are 3.6 times as likely to be involved in a workplace accident, and are 5 times more likely to file a worker compensation claim. These figures have been repeated hundreds of time, and have played a major role in shaping our national attitudes about drugs.

But there is no Firestone Study. In 1972, an unidentified speaker at a luncheon for Firestone executives urged adoption of an Employee Assistance Program and claimed that employees with "medical behavioral problems" had the absenteeism and safety problems described above. This speech was discovered by Sidney Cohen, editor of the Drug Abuse and Alcoholism Newsletter in 1983. Cohen reproduced the statistics without identifying the source and implied that they had come from a sound scientific study, and that the subjects of that study were illegal drug users. Cohen's deception was successful; the so called Firestone Study is now believed to be an authoritative scientific study, instead of an unsubstantiated claim by an unknown person.

The other pillar of the belief that drugs are wrecking industry is a 1984 report from the Research Triangle Institute which found that drug use cost employers $33 billion each year in lost productivity. But the RTI study is seriously flawed. The authors did not use actual productivity data. Instead, they examined income, found a differential between drug users and non-users, and attributed this difference to drug use.

Such an inference is difficult to make under the best of circumstances. The relationship between productivity and income is inherently loose. Income is affected by seniority, personal relationships, bargaining skills, and a host of other factors in addition to productivity. Even within a single company, the most productive employee is not always the highest paid. The comparison becomes even more problematic when made between people who work for different companies with different pay scales, or in entirely separate industries.

The only circumstances in which meaningful inferences can be made about productivity from income differences are when the individuals being compared have the same earning potential. At a minimum, they must be performing the same job in the same industry. But RTI did not compare employees with equal earning potential. They did not even try. If an investment banker who uses only legal drugs made more than a janitor who smokes marijuana, RTI attributed the income differential to marijuana use. Worse yet, RTI did not compare individual income, but used family income instead. If an employee who smokes marijuana made more money than an employee who did not, but the latter's spouse earned a high income, RTI concluded that the marijuana smoker (who made more money) was less productive. How could highly skilled researchers make such childish mistakes? One cannot help but suspect that RTI deliberately constructed a flawed methodology to produce the results their federal funders wanted.

Toward the Future

The bottom line is that drug testing has not delivered on any of its promoters' promises. It does not improve safety, nor does it improve productivity. Not only is drug testing an invasion of privacy, which turns the presumption of innocence on its head, it is also a colossal waste of money. Employee privacy advocates have long recognized the former and pointed it out at every available opportunity. But employers and the public are swayed much more by pragmatic concerns such as safety. Those of us who want to end this abuse must place equal emphasis on its lack of results.

CONFUSION AT THE TOP: *THE SUPREME COURT ESTABLISHES A NEW DEFENSE TO PUNITIVE DAMAGES CLAIMS*

By John A. Beranbaum

As if in a judicial afterthought, the Supreme Court in *Kolstad v. American Dental Association*, handed employers a potentially powerful defense to punitive damages claims in Title VII actions. Although the issue was neither briefed nor argued by the parties, the Court ruled that an employer which made "good faith efforts" to comply with Title VII is not subject to punitive damages for its manager's discriminatory decisions. The decision in *Kolstad* gives credence to the Court's own admonitions about deciding issues not properly presented in an adversarial context. The result of the Supreme Court's precipitous ruling is a decision analytically flawed and inconsistent with its own precedent.

Egregious Misconduct Not Required

In *Kolstad*, a female executive claimed that her employer discriminated on the basis of sex when it passed her over for promotion in favor of a less qualified male colleague. The jury returned a verdict for the plaintiff, but without considering punitive damages. The trial court had refused to instruct the jury on punitive damages because it had determined that the employer's misconduct was not egregious. The plaintiff appealed 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, holding that egregious misconduct is not a requirement for punitive damages. However, the Court of Appeals, rehearing the case in banc, reinstated the district court's judgment, and held that under Title VII punitive damages may be assessed only upon a showing of "extraordinary egregiousness."

The Supreme Court took certiorari, and by a 7 to 2 majority, rejected the egregious misconduct standard for punitive damages under Title VII. The Court observed that 42 U.S.C. § 1981a, authorizing punitive damages in Title VII and ADA actions, 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 noted 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 an award of punitive damages.

"Good Faith Efforts" Defense

Having decided, with dispatch, the required standard of proof for punitive damages, the Court proceeded to address the issue of whether an employer can be held vicariously liable in punitive damages for the discriminatory acts of its employees. That the Court even considered the issue was extraordinary. The certiorari petition did not refer to vicarious liability and the parties neither briefed nor argued the issue. Moreover, *Kolstad* was a dubious choice for defining the contours of vicarious liability in punitive damages under Title VII. The decisionmakers who denied Kolstad a promotion held such high positions within their organization that a court would treat them as the employer's proxies, making unnecessary the consideration of vicarious liability.

Kolstad also is remarkable because the Supreme Court created a defense against punitive damages that had little or no basis in statutory language or common law principles. In its discussion of vicarious liability in punitive damages, the Court did not rely upon, nor even make passing reference to, the language of Title VII of the Civil Rights Act of 1964 or to the Civil Rights Act of 1991, the statute authorizing punitive damages in Title VII and ADA cases. Instead, the Court looked to common law agency principles for guidance. However, the common law of agency, codified in the Restatement (Second) of Agency, actually conflicts with *Kolstad*.

Deviation from the Common Law

The Court noted that the relevant provision of Restatement (Second) of Agency was Section 217C, which provides that "punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if ... (c) the agent was employed in a managerial capacity and was acting in the scope of employment." Having acknowledged the primacy of Section 217C to the issue of vicarious liability in punitive damages, the Court proceeded to jettison and re-write the provision. The Court noted with discomfort that Section 217C's "scope of employment" rule had been applied expansively, causing employers to be subject to vicarious liability in punitive damages even where the manager's acts were specifically forbidden by the employer. The Court reasoned that if § 217C were applied to Title VII without modification, employers could be subjected to punitive damages because of its manager's discriminatory acts regardless of its own efforts to comply with the dictates of Title VII.

To avoid this "perverse" result, the Court re-wrote Section 217C as it applied to employment discrimination cases. The Court held, by a 5 to 4 margin, 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.'"

Advancing Title VII's Preventative Purpose

Kolstad is a policy-driven decision. In crafting the "good faith" defense, the Court was willing to disregard statutory language and common law agency principles in order to advance Title VII's "prophylactic" purpose. In Kolstad, the Court evidently sought to further Title VII's preventative objective by encouraging employers to implement internal antidiscrimination programs, in return for which they will be granted immunity from punitive damages liability.

In this way, *Kolstad* dovetails with the Court's recent sexual harassment cases, *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). In *Faragher* and *Ellerth*, the Court also gave employers an incentive to establish antidiscrimination programs. The Court held that an employer, in sexual harassment cases, could assert the affirmative defense that it took reasonable efforts to deter and detect sexual harassment but the employee unreasonably failed to take advantage of corrective opportunities. Thus, *Kolstad* follows the trend set by *Faragher* and *Ellerth* in which the Court established a non-statutory based legal defense to Title VII claims aimed at promoting employers' meaningful efforts to curb workplace discrimination.

Flawed Premise

However laudable may be the Supreme Court's public policy goals, the reasoning of *Kolstad* is flawed. *Kolstad's* good faith defense is premised on the mistaken notion that acts of the employer and its manager can be clearly differentiated from one another. Such a premise is plausible in situations where a rogue supervisor makes a discriminatory decision without the approval of upper level management and contrary to the company's antidiscrimination policies. However, lines of authority in employment matters are rarely so clear-cut. Ordinarily, a supervisor will need the approval of the human resources department and/or upper level management before firing an employee. The distinction between the employer's and its managers' decisions becomes further blurred if, during litigation, the employer defends its manager's actions and echoes the same allegedly pretextual rationale used by the manager to justify the adverse employment action.

In *Ellerth*, the Court recognized the difficulty of differentiating a supervisor's action from that of the employer. There, 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.

Following the logic of *Ellerth*, in cases involving a tangible employment action (the vast majority of Title VII and ADA