
12. The guidelines provide that an employer should provide every employee with a copy of the anti-harassment policy and should redistribute the policy regularly. The policy should be written in language easily understood by employees, posted in frequented areas within the workplace, and included in employee handbooks. *Id.* § V(C)(1).

Besides drafting and enforcing company policies, the guidelines suggest taking other preventive measures such as: instructing all supervisors and managers to respond to complaints of harassment; correcting apparent harassment even if no complaints are filed; ensuring that supervisors and managers understand their responsibilities under the company policy; monitoring supervisor and manager conduct;
In *Kolstad*, the Supreme Court provides proactive employers with another defense to liability — a "good-faith-compliance" defense to punitive liability. As long as employers undertake good-faith efforts to comply with federal employment discrimination laws, courts cannot assess punitive damages against them. Although the EEOC recommends that its anti-harassment guidelines apply to all types of harassment and discrimination, the guidelines do not specifically outline what constitutes a good-faith effort to comply with Title VII of the Civil Rights Act of 1964 (Title VII), as *Kolstad* requires.

This note examines the Supreme Court's decision in *Kolstad* to determine the merits and implications of its holdings. Ultimately, this note argues that although the Court chose a standard for awarding punitive damages that conflicts with the purpose of the Civil Rights Act, the Court remedied this conflict by establishing the good-faith-compliance defense. Part I contrasts federal law with state law, specifically Title VII with the Oklahoma Anti-Discrimination Act. Part II sets forth the facts, reasoning, and holdings of the *Kolstad* decision. In Part III, the substance of this note embarks on an exploration of what constitutes a *Kolstad* "good-faith" effort by employers to comply with federal anti-discrimination laws. This exploration examines the policy implications of the egregious conduct standard versus the intent-based standard for awarding punitive damages; traces the emergence of the good-faith defense; applies the new EEOC guidelines to the *Kolstad* good-faith defense; compares the *Kolstad* defense with the *Faragher/Ellerth* affirmative defense; analyzes the *Kolstad* defense within the context of Oklahoma law; and researches the lower courts' initial application of the good-faith defense. This note concludes that effective application of *Kolstad* may possibly result in complete realization of Title VII's goal of deterring workplace discrimination and harassment.

1. In *Kolstad*, 527 U.S. at 544; see also Reminders: *Kolstad's "Good Faith" Defense Means What It Says*, FED. LITIGATOR, Feb. 2000, at 47, 47 [hereinafter *Kolstad's "Good Faith" Defense*] (summarizing *Kolstad* defense: "the usual vicarious liability rule is subject to an exception that allows an employer to avoid liability for punitive damages by showing that it attempted in good faith not to discriminate.").


3. EEOC Notice, supra note 11, § II ("The rule in *Ellerth* and *Faragher* regarding vicarious liability applies to harassment by supervisors based on race, color, sex (whether or not of a sexual nature), religion, national origin, protected activity, age, or disability."); see also id. § V(C)(1)(a) ("An employer's [anti-harassment] policy should make clear that it will not tolerate harassment based on sex (with or without sexual conduct), race, color, religion, national origin, age, disability, and protected activity.").


I. History & Law Prior to Kolstad

A. Federal Law

Title VII prohibits discrimination in any aspect of employment on the basis of an individual's race, color, religion, sex, or national origin. Originally, Title VII did not provide for an award of punitive damages. Instead, the remedies for Title VII actions were purely equitable, including such relief as back pay and reinstatement. Finding that "additional remedies under federal law are needed to deter unlawful harassment and intentional discrimination in the workplace," Congress, in 1991, amended Title VII to provide punitive damages for victims of intentional discrimination based on sex, race, national origin, religion, or disability. Section 1981a of the Civil Rights Act of 1991 specifically provides for punitive damages in cases in which the employer discriminated with "malice" or with "reckless indifference" to the complaining party's civil rights. Congress considered monetary liability essential to realizing the deterrent purpose of Title VII, reasoning that if discrimination is expensive, employers will cease their discriminatory practices.

18. Specifically, the Act provides:
   It shall be an unlawful employment practice for an employer —
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
   (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(a). But cf. id. § 2000e-2(e)(1) (permitting intentional discrimination for religion, sex, national origin, or age if these characteristics are a bona fide occupational qualification reasonably necessary to the normal operation of that business or enterprise); id. § 2000e-2(e)(2) (permitting intentional discrimination on the basis of religion where an educational institution is directed toward propagation of the religion).


20. 42 U.S.C. § 1981 note (1994) (congressional findings); see also H.R. Rep. No. 102-40, pt. 1, at 69 (1991) ("Back pay as the exclusive monetary remedy under Title VII has not served as an effective deterrent, and, when back pay is not available, as is the case where a discrimination victim remains on-the-job or leaves the workplace for other reasons other than discrimination, there is simply no deterrent.").


22. Id. § 1981a(b)(1). This statute provides in pertinent part:
   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. § 1981a(b)(1).

Although in line with the purpose of the Civil Rights Act, section 1981a did not provide courts with a clear standard for awarding punitive damages.\textsuperscript{24} Shortly after its implementation, commentators speculated that the new "reckless indifference" language of the statute would "implicate virtually every case involving allegations of intentional discrimination," resulting in a punitive damages award in "the vast majority of cases."\textsuperscript{25} Instead, section 1981a resulted in a federal circuit court split over the appropriate standard for awarding punitive damages under Title VII. Most circuit courts required employees to demonstrate that the employer engaged in some form of egregious behavior.\textsuperscript{26} Other circuit courts, including the Tenth Circuit, focused on the employer's state of mind or intent in determining the existence of malice or reckless indifference.\textsuperscript{27} This lack of uniformity in awarding punitive damages under Title VII and section 1981a led the U.S. Supreme Court to grant certiorari in Kolstad.

\textbf{B. Oklahoma Law}

The Oklahoma Anti-Discrimination Act aims to provide state implementation of the policies embodied in the federal Civil Rights Act of 1964.\textsuperscript{28} The statutory language of the Oklahoma act bears substantial similarity to that of the federal act.\textsuperscript{29} Despite minor differences in wording, the statutes have the same substantive

\begin{itemize}
\item \textsuperscript{24} Lewis, \textit{supra} note 3 (discussing initial confusion with punitive damages standard).
\item \textsuperscript{26} Ngo v. Reno Hilton Resort Corp., 140 F.3d 1299, 1304 (9th Cir. 1998); Harris v. L & L Wings, Inc., 132 F.3d 978, 982-83 (4th Cir. 1997); McKinnon v. Kwong Wah Rest., 83 F.3d 498, 508 (1st Cir. 1996); Emmel v. Coca-Cola Bottling Co. of Chicago, 95 F.3d 627, 636 (7th Cir. 1996); Karcher v. Emerson Elec. Co., 94 F.3d 502, 509 (8th Cir. 1996); Turic v. Holland Hospitality, Inc., 85 F.3d 1211, 1216 (6th Cir. 1996).
\item \textsuperscript{27} Baty v. Willamette Indus., Inc., 172 F.3d 1232, 1247-48 n.8 (10th Cir. 1999) (requiring intent standard); Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 594 (5th Cir. 1998) (affirming jury instruction on intent-based standard); Luciano v. Olsten Corp., 110 F.3d 210, 216-17 (2d Cir. 1997) (requiring mere showing of employer's intent to violate Title VII).
\item \textsuperscript{28} 25 OKLA. STAT. § 1101 (1991) (stating general purpose of act is "to provide for execution within the state of the policies embodied in the federal Civil Rights Act").
\item \textsuperscript{29} The Oklahoma Anti-Discrimination Act provides in pertinent part:
\begin{itemize}
\item A. It is a discriminatory practice for an employer:
\begin{itemize}
\item 1. To fail or refuse to hire, to discharge, or otherwise to discriminate against an individual with respect to compensation or the terms, conditions, privileges or responsibilities of employment, because of race, color, religion, sex, national origin, age or handicap unless such action is related to a bona fide occupational qualification reasonably necessary to the normal operation of the employer's business or enterprise.
\end{itemize}
\item Comparatively, the federal Civil Rights Act provides in pertinent part:
\begin{itemize}
\item (a) Employer practices
\item It shall be an unlawful employment practice for an employer —
\item (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.
\end{itemize}
\end{itemize}
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meaning and protect the same rights. For example, the Oklahoma act uses slightly more expansive language than the federal act. It specifically includes age and handicap in the list of protected classes and it provides that an action is not discriminatory if it relates to "a bona fide occupational qualification reasonably necessary to the normal operation of the employer's business or enterprise." The federal act does not include such language. Moreover, the acts attach different labels to employment violations. For example, the federal act terms such violations as "unlawful employment practices," whereas the Oklahoma act refers to violations as "discriminatory practice[s]." These minor differences in wording, though, are inconsequential to the rights that the acts protect.

A significant disparity between the two acts does appear in the type of remedies they provide. The federal act provides three types of remedies — equitable relief, compensatory relief, and punitive damages. In contrast, the Oklahoma act provides significantly less relief. It provides purely administrative relief, including, at most, reinstatement, back-pay, and attorney fees.

The Oklahoma Supreme Court recently found these administrative remedies inadequate for employees who experience discriminatory practices in the workplace. Consequently, the Oklahoma Supreme Court developed the "Burk public policy tort" to provide compensatory and punitive damages in cases in which "an employer violates public policy goals which are clearly articulated in existing law — constitutional, statutory, or jurisprudential — and then only if there is no adequate, statutorily-expressed remedy for the same." Because no adequate statutory remedy exists in Oklahoma for employment discrimination, Oklahoma courts have applied the Burk public policy tort to afford aggrieved employees a monetary remedy in limited situations under the Oklahoma Anti-Discrimination Act.

The Burk public policy tort does not articulate a standard for awarding punitive damages. Instead, it leaves such awards up to statutory and common law principles. In general, the Oklahoma standard for punitive damages requires only

30. 25 OKLA. STAT. § 1302.
32. 25 OKLA. STAT. § 1302(A).
33. See supra notes 19-23 and accompanying text.
39. Burk, 770 P.2d at 28 n.10 ("recoverable damages including punitive damages in such actions
that the jury find that the defendant acted with "reckless disregard for the rights of others"\textsuperscript{46} or "acted intentionally and with malice towards others."\textsuperscript{47} In Part III, this Note explores Kolstad's application to Oklahoma law and the Burk public policy tort.\textsuperscript{42}

II. Statement of the Case: Kolstad v. American Dental Ass'n

Carole Kolstad (Kolstad) sued the American Dental Association (ADA)\textsuperscript{43} under Title VII for sexual discrimination based on the ADA's choice to promote a male colleague over Kolstad.\textsuperscript{44} Kolstad claimed that the ADA used a "sham" process in selecting which employee to promote.\textsuperscript{45} As evidence of this sham, Kolstad showed (1) that the ADA modified the particular job description to better suit the male employee, and (2) that the employee in charge of the promotion told sexually offensive jokes, made derogatory comments about professional women, and refused to meet with Kolstad concerning her interest in the position.\textsuperscript{46} Thus, Kolstad claimed that the ADA failed to promote her because of her gender in violation of Title VII.\textsuperscript{47}

At trial, the jury found that the ADA discriminated against Kolstad on the basis of sex and awarded her $52,728 in back pay.\textsuperscript{48} However, the district court refused Kolstad's request for a jury instruction on punitive damages,\textsuperscript{49} and Kolstad appealed.\textsuperscript{50}

A. Court of Appeals Analysis

The U.S. Circuit Court of Appeals for the District of Columbia held that the district court should have instructed the jury that an award of punitive damages is appropriate upon a finding of malice or reckless indifference to Kolstad's rights.\textsuperscript{51} The court rejected the ADA's contention that an award of punitive damages requires a finding of "extraordinary egregious" conduct.\textsuperscript{52} The court reasoned that had Congress intended to depart from the well-established intent-based standard for

\begin{itemize}
  \item \textsuperscript{40} 23 OKLA. STAT. § 9.1(B) (2000)
  \item \textsuperscript{41}  Id. § 9.1(C)(1), (D)(1) (emphasis added).
  \item \textsuperscript{42}  See infra Part III.B.2.
  \item \textsuperscript{43}  The suit was brought in the United States District Court for the District of Columbia. Kolstad v. Am. Dental Ass'n, 912 F. Supp. 13 (D.D.C. 1996).
  \item \textsuperscript{44}  Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 530 (1999).
  \item \textsuperscript{45}  Id. at 526.
  \item \textsuperscript{46}  Id. at 531.
  \item \textsuperscript{47}  Id. at 530.
  \item \textsuperscript{48}  Id. at 532.
  \item \textsuperscript{49}  Id.
  \item \textsuperscript{51}  Id. at 1438.
  \item \textsuperscript{52}  Id. at 1437.
\end{itemize}
awarding punitive damages under other federal civil rights statutes, it would have expressly provided so in the language of Title VII.\textsuperscript{53}

Subsequently, the court of appeals granted a motion to rehear en banc the issue of punitive damages.\textsuperscript{54} The en banc majority held that an award of punitive damages requires a showing of egregious conduct.\textsuperscript{55} The majority recognized a two-tier structure of section 1981a.\textsuperscript{56} The first tier provides for an award of compensatory and punitive damages in Title VII cases upon a showing of intentional discrimination;\textsuperscript{57} the second tier requires, for an award of punitive damages, the additional showing of malice or reckless indifference to federally protected rights.\textsuperscript{58} The majority reasoned that this two-tier structure reveals Congress' intent to set the standard for punitive damages higher than the ordinary standard for intentional discrimination under Title VII.\textsuperscript{59} The en banc majority determined that punitive damages would be appropriate in cases in which "the evidence shows that the defendant engages in a pervasive pattern of discriminatory acts, or manifested genuine spite and malevolence, or otherwise evinced a criminal indifference to civil obligations."\textsuperscript{60} Because the majority found no evidence that the ADA engaged in such egregious conduct,\textsuperscript{61} it affirmed the district court in withholding a jury instruction on punitive damages.\textsuperscript{62}

\textbf{B. U.S. Supreme Court Analysis}

\textit{1. The Court Announces the Appropriate Standard for Assessing Punitive Damages}

Recognizing a circuit court split on the issue, the U.S. Supreme Court granted certiorari to determine the circumstances under which courts may award punitive damages in cases arising under Title VII.\textsuperscript{63} The Court held by a 7-2 vote that an employer's conduct need not be egregious to justify awarding punitive damages\textsuperscript{64} as long as the employer acts with the \textit{knowledge} that his or her discriminatory conduct may violate federal law.\textsuperscript{65} The Court considered this holding consistent with the two-tier standard of liability imposed by section 1981a: the first tier limits compensatory and punitive damages to cases of intentional discrimination or

\begin{thebibliography}{99}
\footnotesize

53. \textit{Id.}
54. \textit{Id.} at 1446; see also Kolstad v. Am. Dental Ass'n, 139 F.3d 958 (D.C. Cir. 1998).
55. \textit{Kolstad}, 139 F.3d at 961.
56. \textit{Id.}
58. \textit{Id.} § 1981a(b)(1).
59. \textit{Kolstad}, 139 F.3d at 961-62.
60. \textit{Id.} at 965 (citations and internal quotations omitted).
61. \textit{Id.} at 969 (finding evidence of pre-selection by itself, as was offered in this case, is insufficient to show egregious conduct).
62. \textit{Id.} at 970.
64. \textit{Id.} at 546.
65. \textit{Id.} at 536-37.

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disparate treatment, the second tier requires the additional showing of intent to deprive employees of their federally protected rights, not the additional showing of egregious conduct as the en banc circuit court had found.

The Court reached its intent-based punitive damages standard by examining the meaning of "malice" and "reckless" as they appear in section 1981a. The legislative history of the statute shows that Congress adopted the language of section 1981a from the Supreme Court opinion of Smith v. Wade, which established an intent-based standard for awarding punitive damages in cases arising under section 1983, a civil rights statute similar in purpose to Title VII and section 1981a. Accordingly, the Court found section 1981a likewise incorporates an intent-based standard that ultimately focuses on the employer's state of mind, rather than the employer's actions.

2. The Court Creates a Good-Faith-Compliance Defense to Punitive Liability

Further, the Kolstad Court held in a narrow 5-4 vote that an employer will not be held vicariously liable for discriminatory decisions made by managerial employees when such decisions run counter to the employer's good-faith efforts to comply with Title VII. The Court reached this decision by relying on general principles of agency law, which require the plaintiff to impute liability to the employer for the discriminatory actions of its managerial staff. Assessing vicarious liability for punitive damages against the employer in the face of its good-faith effort to comply with Title VII conflicts with the underlying principle of agency law that one should not be held vicariously liable when she is personally innocent. Recognizing this conflict, the Court allowed employers to escape vicarious punitive liability upon a showing of good-faith compliance with Title

66. Id. at 534-35 (referring to 42 U.S.C. § 1981a(a)(1)).
67. Id. (referring to 42 U.S.C. § 1981a(b)(2)).
68. 461 U.S. 30, 30 (1983) ("[A] jury may be permitted to assess punitive damages . . . 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").
69. Kolstad, 527 U.S. at 536.
70. Id.
71. Id. at 534.
72. Id. at 544.
73. Id. at 542-43 (citing RESTATEMENT (SECOND) OF AGENCY § 217C (1957)).
   This Restatement section provides in pertinent part:
   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 managerial agent of the principal ratified or approved the act.
   RESTATEMENT (SECOND) OF AGENCY § 217C.
74. Id. at 543-44.
75. Id. (citing RESTATEMENT (SECOND) OF TORTS § 909 cmt. b (1991)).
VII. In so doing, the Court noted the importance of encouraging employers to implement anti-discrimination policies that detect and deter Title VII violations.77

3. Essence of Kolstad Holding

The Tenth Circuit recently applied Kolstad in EEOC v. Wal-Mart Stores, Inc.78 This unpublished opinion reduced Kolstad's holding to the following requirements:

[T]o demonstrate its entitlement to punitive damages under 42 U.S.C. § 1981a, a plaintiff must show that: (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; (4) the agent's action was not contrary to the employer's good-faith efforts to comply with Title VII.79

III. Analysis

A. Policy Implications of the Two Standards

In analyzing whether the Court reached the appropriate decision in Kolstad, one must consider the public policy implications underlying the two competing standards — egregious conduct versus intent to violate federal law. Specifically, this note focuses on the policy concerns of balancing the rights, duties, and responsibilities of employers and employees in relation to discrimination and harassment within the workplace.

1. Egregious Conduct Standard

Supporters of the egregious conduct standard view the second tier of section 1981a as requiring the heightened showing that the employer acted in an unnecessarily egregious manner.80 Employers, the defendants to Title VII claims, normally favor this standard because, theoretically, employees have more difficulty meeting and proving the egregious conduct standard. Employees face a more difficult task under the egregious conduct standard because the standard lends itself to proof by direct evidence, rather than circumstantial evidence.81 Direct evidence tends to have more probative value than circumstantial evidence because it does not require the

76. Id. at 544-46.
77. Id.
78. No. 97-2252, 1999 WL 1032963, at *3 (10th Cir. Nov. 15, 1999).
79. Id. (citations omitted); see also Miller v. Kenworth of Dothan, Inc., 82 F. Supp. 2d 1299, 1306 (M.D. Ala. 2000) (setting forth same four requirements from Kolstad holding).
80. Kolstad, 139 F.3d at 961.
81. Id. at 969 n.9; see BLACK'S LAW DICTIONARY 460 (6th ed. 1990) (defining direct evidence as "evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact").
jury to draw inferences regarding the facts in question. In the context of punitive damages under Title VII, requiring proof by direct evidence has the limiting effect of ensuring that employers truly deserve punishment in the form of punitive liability. In contrast, the circumstantial and indirect nature of evidence used to demonstrate an employer's state of mind under the intent standard requires more speculation by the trier of fact. Relying on circumstantial evidence under the intent standard, then, may result in juries assessing punitive damages in a wider array of employment discrimination cases, including cases in which the employer does not actually deserve the penalty.

Another policy implication of the egregious conduct standard is that it serves the underlying purpose of Title VII more effectively than the intent standard. Title VII has an articulated, prophylactic purpose — to provide employers an incentive to prevent intentional discrimination in the workplace. The egregious conduct standard provides such incentive because, unlike the intent-based standard, it does not punish employers for having knowledge of the law. Instead, the egregious conduct standard encourages knowledge of and compliance with Title VII. The egregious conduct standard punishes only outrageous forms of discrimination by the employer, such as total disregard for Title VII responsibilities. The egregious conduct standard, then, ensures the punishment of those employers who choose to ignore their Title VII obligations. In limiting punishment to instances of such outrageous discrimination, the egregious conduct standard encourages employers to take anti-discrimination laws seriously.

2. Intent-Based Standard

Proponents of the intent-based standard advocate the position that the second tier of section 1981a requires merely the intent to deprive the employee of his or her federally protected rights. Courts, though, often interpret this intent standard as requiring no more than the intent inherent in the underlying cause of action — merely the intent to discriminate. This interpretation misconstrues the standard by making the intent to discriminate synonymous with the intent to deprive employee rights. This misconception results in courts awarding punitive

82. See generally Iacobucci v. Boulter, 193 F.3d 14, 26 (1st Cir. 1999) (stating intent standard requires employee-plaintiff to adduce evidence sufficient to show that employer discriminated with knowledge of violating plaintiff's rights or with conscious disregard of possibility of violating his rights).
83. See discussion infra Part III.B.1.
85. See infra notes 90-91 and accompanying text.
86. Kolstad v. Am. Dental Ass'n, 139 F.3d 958, 960 (stating the issue before the court as being "whether the standard of evidence for punitive damages under Title VII is, in all but a narrow range of cases, no higher than the standard for liability"). But see Johnson, supra note 19, at 98 (finding less culpable state of mind required for punitive damages than required to find intent to discriminate).
87. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 536 (1999) (identifying circumstances where intentional discrimination does not warrant punitive damages, including instances where the employer is unaware of the relevant federal prohibition; where the employer believes certain discrimination is lawful; where the underlying theory of discrimination is novel or poorly recognized; or where the employer believes the discrimination falls within a statutory exception to liability); Olsen v. Marriott Int'l,
damages in situations where there is no evidence that the employer intended to deprive an employee of his or her rights but only where evidence is sufficient to prove the claim of discrimination.

The intent-based standard theoretically makes punitive damages more widely available than does the egregious conduct standard. The consequence of awarding punitive damages in the mass of intentional discrimination cases advances the goal of the Civil Rights Act to deter discriminatory practices. By including punitive damages under the Act, Congress evidenced its commitment to halt job discrimination. Harsh penalties such as punitive damages make employers think twice about violating the law. Therefore, proponents argue, the more widespread the availability of punitive damages, the more deterrent their effect.

This policy argument, however, has inherent flaws. The standard itself, not the effect of the standard, should advance the purpose of the Civil Rights Act, yet that is not the case under the intent standard. Rather, the intent standard — discriminating in the face of a perceived risk of violating the law — encourages employers to hide from the law rather than to embrace and apply the law. For example, employers garner the requisite "perceived risk [to] violate federal law" through their familiarity with the law. It follows, then, that a standard under which knowledge of the law exposes employers to punitive liability likewise encourages employers to remain ignorant of the law.

Notably, the Kolstad Court explicitly alluded to such employer ignorance as a defense to punitive liability. For example, in listing circumstances under which an employer may engage in discrimination but would not be liable for punitive damages under the intent standard, the Kolstad Court stated, "an employer may simply be unaware of the relevant federal prohibition." This standard does not further the preventive purpose of the Civil Rights Act. It has the pervasive effect of encouraging employers not to take a proactive approach to preventing discrimination because a proactive approach itself infers knowledge of the law.

Inc., 75 F. Supp. 2d 1052, 1075 (D. Ariz. 1999) ("[T]he terms 'malice' and 'reckless indifference' refer not to an employer's knowledge that it is engaging in discriminatory conduct, but to an 'employer's knowledge that it may be acting in violation of federal law.") (citing Kolstad, 527 U.S. at 536).

88. See infra discussion § III.B.
90. Id.
91. Id.
92. Kolstad, 527 U.S. at 536 ("[I]n the context of Section 1981a, 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.").
93. Id.
94. Id. at 536-37.
95. See, e.g., Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 188 F.3d 278, 283 (5th Cir. 1999) ("[E]xistence of the employment handbook setting forth a policy of non-discrimination is at least prima facie evidence of awareness [of the law].").

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The policies underlying the intent-based punitive damages standard are illogical and inconsistent with the purpose of the Civil Rights Act. The mere fact that the intent standard may result in holding more employers liable for punitive damages does not itself motivate employers to take a proactive approach to discrimination. In fact, considering that any preventive steps the employer takes against discrimination can serve as an aggrieved employee’s proof that the employer discriminated in the face of a perceived risk of violating the law, the intent standard may motivate employers to take an inactive approach to discrimination. Granted, the Supreme Court remedied this flaw in *Kolstad* by coupling the intent standard with a new good-faith-compliance defense to punitive liability. However, as argued in *infra,* this itself provides strong evidence that the Court chose the wrong standard.

**B. Kolstad’s Significance**

1. **Frequency of Use**

Three months after the Supreme Court decided *Kolstad*, the Tenth Circuit had already applied the new punitive damages standard twice, and twenty-one courts across the United States applied it within four months of its decision. This demonstrates that *Kolstad* will most likely prove to be an important case setting forth a frequently invoked standard. Also, EEOC reports show that the total number of employment discrimination claims filed in recent years hovers around 80,000 claims a year, with approximately 20,000 Title VII claims each year. Each of these claimants could potentially seek punitive damages, resulting in a large number of cases invoking the *Kolstad* intent standard every year. The potential frequency of its use makes *Kolstad* a significant decision of which employment and labor law attorneys should take note and advise their clients.

96. *See* discussion in *infra* Part III.C.


Its significance further increases if the Kolstad standard results in the awarding of punitive damages in the vast majority of employment discrimination cases.\(^{100}\) This effect is not immediately apparent and will only demonstrate itself over time. However, a perusal of the cases that have applied the Kolstad standard thus far yields a preliminary demonstration that the intent standard seems to impose a relatively light burden for plaintiffs.\(^{101}\) For example, two cases have applied Kolstad to reverse the lower courts' refusal to award punitive damages,\(^{102}\) while only one court has applied Kolstad to reverse an award of punitive damages.\(^{103}\) Courts have also found that a minimum showing of intent satisfies the Kolstad standard, such as ignoring employee complaints\(^{104}\) or making gender-specific or

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100. *Kolstad*, 108 F.3d at 1441 (Williams, J., dissenting) (suggesting the result of an intent-based standard "is that punitive damages are available in every case of garden-variety Title VII discrimination"); *Powell v. Cobe Labs., Inc.*, Nos. 98-1350, 98-1363, 2000 WL 235241, at *10 (10th Cir. Mar. 2, 2000) (unpublished opinion) ("Given the Court's pronouncements in *Kolstad*, many intentional discrimination cases may meet the 'malice or reckless indifference' requirement of § 1981a."); *Joseph P. Monteleone, Punitive Damages for Employment Discrimination, Risk Mgmt.*, Sept. 1, 1999, at 86, available at 1999 WL 9191776 (hypothesizing that *Kolstad* makes it easier for plaintiffs to obtain punitive damages).

101. *Knowlton*, 189 F.3d at 1187 (applying *Kolstad* to reverse district court's refusal to award punitive damages, finding management's awareness of sexual innuendo within the workplace and lack of response to complaints sufficient evidence of reckless disregard for employee's federally protected rights); *Kimbrough*, 183 F.3d at 785 (applying *Kolstad*, found that evidence that an employer or its management repeatedly ignored complaints about harassment or ratified harassing conduct is sufficient to award punitive damages); *Blackmon*, 182 F.3d at 636 (finding under *Kolstad* the following is sufficient proof for punitive damages: employer failed to investigate employee complaints, failed to institute prompt remedial action and took retaliatory action against employee making complaints); *Smith*, 1999 WL 760218, at *5* (unpublished opinion) (interpreting *Kolstad* standard as allowing mere existence of civil rights violation to guarantee punitive liability with only limited exceptions); *Orkin*, 63 F. Supp. 2d at 693 (applying *Kolstad* to reverse lower court's dismissal of claim for punitive damages, finding employer's comments about employee's foreign accent sufficient evidence of reckless disregard of employee's rights). *But cf. Iacobucci*, 193 F.3d at 26 (applying *Kolstad* to reverse award of punitive damages, finding that the state of mind necessary to make out a cognizable claim "differs importantly from that required to justify punitive damages"); *Dhyne*, 184 F.3d at 988 (applying *Kolstad* to find that delayed action on sexual harassment complaints showed "no evidence suggesting evil motive or intentional violation of federal law").

102. *Knowlton*, 189 F.3d at 1187-88 (applying *Kolstad* to reverse lower court's pre-*Kolstad* finding of insufficient evidence for punitive damages award); *Orkin*, 63 F. Supp. 2d at 693 (applying *Kolstad* to reverse lower court's pre-*Kolstad* dismissal of punitive damages claim).

103. *Iacobucci*, 193 F.3d at 26 (applying *Kolstad* to reverse lower court's pre-*Kolstad* award of punitive damages premised merely on intentional discrimination standard); *see also Scott v. Ameritex Yarn*, 72 F. Supp. 2d 587, 596-98 (D.S.C. Nov. 19, 1999) (applying *Kolstad* to reverse lower court's refusal to grant employer's request for summary judgment on punitive damages).

104. *Deters v. Equifax Credit Info. Servs., Inc.*, 202 F.3d 1262, 1269 (10th Cir. 2000) (basing punitive damages award not only on management's not responding to complaints but also on management minimizing and disregarding complaints); *Knowlton*, 189 F.3d at 1187 (basing punitive damages award on employer's lack of response to complaints of sexual harassment); *Kimbrough*, 183 F.3d at 785 (basing punitive damages award on management ignoring complaints of harassment); *Blackmon*, 182 F.3d at 636 (basing punitive damages award on employer's failure to investigate complaints). *But see Dhyne*, 184 F.3d at 988 (finding delayed action on harassment complaints no grounds for punitive damages); *Lintz v. Am. Gen. Fin., Inc.*, 76 F. Supp. 2d 1200, 1207-08 (D. Kan. 1999) (applying *Kolstad* to refuse punitive damages award based on evidence of adequate response and immediate investigation of
nationality-specific comments about employees. Such applications indicate a low threshold for meeting the Kolstad intent standard.

Coupling this easy-to-meet standard, though, with the Kolstad good-faith-compliance defense should save many employers from punitive liability. Although most employees bringing discrimination claims can potentially demonstrate the requisite employer intent to deprive federally protected rights, many employers should be able to counter such claims with evidence of their good-faith efforts to comply with federal anti-discrimination laws.

Whether this good-faith-compliance defense will prove to be an easy or difficult standard for employers to invoke cannot yet be determined. The courts applying the defense thus far have not allowed employers an easy escape from punitive liability. The courts have found that merely having an anti-discrimination policy in place does not establish the defense without supplemental evidence that the employer actually follows its policy. The most significant, perhaps, of the strict applications of the good-faith defense appears in the Tenth Circuit opinion of Deters v. Equifax Credit Information Services, Inc. The Deters court refused to apply the good-faith defense, distinguishing the vicarious liability standard of Kolstad from the "direct liability" of the case before the court. This indicates that courts harassment complaints).

105. Orkin, 63 F. Supp. 2d at 693 (finding employer's statements about employee's foreign accent grounds for punitive damages award).

106. Julie Brenza, Supreme Court Makes Punitive Damages for Job Bias Harder to Get, TRIAL, Sept. 1, 1999, at 16 (determining Kolstad's good-faith-compliance defense makes courts less likely to award punitive damages); Punitive Damages — Employment Discrimination — "Good Faith Effort" Defense, 14 No. 12 FED. LITIGATOR 308, 309 (Dec. 1999) [hereinafter "Good Faith Effort Defense"

predicting "good faith effort" defense is likely to make punitive damages more difficult to obtain.

107. Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 188 F.3d 278, 286 (5th Cir. 1999) (finding evidence of a grievance filing procedure does not establish good-faith compliance when counter evidence shows that management did not effectively respond to grievances); EEOC v. Wal-Mart Stores, Inc., 187 F.3d 1241, 1249 (10th Cir. 1999) ("[A] generalized policy of equality and respect for the individual does not demonstrate an implemented good-faith policy of educating employees on the Act's accommodation and nondiscrimination requirements"); Greenbaum v. Handelsbanken, 67 F. Supp. 2d 228, 263 (S.D.N.Y. 1999) (finding employer seeking legal counsel on employment issues does not establish good-faith compliance where evidence suggests that employer ignored legal advice). But see Dhyne, 184 F.3d at 988 (finding employer made good-faith efforts to comply with federal anti-discrimination laws despite excessive delay in taking action on complaints of harassment); Lintz, 76 F. Supp. 2d at 1207-08 (finding sufficient evidence of good-faith compliance in immediate response to harassment complaints); Scott v. Ameritex Yarn, 72 F. Supp. 2d 587, 598 (D.S.C. 1999) (refusing to adopt negative inference from Kolstad defense that lack of good-faith efforts to comply with Title VII automatically warrants award of punitive damages).

108. Deffenbaugh-Williams, 188 F.3d at 286 (finding management must follow implemented grievance policy in order to meet good-faith defense); Wal-Mart Stores Inc., 187 F.3d at 1248-49 (finding that to meet the defense, a policy must be relatively specific, and must be implemented and followed within the workplace); Greenbaum, 67 F. Supp. 2d at 263-64 (finding that where employer seeks legal advice, the employer must at least follow such advice in order to have a good-faith defense).

109. 202 F.3d 1262 (10th Cir. 2000).

110. Id. In distinguishing Kolstad, the Tenth Circuit specifically stated:

Kolstad was a case involving vicarious liability, unlike this case which is premised on a theory of direct liability. Thus, the good-faith defense does not apply. It is negated by a
may initially adopt a strict application of the good-faith-compliance defense. Coupling this strict application of the Kolstad defense with the lax application of the Kolstad intent standard may mean that most employers sued under Title VII will face paying thousands of dollars in punitive damages.\textsuperscript{111} This again signifies to employment and labor law attorneys the importance of ensuring that their clients make legitimate efforts to comply with federal anti-discrimination laws.

2. Kolstad's Significance Under Oklahoma Law

The importance of developing and following workplace anti-discrimination policies under Kolstad applies in Oklahoma as well, even though the Oklahoma Anti-Discrimination Act does not provide a punitive remedy for employment discrimination.\textsuperscript{112} Perhaps the absence of judicial remedy under state law makes the remedies available under the federal Civil Rights Act even more important in Oklahoma.\textsuperscript{113} Because Oklahoma employees who fall victim to workplace discrimination do not have a monetary judicial remedy under Oklahoma law, they may be more likely to file federal claims under Title VII. This correlates to frequent application of the Kolstad intent-based standard and good-faith-compliance defense in federal cases brought by plaintiffs within Oklahoma.

\textsuperscript{111} The Civil Rights Act caps punitive damages awards between $50,000 and $300,000, depending on the size of the employer. 42 U.S.C. § 1981a(b)(3) (1994).

\textsuperscript{112} See supra discussion Part I.B.

Just as the Kolstad defense applies in federal courts within Oklahoma, it may also apply to employment discrimination claims brought in state court under the Burk public policy tort. At first glance, Kolstad does not appear applicable to Burk claims because the Burk tort is based on a violation of public policy, not on a violation of an employee's federally protected rights. However, Burk defines "public policy" as including policy goals clearly articulated in constitutional, statutory, or regulatory law as well as in judicial decisions. Because Oklahoma adopted its act in order to implement the policies of the federal Civil Rights Act, the Burk tort arguably subsumes the policy mandates of the Civil Rights Act as articulated in Kolstad so that the Kolstad good-faith defense applies under certain Burk claims.

For example, Oklahoma courts have applied the Burk tort to afford remedy to employees whose protected rights (under both the Oklahoma Anti-Discrimination Act and Title VII) were violated. Further, as a remedy to Burk torts, Oklahoma courts may award punitive damages. It follows, then, that in Burk public policy tort cases arising under the Oklahoma Anti-Discrimination Act, Oklahoma courts could afford employers the opportunity to invoke the Kolstad good-faith defense in order to escape punitive liability. The Kolstad Court created the defense in order to promote the deterrent policy underlying the federal Civil Rights Act. The Oklahoma act, then, incorporates this same deterrent policy. In order to encourage Oklahoma employers to prevent workplace discrimination and harassment, Oklahoma courts should allow employers to raise a similar type of Kolstad defense to Burk public policy torts arising under the Oklahoma Anti-Discrimination Act.

Because the Oklahoma Supreme Court recently opened Oklahoma courtrooms to hearing discrimination claims under the Burk tort even when adequate federal remedies are available, the Kolstad defense may become even more crucial for

114. See supra notes 35-36 and accompanying text.
116. 25 OKLA. STAT. § 1101 (1991) (stating general purpose of act is "to provide for execution within the state of the policies embodied in the federal Civil Rights Act of 1964").
117. Collier, 981 P.2d at 324-25 (reasoning that because the Oklahoma Anti-Discrimination Act includes sexual harassment within protected parameters, it clearly articulates the protection of such under public policy). This rationale could be applied to all protections under the Oklahoma Anti-Discrimination Act. Tate v. Browning-Ferris, Inc., 833 P.2d 1218, 1230 (Okla. 1992) (extending Burk tort to cases of racially motivated discharge or of retaliation for filing racial discrimination complaint). But see Marshall v. OK Rental & Leasing Inc., 939 P.2d 1116, 1122 (Okla. 1997) (determining Burk tort does not extend to cases of constructive discharge due to sexual harassment by co-worker); List v. Anchor Paint Mfg. Co., 910 P.2d 1011, 1014 (Okla. 1996) (refusing to extend Burk tort to claims of wrongful discharge for age discrimination because Oklahoma has adequate statutory remedies).
119. See supra note 115.
120. Collier, 981 P.2d at 326 (1999) (holding quid pro quo sexual harassment cases resulting in
Oklahoma employers. For example, in *Collier v. Insignia Financial Group*\textsuperscript{121} the court found that the language of the Oklahoma Anti-Discrimination Act incorporates the policies of Title VII but does not likewise incorporate its compensatory and punitive remedies.\textsuperscript{122} Instead, the Oklahoma act provides only administrative remedies.\textsuperscript{123} *Collier*, then, looked only to the statutory remedy available under state law to find that an employee could bring a sexual harassment claim under the *Burk* tort.\textsuperscript{124} By ignoring the available remedies under Title VII, *Collier* allows a wronged Oklahoma employee to choose whether to seek remedy in federal court under Title VII or in state court under the *Burk* public policy tort. If the Oklahoma Supreme Court were to choose not to apply a *Kolstad*-type defense in state courts, aggrieved employees would have greater incentive to pursue their claims in state court rather than federal court because, in federal court, an employer's good-faith effort to comply with Title VII would preclude the employee from collecting punitive damages.

The *Kolstad* decision also impacts Oklahoma law by interpreting the statutory language of section 1981a to create an intent-based standard for awarding punitive damages. Although Oklahoma courts have not yet clarified whether the state's punitive damages statute turns on egregious conduct or mere intent, *Kolstad* could prove informative if an Oklahoma court undertakes such a decision. The language of Oklahoma's punitive damages statute substantially resembles the pertinent language of section 1981a. For example, Oklahoma's standard for punitive damages requires "reckless disregard for the rights of others"\textsuperscript{125} or "act[ing] intentionally and with malice towards others."\textsuperscript{126} Similarly, section 1981a requires a showing of intentional discrimination "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."\textsuperscript{127} Both statutes require either malice or reckless disregard for another's rights. Because of this similarity in statutory language, Oklahoma could easily follow *Kolstad* to determine that Oklahoma's punitive damages standard is also intent-based. In this regard, Oklahoma courts could apply *Kolstad to Burk* tort claims to determine whether the employer discriminated in the face of a perceived risk of violating the employee's rights, thus warranting an award of punitive damages.

\textsuperscript{121} 981 P.2d 321 (Okla. 1999).
\textsuperscript{122} Id. at 325.
\textsuperscript{123} Id. (citing Duncan v. City of Nichols Hills, 913 P.2d 1303, 1309 (Okla. 1996)). *Collier* stated that the Oklahoma act will not incorporate additional remedies until the state legislature passes an act to specifically provide so. Id.
\textsuperscript{124} Id. at 326.
\textsuperscript{125} 23 OKLA. STAT. § 9.1(B) (Supp. 1995).
\textsuperscript{126} Id. § 9.1(D)(1).
C. Fair Compromise but Wrong Decision

In Kolstad, the Supreme Court struck a fair compromise in balancing employers' liability with employees' rights. The Court's decision that mere employer awareness of anti-discrimination laws provides sufficient proof of an intent to discriminate would be problematic if not coupled with the Court's subsequent holding that employers can escape liability by making good-faith efforts to comply with Title VII. Without the good-faith-compliance escape chute, the intent-based standard makes punitive damages potentially available in most employment discrimination cases, leaving only a few narrow exceptions to punitive liability. The intent standard implies that evidence of an employer's instituting Title VII compliance programs or seeking legal advice on its obligations under Title VII could be used as support for assessing punitive damages against the employer. This implication arises from the fact that the intent-based standard looks for evidence of the employer's knowledge of violating an employee's federally protected rights. Thus, implementing compliance programs and seeking legal advice suggest an employer's knowledge of its Title VII obligations. The above implication contradicts the stated purpose of the Civil Rights Act — to encourage employers to be proactive in avoiding discrimination and harassment within the workplace.

Kolstad's good-faith defense remedies this problem with the intent-based standard by rewarding, rather than punishing, employers for taking notice of the discrimination laws and implementing preventive programs. This position aligns with the preventive purpose of Title VII. Encouraging employees to adopt anti-discrimination policies and to educate their employees regarding Title VII advances the underlying purpose of the Civil Rights Act. Such polices and education aim to prevent discrimination before it becomes problematic within the workplace.

The Court's addition of the good-faith-compliance defense reveals that the Court reached a decision contrary to the congressional intent underlying Title VII. Clearly, the Court would not have added the good-faith defense unless it recognized that choosing the intent-based standard defeated the prophylactic purpose of the Civil Rights Act. Hence, the Court most likely added the good-faith defense in order to bring the decision within the purpose of the Act.

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129. See id. at 545.
130. See supra notes 87-91 and accompanying text.
131. These exceptions include circumstances where the employer defends intentional discrimination on grounds that it is not unlawful, such as:
   — erroneously using religion, sex or national origin as an employment qualification. Kolstad, 108 F.3d at 1438.
   — overreaching affirmative action plans. Id. at 1439.
   — discrimination that is merely negligent as to federally protected rights. Id.
   — discrimination that occurs outside scope of employer-employee relationship. Id.
   — discrimination that occurs in the face of an underlying theory of discrimination that is novel or poorly recognized. Kolstad, 527 U.S. at 537.
133. Kolstad, 527 U.S. at 545 (citing Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998)).
Eventually, the good-faith defense will prove to have substantially the same effect as would have the egregious conduct standard — limiting the availability of punitive damages awards to only the most egregious cases. This will occur as long as courts effectively interpret the level of employer conduct necessary to reach a Kolstad good-faith compliance. For example, if courts make the compliance bar too easy for employers to meet so that employers can invoke the defense in almost any situation, such interpretation would destroy employee protections under Title VII. Conversely, if courts make the compliance standard too difficult to meet so that employers are rarely able to invoke it, such interpretation would hinder the deterrent policy underlying Title VII and discourage employers from undertaking good-faith efforts to comply with Title VII. Courts should find that a Kolstad defense requires substantial steps, but not necessarily extraordinary efforts, by the employer to thwart discrimination within the workplace. If courts interpret the Kolstad defense in this way, it will prove to be a fair balance of employee protections under Title VII and will encourage employers to prevent workplace discrimination.

Once employment and labor law attorneys learn exactly what courts will consider a good-faith effort to comply with Title VII, they can advise their clients on the specific steps necessary to "insure" against punitive liability. If, after taking these steps, the employer faces a discrimination charge, the employer will be able to slide down the good-faith-compliance escape chute and avoid punitive liability by demonstrating its efforts to comply with Title VII. Eventually, the only employers held liable for punitive damages will be those who negligently fail to enforce anti-discrimination policies within their workplaces. Such failure to comply with the law will itself become egregious conduct in a corporate atmosphere where discrimination prevention is the norm.

D. Problems with Kolstad

1. Good-Faith Defense Was "Voluntary Commentary" by the Court

Kolstad may be a "fair" decision, but it also has some problems. Justice Stevens raises one of these problems in the dissenting opinion, criticizing the majority for "volunteering commentary" on the good-faith-compliance defense discussion. He implies that the Court went out on a limb in deciding this issue because no party briefed or argued the issue, no amicus curiae advocated the position, and the decision "reject[s] the Government's view of its own statute without giving it an

134. Id. at 553 (Stevens, J., dissenting) ("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. It is not this Court's practice to consider arguments — specifically, alternative defense of the judgment under review — that were not presented in the brief in opposition to the petition for certiorari.").

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opportunity to be heard on the issue."\textsuperscript{135} For these reasons, the Court entertained a close majority (5-4) on its good-faith defense holding.

The majority discredits the dissent's criticism by asserting that the agency issue is "intimately bound up with" and "subsumed within" the issue of determining the appropriate circumstances under which to award punitive damages in Title VII actions.\textsuperscript{136} Although the dissent raises an interesting criticism of the majority's creation of a good-faith defense, the defect is not fatal. To the contrary, the Kolstad result would destroy the intention of Title VII without the good-faith-compliance defense. The intent-based punitive damages standard standing alone frustrates the preventive purpose of the Civil Rights Act and renders the statute purely remedial.\textsuperscript{137} The standard encourages ignorance of the law rather than a full embrace of the law in effectuating the prevention of workplace discrimination. The good-faith-compliance defense remedies the defect of the Court's initial holding by encouraging knowledge and implementation of the law.

Because the parties to the case did not put the Court on notice of the idea of a good-faith defense, it is interesting to trace the evolution of this concept. The dissenting judges in the court of appeal's rehearing en banc opinion initially raised the concept of a good-faith defense.\textsuperscript{138} The dissenting judges suggested that because punitive damages are never awarded as of right, juries have the discretion to determine that employers who take certain proactive steps to do "everything they [can] to comply with the law should not be punished with punitive damages."\textsuperscript{139} The Supreme Court then took this concept and expanded it into the good-faith-compliance defense.

The en banc dissent also cited a Supreme Court case that created a similar good-faith defense to liquidated damages in the context of the Age Discrimination in Employment Act (ADEA).\textsuperscript{140} The Court in \textit{Trans World Airlines v. Thurston}\textsuperscript{141} found that meeting with lawyers to draft company policies consistent with the ADEA and subsequently adopting a new policy and adhering to it demonstrated that

\textsuperscript{135} \textit{Id.} Commentators have also criticized the Court for this sort of "procedural overreaching," which Professor Erwin Chemerinsky terms "the new judicial activism." William C. Rooklidge & Matthew F. Weil, \textit{Essay, Judicial Hyperactivity: The Federal Circuit's Discomfort With Its Appellate Role}, 15 BERK. TECH. L.J. 725, 727 n.6 (2000). Chemerinsky has pointed to Kolstad as an example of the Court "stepping out of its traditional appellate role to decide questions as to which certiorari had not been granted, and which had neither been addressed by the lower courts in deciding the case, nor briefed or argued by the parties." \textit{Id.} (citing Erwin Chemerinsky, \textit{The New Judicial Activism}, CAL. LAW., Feb. 2000, at 25, 26).

\textsuperscript{136} Kolstad, 527 U.S. at 540; see also Johnson, \textit{supra} note 19, at 79-86 (considering the agency issue of holding employers liable for punitive damages based on the acts of supervisors central to determining the punitive damages standard).

\textsuperscript{137} \textit{See supra} discussion § III.A.


\textsuperscript{139} \textit{Id.}

\textsuperscript{140} \textit{Trans World Airlines, Inc. v. Thurston}, 469 U.S. 111, 129 (1985) (holding that employers who intentionally violate the ADEA may nevertheless avoid liquidated damages by demonstrating that they attempted "reasonably and in good faith" to comply with the law).

\textsuperscript{141} 469 U.S. 111 (1985).
the employer acted "reasonably and in good faith" to comply with federal law so that liquidated damages were not justified.142 Although the Supreme Court did not cite this case in creating the good-faith-compliance defense, it nevertheless demonstrates that, contrary to Justice Stevens' dissent, this holding does not present a novel concept invented by the Court in the process of volunteering commentary on an issue not before the Court.143

Further, the Tenth Circuit has suggested that case law out of two circuits and at least one district court allowed for a good-faith compliance jury instruction prior to Kolstad. For example, in Cadena v. Pacesetter Corp.,144 the Tenth Circuit recognized that the District Court of Kansas had ruled in 1997 that "a plaintiff asserting vicarious liability against her employer in a Title VII suit may receive punitive damages if she presents evidence demonstrating the employer's failure to make good-faith efforts to remedy known harassment."145 The Cadena court also stated that the Fifth Circuit foreshadowed Kolstad in 1996 with Patterson v. P.H.P Healthcare Corp.,146 which suggested the impropriety of punitive liability when the evidence fails to show that the employer "took any action which was inconsistent with [its nondiscrimination] policy . . . [nor] had knowledge of [the harasser's] malicious or reckless conduct, or authorized, ratified, or approved [the harasser's] actions."147 The Cadena court also cited the Eleventh Circuit's 1996 decision of Splunge v. Shoney's, Inc.,148 which allowed an employer to escape punitive liability upon a showing "that the employer had a general policy against sexual harassment and did investigate the complaints it received."149

Justice Stevens' criticism of the majority's creating the good-faith defense in Kolstad does not render the decision unsound. Rather, as the majority asserts, this issue is inherently bound up in determining the punitive damages standard. Further, the lower court decisions discussed the applicability of a good-faith defense as have other courts in recent years.

142. Id. at 129-30. This good-faith defense under the ADEA is not as broad as the defense provided in Kolstad. For example, a district court determined that the Supreme Court recognizes only three acts of "good faith" that may save the employer from liquidated damages. These three acts are: (1) the employer was ignorant of the correlation between the selection mechanism and age; (2) the employer believed that age was a bona fide occupational qualification; and (3) the employer believed the employee was not covered by the ADEA. Dittman v. Ireco, Inc., 903 F. Supp. 347, 349 (N.D.N.Y. 1995).

143. A case that the Supreme Court cited in arriving at its good-faith defense is Harris v. L. & L. Wings, Inc., 132 F.3d 978 (4th Cir. 1997). Kolstad, 527 U.S. at 544 (stating that Harris observed that "[i]n some cases, the existence of a written policy instituted in good faith has operated as a total bar to employer liability for punitive damages"). This case also illustrates that the Court did not present an entirely novel concept in adopting a good-faith defense.

144. 224 F.3d 1203, 1212-13 (10th Cir. 2000).

145. Id. at 1212 (summarizing Baty v. Willamette Ind., 985 F. Supp. 987, 996 (D. Kan. 1997)) (asserting that the Baty holding "is effectively the same as that announced in Kolstad").

146. 90 F.3d 927 (5th Cir. 1996).

147. Cadena, 224 F.3d at 1212 (quoting Patterson, 90 F.3d at 944).

148. 97 F.3d 488 (11th Cir. 1996).

149. Cadena, 224 F.3d at 1213 (quoting Splunge, 97 F.3d at 491).
2. Kolstad Did Not Define "Good-Faith Effort"

Another problem with Kolstad is that the Court provides no definitive standard for determining what constitutes a good-faith effort to comply with federal anti-discrimination laws.\(^{150}\) The Court gave employers the minimal hint that they should adopt and enforce anti-discrimination policies and should educate their personnel about what is and is not permitted under the law.\(^{151}\) However, the Court does not clarify whether these three steps alone are sufficient for employers to meet the good-faith-compliance defense.

\(^{a\) Response to Farragher/Ellerth Affirmative Defense Is Informative in Determining What Constitutes a Kolstad Good-Faith Defense

Just as it did in Kolstad, the Supreme Court left similar questions unanswered when it created the Farragher/Ellerth affirmative defense to vicarious liability for the sexually harassing conduct of supervisory employees.\(^{152}\) For example, the Farragher/Ellerth affirmative defense requires a showing that the employer exercised "reasonable care" in preventing harassment and that the complaining employee acted "unreasonably" in failing to take advantage of the employer's grievance policy.\(^{153}\) However, the Court did not clarify what constitutes reasonable care by the employer or what constitutes unreasonable failure by the employee.\(^{154}\) Looking to various responses to these unanswered Farragher/Ellerth questions provides a starting point for answering the Kolstad question of what constitutes good-faith compliance with Title VII.

A brief examination of Farragher and Ellerth will facilitate this discussion. The Supreme Court decided both cases on the same day and set forth new standards clarifying employer liability in sexual harassment cases. The Court held that employers could be subject to vicarious liability for the sexually harassing conduct of supervisors with immediate authority over complaining employees.\(^{155}\) However, in cases in which the alleged harassment does not result in a tangible employment action, the employer may invoke a two-step affirmative defense to liability by showing: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee

\(^{150}\) EEOC v. Wal-Mart Stores, Inc., 187 F.3d 1241, 1248 (10th Cir. 1999) (complaining that Kolstad did not outline good-faith standards); see also John A. Beranbaum, Kolstad v. American Dental Association: Punitive Damages Under Title VII, N.Y. L.J., Aug. 18, 1999 (concluding that Supreme Court will likely have to take up issue of punitive damages under Title VII again to clarify numerous questions Kolstad left unanswered); "Good Faith Effort" Defense, supra note 106, at 309 ("Kolstad provides no definitive standard for determining what constitutes good-faith compliance.").

\(^{151}\) Kolstad, 527 U.S. at 544-46.


\(^{154}\) Wright, supra note 152, at 19.

\(^{155}\) Ellerth, 524 U.S. at 763-65; Farragher, 524 U.S. at 805-09.

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unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. 156

In Ellerth, the plaintiff filed a sexual harassment claim against the employer, alleging that a supervisor's suggestive comments forced her constructive discharge. 157 The supervisor's comments did not result in tangible employment actions but were considered employment threats. 158 The plaintiff never reported the harassment to her employer through its formal complaint procedure. 159

In Faragher, the plaintiff lifeguard brought a Title VII complaint against the city, claiming two supervisors engaged in activities that created a sexually hostile atmosphere. 160 Such activities included offensive touching and lewd comments directed towards female lifeguards. 161 Like Ellerth, Faragher suffered no tangible job detriment from the alleged harassment. The defendant had an anti-discrimination policy, but did not post or otherwise publish the policy at the employee's work site. 162

In determining the extent of the employers' vicarious liability for the harassing conduct of supervisors in both cases, the Court looked to the common law rules of agency. 163 In an effort to merge recognized agency principles with the purpose of Title VII, 164 the Court found it necessary to establish a new standard for employer liability in sexual harassment cases involving actionable hostile environments. 165 As stated supra, this new standard and its accompanying affirmative defense left employers with several questions. 166

The EEOC recognized the holes in the Faragher/Ellerth affirmative defense and responded with suggested employer guidelines. 167 The guidelines define "reasonable care" as consisting of formulating, distributing, and enforcing company-wide anti-harassment policies 168 that include certain essential elements. 169 The guidelines also encourage employers to write the policies in language that all employees can easily comprehend, to post the policies in high-traffic areas within the workplace, and to include the policies in employee handbooks. 170

156. Ellerth, 524 U.S. at 765; see Faragher, 524 U.S. at 806.
158. Id. at 747-48.
159. Id.
160. Faragher, 524 U.S. at 780.
161. Id.
162. Id. at 781-82.
164. Ellerth, 524 U.S. at 764 (stating the purpose as "designed to encourage the creation of anti-harassment policies and effective grievance mechanisms").
165. Id. (stating that the new standard accommodates both agency principles and Title VII's deterrent policies).
166. See supra notes 135-137 and accompanying text.
167. EEOC Notice, supra note 11, § V(C).
168. Id. § V(C).
169. See supra note 11.
170. EEOC Notice, supra note 11, § V(C)(I).
https://digitalcommons.law.ou.edu/olr/vol54/iss1/14
These EEOC guidelines do not apply exclusively to sexual harassment and therefore provide guidance in answering the Kolstad question of what constitutes a good-faith effort to comply with Title VII. Employers can use the EEOC guidelines in implementing corporate policy statements regarding the elimination of all forms of discrimination and harassment in their work environments. According to the EEOC, the policy statements should define discrimination and harassment; prohibit such as a matter of company policy; identify internal corporate mechanisms for complaints and redress for aggrieved employees; allow employees to submit complaints above their immediate supervisors; and, as a matter of policy, prohibit retaliation and reprisals against any complaining parties. If employers take the steps suggested in the EEOC guidelines when drafting company policies and follow the guidelines' suggestions for proper enforcement of these policies, employers can use this as evidence of a good-faith effort to comply with Title VII in order to invoke the Kolstad good-faith defense.

Removed from the context of the EEOC response to Ellerth and Faragher, these decisions themselves help clarify the Kolstad defense. For example, Ellerth and Faragher offer "guidance in cases such as hostile environment harassment cases where the defendant has an anti-discrimination policy, has trained its supervisors not to discriminate, and has no reason to believe that discriminatory decisions were being made at a supervisory level." Such evidence in hostile environment cases in which an aggrieved employee seeks punitive damages would demonstrate that the employer acted "in good faith based on reasonable grounds that it was not discriminating" and thus should serve as a defense to punitive liability. The same evidence would probably serve as a sufficient defense to punitive liability in other contexts under Title VII as well.

For the foregoing reasons, the EEOC need not respond to the Kolstad decision with further guidelines for employers. Instead, employers and employment law attorneys need only look to the guidelines already in place as well as other sources explored within this Note to learn what constitutes a good-faith effort to comply with Title VII.

171. See supra note 15.
172. Mantman, supra note 2.
173. Id.
174. Johnson, supra note 19, at 83, 106 (raising Kolstad in the context of what the Supreme Court should do in deciding this case).
175. Id. at 106 (suggesting a less expensive good-faith defense than the one adopted in Kolstad).
176. Id.
177. Wright-Simmons v. City of Oklahoma City, 155 F.3d 1264, 1270 (10th Cir. 1998) (stating three reasons why Ellerth and Faragher apply to cases of racial harassment: first, Faragher encouraged harmonizing standards of racial and sexual harassment; second, precedent suggests that employer-liability standards are the same for race and sex-based discrimination; finally, Ellerth and Faragher interpreted same statutory language that applies to racial harassment cases).
b) Differences Between Faragher/Ellerth and Kolstad Exemplify Importance of Kolstad

Although the Supreme Court followed the same path in Kolstad as it previously laid down in Faragher and Ellerth by stressing the prophylactic purpose of the Civil Rights Act, the Court went further in Kolstad than it had in the previous decisions. For example, the Court exempted cases resulting in "tangible job actions" from the Faragher/Ellerth affirmative defense but made no such exception to the Kolstad good-faith defense. To avoid punitive liability under Kolstad, employers need only demonstrate that the discriminatory conduct of which the plaintiff complains conflicts with the employer's efforts to comply with anti-discrimination laws, regardless of the form and result of the discriminatory conduct. Therefore, even though an employer sued by an employee who experienced a tangible job action as a result of sexual harassment cannot assert the Faragher/Ellerth affirmative defense to vicarious liability, that same employer can escape punitive liability under Kolstad. Accordingly, the Kolstad defense will entice wider use than will the Faragher/Ellerth affirmative defense.

A further difference between the application of the Faragher/Ellerth affirmative defense and the Kolstad good-faith defense is that each defense applies to different types of employees. The Faragher/Ellerth defense shields employers from the vicarious liability of its supervisors' conduct whereas Kolstad applies to the conduct of managerial employees. An employee qualifies as a "supervisor" if he or she has the authority to undertake tangible employment decisions against other employees or has the authority to direct other employees' daily work activities. This special authority exercised by supervisors vests them with an enhanced capacity to harass other employees, thus justifying employer liability for supervisor conduct.

No such concise definition of "managerial employee" exists. Instead, the determination of managerial capacity involves a fact-intensive inquiry, requiring the

178. A tangible employment action is defined as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Burlington Indus. Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
179. Id. at 765; Faragher v. City of Boca Raton, 524 U.S. 775, 808 (1998) ("No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action.").
180. In fact, Kolstad itself arose from a tangible job action — failure of the ADA to promote Kolstad based on her sex. Accordingly, the Court did not exempt such tangible actions from the Kolstad defense.
182. EEOC Notice, supra note 11, § III(A).
183. Ellerth, 524 U.S. at 763.
184. Id. at 763-64 (identifying small number of supervisors within workplace as another justification because employers can more readily guard against their misbehavior).
court to "review the type of authority that the employer has given the employee, the amount of discretion that the employee has in what is done and how it is accomplished."\textsuperscript{186} At a minimum, a managerial employee must be "important," but need not be within the employer's "top management, officers or directors."\textsuperscript{187} It seems, then, that the scope of "managerial" may be broader than that of "supervisory," encompassing more employees so that \textit{Kolstad} will enjoy wider application than the \textit{Faragher}/\textit{Ellerth} affirmative defense in this context as well.

Another distinction between the \textit{Kolstad} good-faith defense and the \textit{Faragher}/\textit{Ellerth} affirmative defense is that \textit{Kolstad} does not require any action or inaction by the complaining employee. The second tier of the \textit{Faragher}/\textit{Ellerth} affirmative defense requires a showing that the complaining employee "unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer."\textsuperscript{188} \textit{Kolstad} merely requires the employer to demonstrate that it made a good-faith effort to comply with federal anti-discrimination laws. There is no similar second tier requirement. Therefore, the \textit{Kolstad} defense will prove easier for employers to invoke and will lead to its increased use.

The three foregoing distinctions explain why courts may invoke the \textit{Kolstad} defense more frequently than the \textit{Faragher}/\textit{Ellerth} defense and demonstrate the need to clarify the boundaries and requirements of the new defense. Although \textit{Faragher} and \textit{Ellerth} created a complete defense to liability while \textit{Kolstad} merely created a defense to punitive liability, \textit{Kolstad}'s importance may rise to the level of \textit{Faragher} and \textit{Ellerth} due to the fact that more employers are likely to invoke the \textit{Kolstad} defense than the \textit{Faragher}/\textit{Ellerth} defense. Also, employers' pocketbooks and bank accounts may consider the \textit{Kolstad} defense fairly significant considering that it will allow them to escape paying awards that could reach as high as $300,000.\textsuperscript{189}

\textbf{E. What Constitutes a Good-Faith Effort?}

\textit{Kolstad} provides employers and employment law attorneys with few examples of what might, at a minimum, constitute a good-faith effort to comply with Title VII. The Court merely suggested employers adopt and enforce anti-discrimination policies and educate employees about federal prohibitions on workplace discrimination.\textsuperscript{190} The court that originally formulated the \textit{Kolstad} defense provided the following as examples of a good-faith attempt to comply with Title VII: "hiring staff and managers sensitive to Title VII responsibilities, requiring

\begin{itemize}
\item \textsuperscript{186} \textit{Ghiardi} \& \textit{Kircher}, \textit{supra} note 185, \S\ 4.4(B)(2)(a), at 181.
\item \textsuperscript{187} \textit{Kolstad v. Am. Dental Ass'n}, 527 U.S. 526, 543 (1999) (referring to definition of managerial employer found in \textit{RESTATEMENT (SECOND) OF TORTS} \S\ 909); see also \textit{Dudley v. Wal-Mart Stores, Inc.}, 166 F.3d 1317, 1323 (11th Cir. 1999) (holding that "managerial capacity" requires the discriminating employee be "high[1] up the corporate hierarchy" or that upper management "countenanced or approved" the conduct).
\item \textsuperscript{188} \textit{Ellerth}, 524 U.S. at 765; \textit{Faragher v. City of Boca Raton}, 524 U.S. 775, 807 (1998).
\item \textsuperscript{189} 42 U.S.C. \S\ 1981a(b)(3) (1994) (setting cap on punitive damages awards between $50,000 and $300,000, depending on the size of the employer).
\item \textsuperscript{190} \textit{Kolstad}, 527 U.S. at 545.
\end{itemize}
effective [Equal Employment Opportunity] training, or developing and using objective hiring and promotion standards."¹⁹¹

Commentators also offer several suggestions for making a good-faith effort to comply with federal law. One suggests that a "good-faith effort to comply" means that employers should adopt and implement anti-discrimination policies and educate their workforce and be ever-vigilant in monitoring the workplace to ensure that policies are regularly and consistently applied.¹⁹² Speaking specifically about company policies, another commentator suggests that such policies should lead any observer — whether a disgruntled employee, a plaintiff's attorney, a judge, or a jury — to conclude that the employer exemplifies good corporate citizenship and demonstrates a serious commitment to preventing discrimination and harassment in its workplace.¹⁹³ The commentator suggests that, at a minimum, an employer's compliance program should include the following:

(1) A state-of-the-art equal employment, anti-discrimination, and anti-harassment policy and complaint procedure.
(2) An effective orientation program to educate all employees about the company's policies and procedures.
(3) Exacting expectations of management behavior communicated to and required of all supervisory personnel.
(4) Supplementary policy and procedures to implement the corporation's compliance with respect to discrimination and harassment.
(5) A relentless commitment to "best workplace practices" designed to eliminate any problems of discrimination or harassment.¹⁹⁴

An employer should also communicate its commitment to Title VII to the community in order to demonstrate good-faith efforts.¹⁹⁵

As discussed supra, EEOC guidelines offer further insight into complying with Title VII.¹⁹⁶ However, the most informative insight comes from the lower courts charged with applying the Kolstad defense.¹⁹⁷ Thus far, courts have indicated that adopting written company policies and following such policies may be sufficient to demonstrate a good-faith defense,¹⁹⁸ but that actually implementing the written

¹⁹². See High Court, supra note 7, at 6 (interpreting Kolstad defense); "Good Faith Effort" Defense, supra note 106, at 308 ("[A]n employer asserting the defense will have to show that it has specific policies in place that focus particularly on the requirements of Title VII or the ADA. . . . It will also be important for the defendant to show that managerial and supervisory employees have been trained in its nondiscrimination policies and are familiar with how to apply them in the workplace.").
¹⁹³. Maatman, supra note 2.
¹⁹⁴. Id.
¹⁹⁵. Swallows, supra note 3, at 14 (suggesting that a company's commitment to equal employment opportunities should be communicated in job vacancy announcements, on employment applications and job descriptions, in employers' policies, and during periodic employee and management training sessions).
¹⁹⁶. See discussion supra Part III.D.2.a.
¹⁹⁷. Lewis, supra note 3 (indicating that Kolstad leaves it up to circuit courts to determine what constitutes good-faith effort and that the courts can look to Faragher and Ellerth in making this determination).
¹⁹⁸. White v. Ultramar, Inc., 981 P.2d 944, 947 n.2 (Cal. 1999) (noting that "if a company has a
policies more conclusively demonstrates good faith. Other indications of a good-faith attempt at compliance include "periodic publication to workers of the employer's anti-harassment policy; an effective and practical grievance process; and training sessions for workers, supervisors, and managers about how to recognize and eradicate unlawful harassment." Courts may even find that an employer made good-faith efforts at compliance despite delays in responding to employee complaints.

Courts have also found that certain actions do not measure up to a good-faith effort to comply with federal law. For example, a written anti-discrimination policy, without more, does not provide sufficient evidence of good faith. A grievance procedure for filing complaints does not sufficiently demonstrate good faith, nor does seeking legal counsel on employment issues. One court has also rejected the converse of the good-faith defense — that failing to make a good-faith attempt to avoid discrimination in the workplace automatically subjects the employer to punitive damages. Essentially, "for the good-faith exception to apply, there must be a policy of nondiscrimination both in words and in practice."

written company policy that specifically forbids retaliation against employees who testify at unemployment hearings may operate to limit corporate liability for punitive damages, as long as the employer implements the written policy in good faith"; Haynes v. Rhone-Poulenc, Inc., 521 S.E.2d 331, 352 (W. Va. 1999) (Workman, J., dissenting) (finding good-faith effort where employer adopted a generous medical leave policy and replaced the employee in accordance with the policy). But see Miller v. Kenworth, 82 F. Supp. 2d 1299, 1310 (M.D. Ala. 2000) (noting that although "adoption of antidiscrimination policies is . . . important . . . a policy alone is not sufficient as a matter of law to establish an employer's good faith").

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199. Romano v. U-Haul Int'l, 233 F.3d 655, 670 (1st Cir. 2000) ("A written non-discrimination policy is one indication of an employer's efforts to comply with Title VII. But a written statement, without more, is insufficient . . . A defendant must also show that efforts have been made to implement its anti-discrimination policy, through education of its employees and active enforcement of its mandate.").


201. Dhyne v. Meiners Thiftway, Inc., 184 F.3d 983, 988 (8th Cir. 1999) (finding good-faith efforts to comply with federal anti-discrimination laws despite excessive delay in taking action on complaints of harassment).


203. Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 188 F.3d 278, 286 (5th Cir. 1999) (finding evidence that employer encourages employees to file grievances does not suffice to establish good-faith compliance when counter evidence shows that management did not effectively respond to grievances); Blackmon v. Pinkerton Sec. & Investigative Servs., 182 F.3d 629, 636 (8th Cir. 1999) (finding good-faith defense requires prompt investigation of complaints and effective remedial action but half-hearted responses do not suffice).

204. Greenbaum v. Handelsbanken, 67 F. Supp. 2d 228, 263 (S.D.N.Y. 1999) (finding that retaining legal counsel on employment issues does not establish as matter of law a good-faith effort when evidence suggests that employer disregarded counsel's advice).

205. Scott v. Americlex Yarn, 72 F. Supp. 2d 587, 598 (D.S.C. 1999); see also Kolstad's "Good Faith" Defense, supra note 13, at 47 ("While good faith efforts to comply with federal anti-discrimination laws prevent employers from being liable for punitive damages, their failure to take such steps does not make liability for punitive damages automatically imputable to them.").

As demonstrated in this note, the Kolstad Court chose a standard for awarding punitive damages in employment discrimination and harassment cases that conflicts with the underlying purpose of Title VII. The Court, however, recognized and remedied this defect by creating the good-faith-compliance defense to punitive liability. This defense advances the preventive purpose of Title VII by rewarding those employers who initiate a proactive approach to workplace discrimination and harassment.

Although the Court left ambiguous what actions employers must take to demonstrate a good-faith effort to comply with Title VII, employers and employment law attorneys can draw from numerous sources to determine the necessary steps. From the research contained herein, a good-faith effort seems to begin with adoption of clear anti-discrimination/anti-harassment policies within the workplace. The policies should define discrimination and harassment and explicitly prohibit such conduct within the workplace. The policies should also provide aggrieved employees an avenue for complaining without fear of retaliation. Employers not only need to adopt such policies, but also need to distribute the policies to employees, educate employees on their obligations and protections under the policies, post the policies within the workplace, include the policies in employee handbooks, and encourage employees to follow the policies.

As long as courts find good-faith compliance in employer actions such as the ones described above, the good-faith defense will prove effective in striking a fair balance between employee rights and employer liability. However, courts that either set the compliance mark too high or too low will destroy the preventive benefit of the Kolstad defense.

Effective anti-discrimination workplace policies are now a company's best and most essential defense against a claim for punitive damages in the post-Kolstad era. Kolstad has the potential to make anti-discrimination programs the norm in workplaces across the United States and eventually result in complete fulfillment of the deterrent purpose underlying Title VII.

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