A. Introduction

Historically, federal courts have allowed the recovery of money damages resulting from civil rights violations and acts of discrimination even when the specific statute is silent as to the appropriate remedy. However, punitive damages which are intended to punish violators and deter them from engaging in similar conduct in the future, have been less uniformly applied in the employment law context. This, in part, has to do with the many different civil rights statutes in place and their lack of cohesion.

The Kolstad v. American Dental Association decision of the Supreme Court’s 1999 term answered a number of key questions concerning the test for punitive damages in civil rights’ cases. 527 US 526 (1999). Most importantly, it verified that the 1991 Civil Rights Act does not mandate that in order to assess punitive damages the intentional discrimination must be egregious.

Already, the Kolstad decision has been widely cited and has been applied to §1981, §1983, Title VII, ADA, and Fair Housing Act cases. The Kolstad decision’s punitive damages standard, because it has been applied to a number of employment statutes, has the potential to evolve into a common test for all employment statutes that allow punitive damages.

However, as will be described infra, the Kolstad decision, in trying to identify circumstances in which a court could find that intentional discrimination would not yield punitive damages has created a situation in which courts have great flexibility to determine the appropriateness of punitive damages. The contours of lower courts’ decisions in these issues will likely have to await further guidance from the Supreme Court.

B. The 1991 Civil Rights Act and the Conflict between the Circuits

Prior to the 1991 Civil Rights Act, punitive damages were unavailable in Title VII, Title I, and §501 Rehabilitation Act actions. Upon passage of the Act, in November 1991, a new code section, §1981(a), allows punitive damages for intentional discrimination (as opposed to disparate impact cases). However the statutory language states that a plaintiff can only recover punitive damages if the defendant acted “with malice or with reckless indifference” to the individual’s rights.

The Act also places caps on amount of damages individuals can receive. The largest amount a plaintiff can be awarded is $300,000. Section 1981(a)(2) authorized the recovery of compensatory and punitive damages in Title I and §501 actions in which disparate treatment discrimination is proved.
Leading up to the Kolstad decision, many circuit courts Amendment read the “malice and reckless indifference” language of the 1991 Act, combined with the legislative history of the Act, to mean that punitive damages require either egregious or extraordinarily egregious conduct, Luciano v. Olsten Corp., 110 F.3d 210 (2nd Cir. 1997).

Other circuits based their decisions on the statutory language in the 1991 Civil Rights Act that did limit the number of intentional discrimination suits that punitive damages could be applied to, but not to the extent of extraordinary egregious conduct. Kim v. Nash Finch Co., 123 F.3d 1046 (8th Cir. 1997).

C. The Kolstad Decision

In Kolstad, a female employee of the American Dental Association, brought a Title VII action against her employer when the employer failed to promote her. Kolstad at 2122. Kolstad argued that the promotion process was a sham and the selected reason for selecting Spangler, her coworker, was pretext because he was actually selected before the process began. Id. The jury awarded Kolstad backpay damages totaling $52,718. Id. However, the District Court refused petitioner’s request for an instruction on punitive damages. Id. at 2123.

A majority of the District of Columbia Appellate Court, in an en banc decision, found that based on the 1991 Civil Rights Act’s structure and legislative history, the defendant’s actions must not only be intentional, but must be egregious for a court to impose punitive damages. 139 F.3d 958 (DC Cir.1998). Further, the Court held that “before the question of punitive damages can go to the jury, the evidence of the defendant’s culpability must exceed what is needed to show intentional discrimination.” Id. at 961.

The Supreme Court found that it is true that punitive damages can be assessed in only a subset of cases involving intentional discrimination. The test, however, is not whether a defendant’s actions were egregious. Id. at 2124. The correct test, as written in the statute, is if the intentional discrimination includes “malice or reckless indifference to [the plaintiff’s] protected rights.” §1981(a). The Court found that this statutory standard mirrors the standard in Smith v. Wade, in which the Court ruled that punitive damages in a §1983 action can be assessed 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.” 461 U.S at 56.

In Smith the Court required a “subjective consciousness” of a risk of injury or illegality and a “criminal indifference to civil obligations.” Id. at 37. Further, the Smith Court compared the recklessness standard to the requirement that defendants act with “knowledge of falsity or reckless disregard for the truth” before punitive awards are available in defamation actions. Id. at 50. In resolving the circuit split that led to Kolstad, the Supreme Court held, “applying the Smith standard in the context of § 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.” Kolstad at 2125.
The **Kolstad** Court identified circumstances in which intentional discrimination does not give rise to punitive damages. Id. These cases include cases in which the employer is unaware of the federal statute, cases in which the employer believes that the discrimination is lawful, cases in which the underlying theory of discrimination is novel or otherwise poorly recognized, or cases in which a bona fide occupational qualification defense or other statutory exception to liability exists. Id.

The **Kolstad** decision also held that “in the punitive damages context, an employer may not be held vicariously liable for discriminatory employment decision of managerial agents where these decisions are contrary to the employer’s “good faith efforts to comply with Title VII.” The Court reiterated that an employer may avoid liability for actions of employees if it enacts and strongly enforce an anti-discriminatory policy.

**D. Post—** **Kolstad** **Issues**

1. **Kolstad**’s **Effect on Punitive Damage Awards**

   There will likely be an increase in punitive damage awards post-**Kolstad** because many appellate courts had imposed the narrower egregious standard for assessing punitive damages. However, because **Kolstad** still limits the types of intentional discrimination that merits punitive damages and because the **Kolstad** decision highlights the limitation on liability for defendants that act in good faith, this increase in the award of punitive damages would likely not be significant.

   Arguably, because of the Court’s language in **Kolstad** and other recent Supreme Court cases (**Burlington Industries** v. **Ellerth**, 524 U.S. 742 (1998); **Faragher** v. **City of Boca Raton**, 118 S.Ct 2275) explicitly call for employers to do more to prevent discrimination and explicitly mandate courts to limit liability for those employers who do make a good faith effort to stop discrimination, the more serious, persistent and untreated discrimination will be treated with the maximum amount of punitive damages available. Whereas discrimination claims that are less serious, but are discouraged by management and are not investigated, the affirmative defense of good faith effort will seriously limit any damages. Empirical work to study the actual effect of the Supreme Court’s recent holdings on damages would be valuable.

2. **Appellate Cases Concerning whether to assess Punitive Damages in Intentional Discrimination Cases**

   In analyzing circuit court decisions since **Kolstad**, it seems clear that the Supreme Court’s explanation of when intentional discrimination does not give rise to punitive damages needs to be made more concrete because the circuit courts have not been consistent. An analysis of some cases post-**Kolstad** is revealing:

   • In **Iacobucci** v. **Boulter**, 193 F.3d 14 (1st Cir., 1999), in a §1983 claim the Circuit Court confirmed a district court decision denying punitive damages in a case in which a police officer arrested a person for videotaping a city commission meeting and detaining him for four hours and deleting the videotape. The Court reasoned that because there was no
evidence the police officer “harbored any malice or acted with reckless indifference to Iacobucci’s constitutional rights” when he arrested Iacobucci, punitive damages were unavailable, even though the videotape was erased while in police custody.

- In *Dhyne v. Meiners Thriftway, Inc.*, 184 F.3d 983 (8th Cir., 1999), the Court affirmed the district court’s refusal to submit the punitive damages claims to the jury. The Court found that an excessive delay in responding to employee’s complaints was not enough to support a claim for punitive damages in that no malice or recklessness was present.

- In *Gile v. United Airlines, Inc.*, 2000 WL 656348 (7th Cir., 2000), an ADA case, the Appellate Court ruled that United Airline’s “refusal to change the shift of the plaintiff because of plaintiff’s disability amounted to negligence because it misunderstood her difficulties, did not regard her condition as disability and neglected to pursue plaintiff in developing an alternative accommodation.” However, the Court further found that although United wrongly believed that plaintiff was not disabled under the ADA and did not adequately address her accommodation request, United did not exhibit the requisite reckless state of mind regarding whether its treatment of Gile mandated punitive damages.

However, in other cases punitive damages have been awarded and the same events that constituted the discrimination were found to be reasons why the good faith exception was not appropriate. Some of these cases follow:

- In *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278 (5th Cir., 1999), a case of the chain firing of an employee for interracial dating, the Fifth Circuit found that Wal-Mart's only evidence against the imposition of punitive damages was that it encourages employees to contact higher management with grievances. Wal-Mart did not explain how a Wal-Mart manager's comment about Wal-Mart corporate hostility to interracial relationships could pass unrebuted at a meeting with two other Wal-Mart managers present. Plaintiff on the other hand, presented substantial evidence that Wal-Mart failed to respond effectively to her complaints about the managers’ racial animus. Despite the upper-management’s promise to check into her complaint of hostility to her interracial relationship, she was fired the next month. Here, the discriminatory actions themselves were cause for punitive damage awards such that a Kolstad exception to the intentional discrimination would not be appropriate.

- In *Deters v. Equifax Credit Information Services, Inc.*, 202 F.3d 1262, (10th Cir., 2000), the Court found that the type of sexual harassment by the defendants, including unwanted touching and demands for sexual favors were enough such that recklessness and malice are to be inferred from the discrimination and thus, a lack of good faith effort to escape punitive damages could be found in order to impose punitive damages.

- In *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431 (4th Cir., 2000), The Appellate Court found that Circuit City did not fall into one of the Kolstad exceptions for waiving the imposition of punitive damages. Further the Court found that its anti-discriminatory policy, “Treating Associates with Respect,” was not seriously implemented and the discrimination at the store was evidence of the lack of importance.
In Alexander v. Riga, 208 F.3d 419 (3rd Cir., 2000), a Fair Housing Act case, the Third Circuit found that recklessness and malice may be inferred when a manager responsible for showing and renting apartments repeatedly refused to deal with African-Americans about the apartment, and misrepresented the apartment's availability.

In Blackmon v. Pinkerton Security & Investigative Services, 182 F.3d 629 (8th Cir., 1999), a sexual harassment case, because the defendant complained to three levels of supervision, was retaliated against for complaining and because defendant fired another coworker in an effort to escape liability and further attempted to escape liability by soliciting information about employee to prove that she caused the harassment, the Court ruled that this employer did not conduct an even-handed, good-faith investigation and thus punitive damages were correctly imposed.

In Alexander v. Fulton County, Georgia, 82 FEP Cases 858 (11th Cir. 2000), a black prison officer’s testimony that she knew discrimination was illegal was enough to show that a reasonable jury could conclude that the officer acted in face of perceived risk that her actions would violate federal law.

The Deffenbaugh-Williams and the Lowery cases, supra, are interesting because the courts are finding that a corporation not only needs to have anti-discrimination policies in place to pass the good faith test and escape vicarious liability, but the policy needs to be enforced. The Alexander case rebuts the proposition that management should not enact policies against discrimination in the fear that these policies would open the companies to liability.

As these cases display, the Kolstad “escape clause” that eliminates punitive damages if the employer does not know the discrimination is illegal is narrow. This is because in most discrimination cases, like that of Alexander, all that is needed to find that a reckless indifference to a person’s legal rights is the testimony of a manager saying she knew the discrimination in question is illegal.


As indicated previously, Kolstad was influenced by the Smith decision because Congress wanted to replicate the §1981 and §1983 standards for Title VII, ADA and §501Rehabilitation Act cases. Now, the Kolstad decision is influencing other employment discrimination and civil rights statutes. The current state of the law regarding punitive damages for various employment statutes is as follows. Note that the ADA, FLSA and EPA have similar standards to Kolstad for imposing liquidated damages, but do not have punitive damages.

• Title VII. The 1991 Civil Rights Act limits compensatory and punitive damage awards to cases of intentional discrimination. The employer must act with a state of mind of “malice or with reckless indifference to [the plaintiff’s] federally protected rights.” §1981(b)(1). Kolstad held (1) the conduct of defendants need not be egregious, and (2) the 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. Kolstad, 119 S.Ct 2118, 2125. The 1991 Civil Rights Act
also placed numerical limits as to the punitive damages a court may impose that vary with the size of the employer. 42 USCS § 1981a(a)(1).

**Section 1981 and 1983.** Punitive damages are available for §1981 and §1983 actions. Johnson v. Railroad Express Agency, 421 U.S. 454 (1975). These actions employ a “malice, willfulness or reckless disregard for plaintiff’s federally protected rights” standard, similar to that defined in Kolstad. Smith v. Wade, 103 S.Ct. 1625 (1983), held that in §1983 claims, in which the recklessness standard is utilized, “defendants must act with “knowledge of falsity or reckless disregard for the truth”’ Id. at 50. In Kolstad, the Supreme Court found that the 1991 Civil Rights Act was based on Smith and the Court used the analysis in Smith for the Title VII claim in Kolstad. In Iacobucci v. Boulter, 193 F.3d 14 (1st Cir. 1999), the Court found the Kolstad decision was applicable to determine the prudence of a §1983 claim.

**ADEA.** No punitive damages are permitted under the ADEA, except for retaliation claims. However, § 7(b) of the ADEA states that an employer’s conduct must be “willful” for liquidated damages to be imposed. In Hazen Paper Company v. Biggins, 113 S.Ct. 1701, 1709, the Court reiterated that the “willful” standard is that of “knowledge or reckless disregard.” The definition of willful is whether “the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.” Id. at 1710.

**ADA.** The 1991 Civil Rights Act also amended the ADA to include a provision adding punitive damages for intentional discrimination. 42 USCA § 1981(a)(2). Thus the Kolstad decision would apply, holding that the intentional discrimination need not be egregious.

**Fair Housing Act.** In the Fair Housing Act, there is a specific damages provision in the plain language of the statute. 42 U.S.C. § 3613(c) provides the relief which may be granted, when private individuals seek to enforce the Fair Housing Act: (1) In a civil action under subsection (a) of this section, if the court finds that a discriminatory housing practice has occurred ..., the court may award to the plaintiff actual and punitive damages, and ... may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate). In Alexander v. Riga, 208 F.3d 419 (3rd Cir., 2000), Kolstad was used to determine the applicability of punitive damages.

**Rehabilitation Act.** The 1991 Civil Rights Act also added punitive damages for §501 actions under the Rehabilitation Act. Because this was the statutory provision analyzed in Kolstad for Title VII cases, the same standards will apply.

**Equal Pay Act and Fair Labor Standards Act.** Neither compensatory nor punitive damages are available for EPA violations in §16 cases. Liquidated damages are available under the EPA and the FLSA. The Equal Pay Act states employers “shall be liable to the employee for employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.” 29 U.S.C. § 216(b). Under Section 15(a)(3) of the FLSA, an employer
Punitive Damages in Employment Discrimination Law

“shall be liable for such legal or equitable relief as may be appropriate …, including without limitation employment, reinstatement, promotion and the payment of wages lost and an additional equal amount as liquidated damages.” 29 U.S.C. § 216(b). However in 1947 the FLSA statute, of which the EPA is part, was amended to confer discretion on the courts to deny otherwise awardable liquidated damages in whole or part when satisfied that the employer acted or omitted action “in good faith and that he had reasonable grounds for believing that his act or omission was not a violation. . . .” Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976). Thus again in these statutes, determinations similar to those explained in Kolstad need to be made.

E. Conclusion

Finally, as can be seen in the judicial and statutory history prior to Kolstad and the appellate court decisions since Kolstad, the civil rights statutes that allow punitive damages are coalescing around one test for the imposition of such damages. This is, in part, because of the incestuous beginnings of the 1991 Civil Rights Act with respect to punitive damage. That is, the Act’s replication of language in Smith and explicit interest in the legislative history to replicate the §1981 and §1983 tests. Further, the application of Kolstad to other statutes is accentuating this process of conformity. Again, already the Kolstad decision has been applied to §1981, §1983, Title VII, ADA, and Fair Housing Act cases. However, some of this standardization may stem from the desire for consistency in employment discrimination law statutes.