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# Civil Rights Act of 1991 -- Employer Liability for Punitive Damages in Title VII Claims

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the governance of a massive administrative undertaking is at stake, open discussion of the individual focus or group orientation of one's opinions may help prevent an innocuous choice of words from triggering a real-world anomaly.

### C. Civil Rights Acts

*1. Civil Rights Act of 1991 — Employer Liability for Punitive Damages in Title VII Claims.* — The Civil Rights Act of 1991[1] ("the 1991 Act") expanded the remedies available for violations of Title VII of the Civil Rights Act of 1964[2] ("Title VII") to deter intentional discrimination more effectively.[3] The 1991 Act subjected employers who are found guilty of intentional employment discrimination to compensatory and possible punitive damages in addition to the equitable relief already available under Title VII.[4] Last Term, in *Kolstad v. American Dental Ass'n*,[5] the Supreme Court determined the circumstances under which a court may award punitive damages under Title VII. The Court ruled that to obtain punitive damages a plaintiff must demonstrate that the defendant acted with malice or reckless indifference to her federally protected rights, rather than with egregiousness, the higher standard imposed by the District of Columbia Circuit. This holding accurately interpreted Congress's intended standard for punitive damages. The Court went on to state, however, that employers will not be vicariously liable for punitive damages when the discriminatory employment decisions of managerial agents are made contrary to the employer's "good-faith efforts to comply with Title VII."[6] Yet the Court did not define what constitutes such efforts.[7] By allowing

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to change "the behavior of a whole society"); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1191–93 (1986) (asserting a tension between "policing" of individual infractions and "associational forms of regulation," which require sustained involvement in group activities); *cf.* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 7 (1938) (describing the rise in "administrative process" as a result of "the growing interdependence of individuals in our civilization"); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 12–25 (1998) (arguing that the "regulatory state" is a response to problems of collective action).

[1] Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C. (1994)).

[2] 42 U.S.C. §§ 2000e–2000e-17 (1994).

[3] *See* H.R. REP. NO. 102-40, pt. 1, at 14 (1991). The 1991 Act also made punitive damages available for violations of the Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (1994).

[4] *See* Civil Rights Act of 1991, 42 U.S.C. § 1981a (1994).

[5] 119 S. Ct. 2118 (1999).

[6] *Id.* at 2129 (quoting Kolstad v. American Dental Ass'n, 139 F.3d 958, 974 (D.C. Cir. 1998) (Tatel, J., dissenting)).

[7] *See* E.E.O.C. v. Wal-Mart Stores, Inc., Nos. 98-2015, 98-2030, 1999 WL 638210, AT *6 (10th Cir. 1999) ("*Kolstad* provides us no definitive standard for determining what constitutes good-faith compliance."). In *Wal-Mart*, the Tenth Circuit applied the *Kolstad* ruling to a case involving

employers to avoid punitive liability for their agents' unlawful behavior without establishing a clear good-faith-effort standard, the Court rendered Title VII's most powerful deterrent mechanism — punitive damages — ineffectual.

Carole Kolstad served as the Director of Federal Agency Relations in the Washington, D.C. office of the American Dental Association (ADA).[8] Tom Spangler was the Legislative Counsel in the same office.[9] In September 1992, Jack O'Donnell announced that he was retiring both as Director of Legislation and Legislative Policy and as Director of the Council on Government Affairs and Federal Dental Services, the second-highest position in their office.[10] In the fall, both Kolstad and Spangler formally applied for O'Donnell's position.[11] Both had worked directly with O'Donnell and had received "distinguished" performance ratings.[12] In December 1992, the ADA notified Kolstad that it had chosen Spangler as O'Donnell's replacement.[13]

Kolstad brought an action under Title VII in the United States District Court for the District of Columbia, alleging that in selecting Spangler to succeed O'Donnell, the ADA had intentionally discriminated against her on the basis of sex.[14] The jury found in Kolstad's favor and awarded her $52,718 in damages, which represented the additional pay that she would have received had she been chosen to replace O'Donnell.[15] The jury did not consider awarding Kolstad punitive damages because the judge had not instructed it on the issue.[16] Kolstad moved for additional equitable relief in the form of instatement to O'Donnell's position with the ADA.[17] The court denied this

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punitive damages for a violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (1994).

8 *See Kolstad*, 139 F.3d at 960.

9 *See id.*

10 *See* Kolstad v. American Dental Ass'n, 108 F.3d 1431, 1434 (D.C. Cir. 1997).

11 *See id.*

12 *See id.*

13 *See* Kolstad v. American Dental Ass'n, 912 F. Supp. 13–14 (1996).

14 *See id.* Kolstad based her claim of unlawful discrimination on an assertion of disparate treatment, which is significant because only disparate treatment claims are eligible for punitive damage awards. *See* 42 U.S.C. § 1981a (1994). A plaintiff claiming disparate treatment must show the following: that the plaintiff is a woman, that the plaintiff was refused a position for which she applied and was qualified, and that the employer filled the position with a man. *See Kolstad*, 108 F.3d at 1436. After a plaintiff has made this prima facie case, the burden shifts to the employer-defendant to rebut the plaintiff's claim with evidence of legitimate, nondiscriminatory reasons for its decision. *See id.* If this burden is satisfied, then the burden shifts back to the plaintiff to prove that the defendant-employer's reasons were pretexts for unlawful discrimination. *See id.*; *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (stating the elements necessary to prove racial discrimination).

15 *See Kolstad*, 912 F. Supp at 14.

16 *See id.*

17 *See id.*

motion because, despite the jury verdict, the court did not believe that Kolstad had actually proved unlawful sex discrimination.[18]

Both parties appealed to the United States Court of Appeals for the District of Columbia Circuit.[19] The court of appeals held that the district court had erred in not instructing the jury on punitive damages.[20] The ADA argued that Congress intended only for plaintiffs in "extraordinarily egregious cases" to recover punitive damages.[21] Writing for the Court, Judge Tatel rejected the ADA's argument and endorsed Kolstad's argument that the standard of proof for punitive damages under 42 U.S.C. § 1981a is the same as the standard under 42 U.S.C. §§ 1981 and 1983.[22] Judge Williams dissented from the finding on punitive damages, arguing that the minimum standard of evidence for punitive damages should be higher than the standard for liability.[23]

The District of Columbia Circuit granted an en banc rehearing on the punitive damages issue, and the court adopted Judge Williams's position,[24] holding that a plaintiff could be awarded punitive damages only upon a showing of egregious behavior.[25] Finding that Kolstad did not demonstrate that her employer acted egregiously, the court affirmed the district court's refusal to instruct the jury on punitive dam-

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[18] *See id.* at 15–16. The ADA had moved to overturn the jury verdict as a matter of law, but the court denied the motion. *See id.* at 13. The court found that the verdict could not be overturned because under *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995), a jury's decision to infer unlawful discrimination solely based on a belief that the defendant-employer's explanations are simply pretextual is appropriate and cannot be overturned. *See Kolstad*, 912 F. Supp. at 15.

[19] Kolstad appealed the district court's decision not to instruct the jury on punitive damages, and the ADA appealed the district court's denial of its motion for judgment as a matter of law. *See Kolstad*, 108 F.3d at 1434.

[20] *See id.*

[21] *Id.* at 1437 (internal quotation marks omitted).

[22] *See id.* at 1437–38. Punitive damages are awarded under section 1981 if the plaintiff proves that the defendant acted with evil motive or intent, or with reckless or callous indifference to the rights of the plaintiff. *See id.* Section 1981a's language tracks the standard of proof requirements for punitive damages under other civil rights statutes, including sections 1981 and 1983, and the court decided that if Congress had wanted courts to depart from the "well-established legal standards" for punitive damages, then it would have made that intent clear. *Id.* at 1437.

[23] *See id.* at 1440 (Williams, J., concurring in part and dissenting in part). Based on the common law analog of intentional discrimination — intentional torts — Judge Williams argued that punitive damages should be allowed only when the plaintiff has proven that the defendant acted with "a state of mind more extreme than what is required for the intentional tort on which the punitive claim is piggybacked." *Id.* at 1441–42.

[24] *See* Kolstad v. American Dental Ass'n, 139 F.3d 958, 960 (D.C. CIR. 1998). Judge Williams wrote for the court, and Judges Silberman, Ginsburg, Sentelle, Henderson, and Randolph joined the opinion. In determining the standard for punitive damages under 42 U.S.C. § 1981a, the court was guided by the belief that the 1991 Act created a "two-tiered scheme of liability," in which punitive damages were not to be automatically available to all Title VII plaintiffs. *Id.* at 961–62. The court read the 1991 Act's legislative history as indicating that Congress "intended to establish an egregiousness requirement for punitive damages." *Id.* at 965.

[25] *See id.* at 969.

ages.[26] Judge Tatel dissented,[27] arguing that because section 1981a does not mention egregiousness, applying such a standard would conflict with the reckless indifference requirement of sections 1981 and 1983.[28] Judge Tatel maintained that because it was the court's duty to give effect "to every clause and word of [the] statute," the court could not ignore the reckless indifference standard or undermine it by adopting an egregiousness standard.[29]

The Supreme Court reversed the District of Columbia Circuit's decision and held that a plaintiff does not have to demonstrate egregious conduct to obtain punitive damages.[30] Writing for the Court,[31] Justice O'Connor determined that Congress intended to impose two standards of liability on employers found liable for intentional discrimination: one for compensatory damages and another, higher standard for punitive damages.[32] The Court held that section 1981a's required showing of "malice" or "reckless[ness]" stated the requisite higher standard for punitive damages.[33]

Having rejected the District of Columbia Circuit's egregiousness standard, the majority proceeded to address an issue that the parties did not raise: "the proper legal standards for imputing liability to an employer in the punitive damages context."[34] The Court concluded that employers cannot be vicariously liable for punitive damages for the discriminatory employment decisions of managerial agents when

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26 *See id.*

27 Chief Judge Edwards and Judges Wald, Rogers, and Garland joined Judge Tatel's dissent.

28 *See Kolstad*, 139 F.3d at 971 (Tatel, J., dissenting).

29 *Id.* (quoting Bennett v. Spear, 520 U.S. 154, 173 (1997)) (internal quotation marks omitted). Judge Tatel also argued that the majority opinion failed to provide district courts with adequate guidance as to what constitutes egregiousness. *See id.* at 976–78.

30 *See Kolstad*, 119 S. Ct. at 2124, 2126.

31 Part I of Justice O'Connor's opinion was unanimous. Justices Stevens, Scalia, Kennedy, Souter, Ginsburg, and Breyer joined Part II-A of Justice O'Connor's opinion, and Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas joined Part II-B. Part II-A considered the evidentiary standard necessary for obtaining punitive damages and Part II-B discussed the conditions under which employers can be vicariously liable for punitive damages.

32 *See Kolstad*, 119 S. Ct. at 2124.

33 *Id.* (quoting 42 U.S.C. § 1981a(b)(1) (1994)) (internal quotation marks omitted). The 1991 Act's innovation was that it enabled plaintiffs to obtain punitive damages on the condition that the defendant-employer acted with malice or reckless indifference to the federally protected rights of the plaintiff. *See* 42 U.S.C. § 1981a(b)(1). The "malice" and "reckless indifference" standards refer to the employer's knowledge that it may be acting in violation of Title VII, not that it may be engaging in discriminatory behavior. *See id.* The Court raised this distinction and noted that there are circumstances under which intentional discrimination does not give rise to punitive damages because the employer is unaware that the discrimination is unlawful. *See Kolstad*, 119 S. Ct. at 2125.

34 *Kolstad*, 119 S. Ct. at 2127. Justice O'Connor stated that this "issue is intimately bound up with the preceding discussion on the evidentiary showing necessary to qualify for a punitive award, and it is easily subsumed within the question on which we granted certiorari . . . ." *Id.* at 2127.

those decisions are contrary to the employer's "good-faith efforts to comply with Title VII."[35] The Court applied modified agency principles to its analysis of employer liability for punitive damages. The Court first examined traditional agency principles, which allow a principal to be held vicariously liable for the actions of its agent when the agent "was employed in a managerial capacity and was acting in the scope of employment."[36] The Court observed that acting in the "scope of employment" can include intentional torts involving conduct that the employee "is employed to perform, that occur substantially within the authorized time and space limits, and is actuated, at least in part, by a purpose to serve the employer."[37] The Court reasoned that these broad guidelines would cause an employer who "makes every effort to comply with Title VII" to be held liable for the discriminatory employment decisions of managerial agents.[38]

The Court found that this outcome, however, was in tension with both the purposes of Title VII and the principles underlying common law limitations on vicarious liability for punitive damages[39] because it would "reduce the incentive for employers to implement antidiscrimination programs," a result directly contrary to the "purposes underlying Title VII."[40] The Court based this conclusion on its belief that Title VII was "designed to encourage the creation of antiharassment policies and effective grievance mechanisms."[41] The Court argued that holding all employers vicariously liable for punitive damages for the discriminatory employment decisions of managerial agents would have a chilling effect on the implementation of antidiscrimination programs and policies. The Court reasoned that the existence of an antidiscrimination program would lead a court to believe that the employer was aware of Title VII's requirements. Therefore, any violation of Title VII would automatically constitute acting with malice or reckless indifference to the federally protected rights of the plaintiff, thus satisfying the standard for punitive liability. Under this reasoning, employers would have a disincentive to implement antidiscrimination programs because it could lead to automatic liability.[42]

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[35] *Id.* at 2129 (quoting Kolstad v. American Dental Ass'n, 139 F.3d 958, 974 (D.C. Cir. 1998) (Tatel, J., dissenting)) (internal quotation marks omitted).

[36] *Id.* at 2128 (quoting RESTATEMENT (SECOND) OF AGENCY § 217C (1958)) (internal quotation marks omitted).

[37] *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 228(1) (1958)) (internal quotation marks omitted).

[38] *Id.*

[39] *See id.* at 2128–29.

[40] *Id.*

[41] *Id.* (quoting Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2270 (1998)) (internal quotation marks omitted).

[42] *See id.*

Chief Justice Rehnquist, joined by Justice Thomas, dissented from the Court's rejection of the egregiousness requirement, arguing that such a requirement is implied in Congress's two-tiered scheme for monetary relief.[43] The Chief Justice concurred, however, in the Court's application of modified agency principles to limit an employer's vicarious liability for punitive damages.[44]

Justice Stevens concurred in part and dissented in part.[45] He concurred in the Court's decision to reject an egregiousness requirement for punitive damages.[46] Finding that the vicarious liability issue was not properly before the Court, Justice Stevens dissented from the Court's holding regarding that issue.[47] Justice Stevens argued that the vicarious liability issue was not properly before the Court because the facts of the case did not present that issue and the parties had not briefed it.[48] Furthermore, Justice Stevens argued that the agency issue was not applicable to this case.[49] Promotion decisions are "quintessential company acts," he argued, and therefore there is no need to use agency principles to impute the promotion decision to the employer.[50]

Given the plain language of the 1991 Act and Congress's intent, the Court's primary holding — that plaintiffs need not demonstrate egregiousness to obtain punitive damages — is correct.[51] The Court's decision that certain employers cannot be vicariously liable for punitive damages, however, is mistaken. The Court stated that the primary objective of Title VII is to prevent unlawful discrimination[52] and that this purpose is adequately advanced when employers are encouraged to adopt antidiscrimination policies.[53] The Court's holding, however, assumed that employer antidiscrimination policies are the only means of preventing discrimination. According to this view, if punitive liability threatens these preventive measures — as the Court insisted it does — then punitive liability cannot be extended because it would leave no way to prevent unlawful discrimination. Yet both Title VII and the 1991 Act deliberately rely on alternative preventative meas-

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[43] *See id.* at 2130 (Rehnquist, C.J., concurring in part and dissenting in part).

[44] *See id.*

[45] Justice Stevens was joined by Justices Souter, Ginsburg, and Breyer.

[46] *See Kolstad*, 119 S. Ct. at 2130 (Stevens, J., concurring in part and dissenting in part).

[47] *See id.*

[48] *See id.* at 2133.

[49] *See id.*

[50] *Id.* (quoting Kolstad v. American Dental Ass'n, 139 F.3d 958, 968 (D.C. Cir. 1998)) (internal quotation marks omitted).

[51] Although Congress intended the standard for punitive damages to be higher than the standard for ordinary liability, Congress clearly meant the higher standard to be malice or reckless indifference, as stated in the language of section 1981a(b)(1). *See id.* at 2124; H.R. REP. NO. 102-40, pt. 1, at 72 (1991); *supra* note 14 (describing the standard for ordinary liability).

[52] *See Kolstad*, 119 S. Ct. at 2129.

[53] *See id.*

ures. Congress recognized, in 1964 and again in 1991, that remedial procedures can serve as effective deterrent mechanisms for preventing unlawful discrimination.[54]

In 1991, Congress believed that punitive damages would serve as a more effective deterrent for unlawful discrimination than the existing equitable remedies.[55] Congressional findings indicated that the available equitable remedies were "not adequate to deter unlawful discrimination."[56] In an attempt to effectuate the deterrent purpose of Title VII, Congress made compensatory and punitive damages available to victims of unlawful discrimination under the 1991 Act.[57] Congress believed that liability for monetary relief was critical for realizing the deterrent purpose of Title VII, reasoning that if discrimination is expensive, people will stop engaging in discriminatory behavior.[58]

Allowing employers to escape vicarious punitive liability undermines the deterrent effect that imposing punitive liability was intended to have under the 1991 Act.[59] Because individuals are generally not personally liable for punitive damages and employer vicarious liability for punitive damages has been limited by *Kolstad*, few people will be deterred by the threat of punitive damages.[60] Although there are other mechanisms that encourage adherence to Title VII, the pre-1991 deterrent mechanisms have clearly not been successful from Congress's perspective.[61]

In deciding the vicarious liability question, the *Kolstad* Court examined the effect of such liability on employers' adoption of antidiscrimination policies. The Court thus focused its inquiry too narrowly; it should have examined the effect of vicarious liability on the broader deterrent purpose of Title VII and the 1991 Act. The deterrent purpose of these laws extends beyond encouraging employers to adopt antidiscrimination policies to preventing employers from engaging in unlawful discrimination. Had the Court examined the effect of vicari-

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[54] *See* Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (1994); Civil Rights Act of 1991, 42 U.S.C. § 1981a (1994).

[55] Compensatory and punitive damages were already available in 1991 for intentional discrimination based on race but were not available for discrimination based on religion or sex. *See* H.R. REP. NO. 102–40, pt. 1, at 65.

[56] *Id.* at 18.

[57] *See* 42 U.S.C. § 1981a (1994).

[58] *See* H.R. REP. No. 102-40, pt. 1, at 69.

[59] The deterrent effect of punitive damages is similar to the deterrent effect of general punishment. When individuals understand that they may become subject to a particular punishment — for example, punitive damages — for taking a certain action, fear of punishment will generally deter them from that action. *See* BLACK'S LAW DICTIONARY 450 (6th ed. 1990).

[60] *See* Michael D. Moberly & Linda H. Miles, *The Impact of the Civil Rights Act of 1991 on Individual Title VII Liability*, 18 OKLA. CITY U. L. REV. 475, 490–92 (1993).

[61] *See* H.R. REP. NO. 102–40, pt. 1, at 18 ("[E]xisting [civil rights] protections and remedies are not adequate to deter unlawful discrimination.").

ous liability on the prevention of unlawful discrimination — the broader purpose of Title VII — it would have seen that holding employers vicariously liable for punitive damages would not have undermined, but instead would have furthered, the deterrent purposes of Title VII and the 1991 Act. Potential liability for punitive damages would encourage employers to take the steps necessary to adhere to Title VII. Limiting the potential for punitive liability leaves employers with the pre-1991 incentives to adhere to Title VII — the incentives that Congress deemed inadequate.

Although the Court did not define what constitutes a good-faith effort to comply, the resulting standard is likely too low to gauge adequately an employer's attempt to comply with Title VII. Law firms advising employers about the *Kolstad* ruling have stated: "As an employer, you can breathe a bit easier — you don't have to worry quite as much about large punitive damage awards *if* you've adopted and implemented antidiscrimination policies."[62] The employment law newsletters also state, however, that making a good-faith effort under *Kolstad* requires, at a minimum, having antidiscrimination policies in place that are regularly and consistently used.[63] In *Equal Employment Opportunities Commission v. Wal-Mart Stores*,[64] the Tenth Circuit recently applied the *Kolstad* ruling and measured the defendant-employer's good-faith effort by the existence of an antidiscrimination policy.[65] The Tenth Circuit held that although the defendant-employer had a generalized policy of equality, it had not educated its employees on the requirements of the federal law involved and therefore its general policy did not constitute a good-faith effort to comply.[66] Unfortunately this decision did not provide more guidance as to what constitutes a good-faith effort because the facts did not even meet the minimum requirements.[67] As is evident in the advice from the employment law newsletters and the holding in *Wal-Mart Stores*, employers will only be concerned with having regularly and consistently used antidiscrimination policies and employee education regarding the ap-

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[62] *High Court Ends Term with Important Rulings on ADA, Punitive Damages*, PA. EMPLOYMENT L. LETTER (Buchanan Ingersoll), July 1999, at 4 [HEREINAFTER, *High Court, Pa.*]; *accord High Court Ends Term with Important Rulings on ADA, Punitive Damages*, N.H. EMPLOYMENT L. LETTER (Sulloway & Hollis), August 1999, at 6 [HEREINAFTER, *High Court, N.H.*]. These law firms also stated, however, that employers could not turn a blind eye to employee actions once the policies were in place; rather, it would be necessary for employers to ensure that their policies were being applied. *See High Court, Pa.* at 4; *High Court, N.H.* at 6.

[63] *See High Court, Pa.* at 4; *High Court, N.H.* at 6.

[64] No. 98-2015, 98-2030, 1999 WL 638210 (10th Cir. 1999).

[65] *See id.* at *7.

[66] *See id.*

[67] The defendant did not meet the minimum requirement of personnel education regarding federal rights.

plicable federal laws, and will not be as interested in taking the necessary action to ensure that their employees do not unlawfully discriminate.

By focusing on the existence of antidiscrimination policies as evidence of an employer's good-faith effort to comply with Title VII, the Court has chosen an unreliable indicator. Modern employment discrimination is generally covert,[68] and antidiscrimination policies may not be indicative of an employer's effort to comply with Title VII. The employment law newsletters' insistence that the policies are regularly and consistently used is an attempt to address this concern, yet such policies do not gauge important subtle factors that affect an employer's compliance efforts. Subtle factors include supervisors' revealing their attitudes about the seriousness of discrimination matters through verbal and non-verbal innuendoes, employees noticing that filed complaints are never positively resolved, and the reactions of supervisors and management to individuals that use the policies. Because these factors would be difficult to document when attempting to rebut an employer's claim that its regularly and consistently used antidiscrimination policies represent a good-faith effort to comply, it would be hard to determine an employer's true effort to comply with Title VII.

The Court based its decision on the idea that the best way to induce compliance with Title VII is to provide employers with positive incentives. This opinion conflicts with Congress's decision that the best way to induce Title VII compliance is by providing a negative incentive — punishment — to those who engage in intentional discrimination.[69] The difference in the two liability regimes is the amount of effort that employers will make to comply with Title VII by preventing unlawful discrimination. Under the regime the Court established in *Kolstad*, employers will be interested in establishing antidiscrimination policies with two components: a component indicating that it is not company policy to discriminate against individuals on the basis of race, color, religion, sex, or national origin; and a component detailing a procedure for addressing claims of discrimination. Alternatively, if the Court had allowed employers to be vicariously liable for punitive damages, then employers would institute antidiscrimination policies that actively ensure compliance with Title VII and ensure that em-

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[68] *See* David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1644 (1991) (discussing the covert nature of employment discrimination); Marina C. Szteinbok, Note, *Indirect Proof of Discriminatory Motive in Title VII Disparate Treatment Claims After* Aikens, 88 COLUM. L. REV. 1114, 1114, 1116 (1988) (same).

[69] *See* H.R. REP. NO. 102-40, pt. 1, at 69–70.

ployers seriously address potential violations.[70] By making punitive damages available to victims of intentional employment discrimination, Congress intended to do more than to ask employers to try to comply with Title VII — it intended to punish them if they failed to comply.

If the Court was interested in providing a positive incentive for Title VII compliance without undermining the deterrent effect of punitive damages, it could have adopted a rule similar to the rule adopted in *Burlington Industries, Inc. v. Ellerth*[71] and *Faragher v. City of Boca Raton*[72] governing employer liability for a supervisor's sexual harassment. Employers would be vicariously liable for punitive damages subject to an affirmative defense, enabling employers who exercise reasonable care to prevent and correct promptly discriminatory behavior to escape vicarious liability for punitive damages.[73] The *Kolstad* rule presumably places the burden of proving that an employer did not make a good-faith effort on the plaintiff. If employers bear the burden of proving reasonable care or a good-faith effort to avoid otherwise automatic punitive liability, employers would have a stronger incentive to take the actions necessary to prevent unlawful discrimination in their workplaces. The incentive would be stronger because employers would face the more difficult task of proving that they took reasonable care or made a good-faith effort to comply, rather than escaping liability because the plaintiff could not prove that the discriminatory behavior did not comport with the employer's good-faith effort.

Both Title VII and the 1991 Act were enacted to prevent unlawful discrimination and each used different types of deterrent mechanisms. Had the *Kolstad* Court appreciated the broader purpose of both laws, it would have seen that holding employers vicariously liable for punitive damages would not have undermined the purpose of Title VII. In fact, the Court would have concluded that it was only by holding employers vicariously liable for punitive damages that courts could spur employers to work tirelessly to prevent unlawful discrimination in their workplaces.

*2. Title IX — School District Liability for Student-on-Student Sexual Harassment.* — Enacted to eliminate gender discrimination in

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[70] *Cf.* H.R. REP. NO. 102-40, pt. 1, at 70 (implying that employers take active measures to prevent employment discrimination only when there is "increased liability").

[71] 118 S. Ct. 2257 (1998).

[72] 118 S. Ct. 2275 (1998).

[73] In *Burlington Industries* and *Faragher* the Court decided that employers would be vicariously liable for a supervisor's sexual harassment unless they demonstrated two things: first, that the employer "exercised reasonable care to prevent and correct promptly any sexually harassing behavior"; and second, "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Burlington Indus.*, 118 S. Ct. at 2270; *accord Faragher*, 118 S. Ct. at 2292–93.