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Kolstad v. American Dental Association: Punitive Damages Under Title VII

Lost in the flurry of last month's Supreme Court decisions interpreting the Americans with Disabilities Act (ADA) was another significant employment discrimination case, *Kolstad v. American Dental Association*.[1]

In *Kolstad*, the Supreme Court ruled on the availability of punitive damages against an employer under Title VII of the Civil Rights Act of 1964, the federal statute prohibiting employment discrimination. Whereas the recent ADA cases were a clear victory for employers and their advocates, *Kolstad* was a mixed decision, giving both employers and employees reason to cheer and to despair.

Carole Kolstad worked for the American Dental Association in its Washington office as the Director of Federal Agency Relations. When her boss announced plans to retire, Kolstad applied for his job, as did a male executive, Jack Spangler. The acting head of the Washington office, Leonard Wheat, requested that the Association's Executive Director, make the decision between Kolstad and Spangler. The Executive Director chose Spangler, and Kolstad sued, claiming sex discrimination.

Kolstad contended that Spangler's selection had been decided before the formal application process began. As proof, Kolstad pointed to the fact that the Association changed the position's job description so that it more closely resembled the job Spangler was holding. Kolstad also presented evidence that Wheat made sexually offensive jokes and derogatory statements about women professionals. She also asserted that Wheat delayed meeting to discuss her interest in the new position, and that the Executive Director never spoke to her about the position before making his decision.

The jury returned a verdict for Kol-

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stad. However, the jury did not consider punitive damages because the trial judge determined as a matter of law that the facts of the case would not justify such an award. Kolstad appealed from the district court's refusal to instruct the jury on punitive damages. A split panel of the District of Columbia Circuit Court of Appeals reversed the district court, and rejected the association's argument that a punitive damages award requires proof of the employer's egregious misconduct. The Court of Appeals, rehearing the case en banc, affirmed the district court, and held that under Title VII punitive damages may be assessed only upon a showing of "extraordinary egregiousness."

Supreme Court Decision

The Supreme Court took certiorari to consider under what circumstances punitive damages may be awarded in a Title VII action. The Court addressed two separate, although interrelated, issues: one, does Title VII require egregious misconduct for an award of punitive damages? and two, under what circumstances can other employees' discriminatory actions be imputed to the employer for purposes of assessing punitive damages? Justice Sandra Day O'Connor wrote the opinion for the Court, which, by 7 to 2, rejected the egregious misconduct standard. By a closer 5-to-4 margin, the Court held that an employer is not liable in punitive damages for its managers' discriminatory decisions where the employer has made "good faith efforts" to comply with Title VII.

In analyzing whether egregious misconduct was required to support an award of punitive damages, the Court considered the language of 42 USC Section 1981a, the statute authorizing punitive damages in Title VII and ADA actions.[2] The statute provides that a plaintiff may recover punitive damages when the employer engaged in discriminatory practices "with malice or with reckless indifference to the federally protected rights of the aggrieved individual." The Court observed that the terms "malice" and "reckless indifference" relate to the actor's state of mind whereas "egregiousness" describes conduct. The Court held that while a showing of egregious misconduct might be used to infer that the employer acted with an evil motive, it was not an independent requirement for punitive damages. Instead, an employer must at least discriminate in the face of a perceived risk that its action will violate federal law to

Court noted that the common law interprets the term "scope of employment" broadly. Under common law, a manager's discriminatory actions would be deemed as within the scope of employment so long as the challenged conduct is the kind the manager is employed to perform and is motivated, at least in part, by a purpose to serve the employer. The Court reasoned that if Restatement (Second) of Agency §217 C(c) were applied to Title VII without modification, employers could be subjected to punitive damages on the basis of their managers' discriminatory conduct, despite having made concerted efforts to comply with the dictates of Title VII.

To avoid this "perverse" result, the Court re-wrote §217 C(c) as it applies to employment discrimination cases. The Court held that "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good-faith efforts to comply with Title VII.'"

'Faragher' Case

By establishing a "good faith" limitation, the Court encouraged employers to prevent and correct discriminatory practices internally — in return for which the employer would be relieved of punitive damages liability. In this way, *Kolstad* follows the trend set by the Court's recent sexual harassment cases, *Faragher v. City of Boca Raton* and *Burlington Industries Inc. v. Ellerth*.[4] *Faragher* and *Ellerth* established the affirmative defense to sexual harassment claims that the employer took reasonable steps to deter and detect sexual harassment but that the employee unreasonably failed to take advantage of the corrective opportunities. By giving employers incentives to establish meaningful antidiscrimination programs, the Court, in *Kolstad, Faragher* and *Ellerth*, sought to advance the "prophylactic" purpose of Title VII, and, perhaps, to reduce the federal judiciary's burgeoning employment discrimination docket.

If one of the goals of the *Kolstad* majority was to curtail employment discrimination litigation, the decision is likely to fail, at least in the short term. In fact, by carving out a new exception to punitive damages liability under Title VII, *Kolstad* opens up a host of legal questions that only further litigation will answer. Among the questions needing resolution is:

[illegible] efforts" to comply with Title VII. The Court only hinted at what kind of efforts an employer need make in order to

over the employee.[5] In *Kolstad*, the Court did not differentiate a "manager" from a "supervisor," but presumably the definitions overlap. With *Kolstad* this year and *Faragher* and *Ellerth* last year, the Court now has created two variations of vicarious liability under Title VII. In the context of punitive damages, the employer is charged with a manager's actions, while in the context of sexual harassment liability, the employer is charged with a supervisor's actions. In the interests of simplicity and predictability, the courts should set a single standard.

Vicarious Liability

Finally, does the Court's vicarious liability analysis even apply where the employer participated in or approved the manager's discriminatory decision? In cases where a supervisor makes a discriminatory decision without the participation of upper level management and contrary to the company's anti-discrimination policy, the Court's new "good faith" defense is plausible. For example, where, unbeknownst to management, and in direct violation of the employer's antidiscrimination policies, a supervisor fires a woman because she refuses to have sex with him.

However, lines of authority in employment matters are rarely so clear. For instance, a supervisor may need the approval of the human resources department and/or management before being able to fire someone. In *Ellerth*, the Court recognized this reality of corporate life. The Court stated that when an employer takes a "tangible employment action" — that is, a decision which significantly changes an individual's employment status — the company, and not any one manager, is responsible.

> Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors.[6]

Following the logic of *Ellerth*, in cases involving a tangible employment action there is no reason to consider vicarious liability since, by definition, the company, not a lone manager, took the challenged action. Likewise, it follows that [illegible] challenged tangible employment actions the good faith [illegible] *Kolstad* envisions a situation where the

be liable in punitive damages."

The majority opinion did not discuss the kind of evidence needed to show "malice" or "recklessness." In contrast, Justice Stevens, concurring in this part of the Court's opinion, suggested that evidence of pretext on the part of an employer would suffice. Justice Stevens offered the following examples of employer conduct evincing malice or reckless indifference: "An employer, may ... express hostility toward employment discrimination laws or *conceal evidence regarding its 'true' selection procedures because it knows they violate federal law*" (emphasis added). In reviewing the record below, Justice Stevens concluded that there were ample grounds to conclude that the Dental Association had willfully violated Title VII. The Association failed to meaningfully consider Kolstad's application because of her gender; the selection process was a sham; and, at trial, the employer relied on false, pretextual reasons for its refusal to promote.

Second Part of Opinion

In the second part of its opinion, the Court addressed the issue of whether an employee's willful violation of Title VII can be imputed to the employer for purposes of establishing punitive damages liability. As pointed out by Justice Stevens, that the Court even considered this issue was extraordinary. The certiorai petition did not refer to the question of vicarious liability and the parties neither briefed nor argued it. Moreover, *Kolstad* was not a particularly apt case to address this issue. The alleged wrongdoers were so high in the Association's hierarchy that they would be considered the Association's proxies, obviating the need to impute their misconduct onto the employer.[3]

With 42 USC §1981a silent on the issue of vicarious liability, the Court looked to common law agency principles for guidance. The relevant common law is codified at Restatement (Second) of Agency §217 C. Section 217 C sets forth four different circumstances where punitive damages can be assessed vicariously:

> Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if:
>
> (a) the principal authorized the doing and the manner of the act, or
>
> (b) the agent was unfit and the principal was reckless in employing him, or
>
> (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
>
> (d) the principal or a managerial agent of the principal ratified or approved the act.

Of the four grounds for liability, the Court considered only subsection (c), the "scope of employment" rule. The defeat punitive damages. In referring to Title VII's deterrant purpose, the Court wrote,

> The purposes underlying Title VII are similarly advanced where employers are encouraged to *adopt antidiscrimination policies and to educate their personnel on Title VII's prohibitions*. (emphasis added).

Further, in suggesting issues to be decided upon remand, the Court stated,

> It may also be necessary to determine whether the Association had been making *good faith efforts to enforce an antidiscrimination policy*. (emphasis added).

These admittedly sparse comments suggest that good faith compliance efforts would need to include at least three elements: one, an antidiscrimination policy; two, meaningful enforcement of such policy; and three, equal employment opportunity training of staff.

In addition, the requirement that compliance efforts be taken in "good faith" signals that the employer must undertake such measures honestly and conscientiously.[5] An employer's sham or nominal measures at Title VII compliance would not shield it from vicarious liability. It also follows that good faith efforts will vary depending upon the size and resources of the employer. Good faith efforts for an employer with fifteen employees, the minimum number for a covered entity under Title VII, might consist of establishing a clearly stated antidiscrimination policy and grievance procedure, whereas for a Fortune 500 company more substantial measures would be required.

Two, what level of authority must an employee have to be considered a "manager" whose malicious or reckless conduct is imputed to the employer for purposes of awarding punitive damages? *Kolstad* is not clear on this point. The Court adopted the terms "managerial agents" and "agents acting in a managerial capacity" from the Restatement (Second) of Agency §217 C. The Restatement does not give a precise definition of "managerial capacity" so the Court had to settle for the following: "an employee must be 'important,' but perhaps need not be the employer's 'top management, officers, or directors,' to be acting 'in a managerial capacity'" (citations omitted). The Court added that a determination as to whether an employee is a manager requires a fact-intensive inquiry, including a review of the type of authority given the employee and the amount of discretion the employee exercises.

In *Faragher* and *Ellerth*, the Court held that employers are presumptively liable for all acts of sexual harassment committed by a "supervisor." A supervisor is defined as a person with immediate or successively higher authority manager is the bad actor, and the employer is innocent and law-abiding. However, with a tangible employment action, the employer loses its innocence. In those cases the employer has, in effect, ratified the manager's action so that the employment decision becomes "an official act of the enterprise."[8] The good faith defense, if applied to cases involving a tangible employment action, would make employers unaccountable — at least in terms of punitive damages — for their own discriminatory acts, a result which certainly contravenes Title VII's preventative and remedial purposes.

In sum, *Kolstad* complicates, not simplifies, employment discrimination litigation. The Supreme Court likely will have to take up again the issue of punitive damages under Title VII to clarify the numerous questions it left unanswered.

(1) *Kolstad v. American Dental Ass'n*, No. 98-208, 1999 U.S. LEXIS 4372 (June 22, 1999).

(2) Prior to 1991, compensatory and punitive damages were not available under Title VII. That changed in 1991 with the passage of the Civil Rights Act of 1991, which established 42 USC §1981a. Pursuant to the 1991 Act, Title VII and the ADA authorize compensatory and punitive damages, subject to caps, in cases of intentional discrimination.

(3) See *Torres v. Pisano*, 116 F3d 625, 636-37 (2d Cir.), cert. denied, 118 S.Ct. 563 (1997).

(4) *Faragher v. City of Boca Raton*, 524 US 775 (1998); *Burlington Industries, Inc v. Ellerth*, 524 US 742 (1988).

(5) *Black's Law Dictionary* (West 1979) defines "good faith" as describing "that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation."

(6) *Ellerth*, 141 LEd2d at 655.

(7) Id. at 654.

(8) Id. In cases involving a tangible employment action, if a court were to analyze a claim for punitive damages under Restatement (Second) of Agency §217 C, arguably, it would apply subsection (d), rather than subsection (c) (the scope of employment rule). Section 217 C(d) provides that punitive damages are recoverable where the principal has approved or ratified the agent's act.

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