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COMPLYING WITH THE MANDATE OF *KOLSTAD*: ARE YOUR GOOD FAITH EFFORTS ENOUGH?

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I. INTRODUCTION

During its 1998-1999 term, the United States Supreme Court issued a number of important decisions in the area of employment law. Two of the decisions, *Faragher v. Boca Raton*¹ and *Burlington Industries, Inc. v. Ellerth*,² addressed an employer's liability for sexual harassment committed by managers or other supervisory personnel. A third decision, *Kolstad v. American Dental Association*,³ addressed when a jury may award punitive damages against an employer for the discriminatory conduct of its managers or other supervisory personnel. The primary significance to employers of all three decisions lies in the defenses they recognize for employers who may be *doing the right thing* but face vicarious liability for the actions of their management-level employees.⁴ *Ellerth* and *Faragher* recognize that an employer can avoid vicarious liability for workplace harassment committed by a member of management, if it produces sufficient evidence that its words and deeds reflect a policy and practice of preventing and promptly correcting the harassment.⁵ The employer must also demonstrate that the target of the alleged harassment essentially failed to take advantage of the opportunities the company provided for addressing workplace harassment or otherwise failed to avoid the harm.⁶ *Kolstad* recognized that

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1. 524 U.S. 775 (1998).

2. 524 U.S. 742 (1998).

3. 527 U.S. 526 (1999).

4. As noted by the Court in *Kolstad*, an employer's vicarious liability for punitive damages related to the acts of its employees is determined by whether the employee was serving in a managerial capacity when he/she "committed the wrong." 527 U.S. at 543.

5. *Faragher*, 524 U.S. at 807-08.

6. *See id.*

although an employer may face vicarious liability for intentional discrimination or workplace harassment committed by a manager, the company's good faith efforts to comply with anti-discrimination laws might preclude liability for punitive damages.⁷ All three decisions were supported by the sensible rationale that it is unreasonable to simply allow agency principles to always punish the *innocent* employer (one who makes every effort to comply with the laws prohibiting discrimination or harassment) for the unlawful actions of its managers.⁸ Moreover, to do otherwise would discourage employers from proactive compliance with Title VII and other anti-discrimination laws.⁹

Although the Supreme Court's opinion in *Kolstad* placed limits on the circumstances in which employers will be vicariously liable for punitive damages caused by unlawful actions of its managers, it did not prescribe concrete guidelines for what constitutes good faith efforts to comply with the law.¹⁰ The circuit and district courts, however, have attempted to define the circumstances in which the truly *innocent* employer, through its good faith efforts, can avoid liability for punitive damages. This article first examines the cases decided before *Kolstad* that applied similar factors to determine if an employer's efforts to comply with the law would bar an award of punitive damages. It next discusses the *Kolstad* decision and the parameters established for imposing or avoiding liability for punitive damages. The article subsequently describes some of the recent decisions examining *Kolstad's* good faith efforts defense, starting with decisions rendered by the Tenth Circuit and including noteworthy cases from other circuit and district courts. Finally, the article analyzes what employers must do, and avoid doing, to ensure that they may take advantage of the *Kolstad* defense when facing litigation.

II. CASES FORESHADOWING *KOLSTAD'S* "GOOD FAITH EFFORTS"

Kolstad did not articulate an entirely novel legal concept in announcing that an employer may shield itself from vicarious liability for punitive damages by showing that it has engaged in good faith efforts to comply with federal anti-discrimination laws. Before the Supreme Court's decision in *Kolstad*, several circuit courts relied on similar analyses to determine an employer's punitive damages liability in civil rights actions.¹¹ Following is a brief discussion of these prescient cases.

7. *Kolstad*, 527 U.S. at 545-46.

8. The Court in *Kolstad* relied upon the Restatement (Second) of Torts which recognizes that it is "improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously." *Id.* at 544.

9. The Court in *Kolstad* also concluded that relying upon the Restatement of Agency Scope of Employment Rule to impose punitive damages under Title VII "would reduce the incentive for employers to implement anti-discrimination programs." *Id.* at 544.

10. The Tenth Circuit aptly noted, in the context of a claim of discrimination asserted under the Americans With Disabilities Act, that "*Kolstad* provides that no definitive standard for determining what constitutes good faith compliance with the anti-discrimination requirements of the ADA." *See* Equal Employment Opportunity Comm'n v. Wal-Mart Stores, Inc., 187 F.3d 1241, 1248 (10th Cir. 1999).

11. *See infra* notes 13-29 and accompanying text.

A Tenth Circuit decision, *Baty v. Willamette Indus.*,¹² handed down two months before *Kolstad*, utilized several of the same criteria courts have used since *Kolstad* to determine whether an employer can escape liability for punitive damages through prophylactic and remedial measures it takes to prevent, detect, and respond to unlawful discrimination in the work place.

Patricia Baty ("Baty") sued Willamette Industries ("Willamette") for hostile environment sexual harassment and retaliation.¹³ Baty alleged that she had been subject to almost constant sexual harassment from her male co-workers since she began her employment in 1993.¹⁴ The harassment included sexually explicit remarks, gestures, and graffiti targeted specifically at her.¹⁵ Baty also claimed that she was terminated in retaliation for complaining to management about the harassment.¹⁶ At trial, the jury found for Baty on her hostile environment and retaliation claims and awarded her economic, compensatory, and punitive damages.¹⁷

On appeal, Willamette argued that the evidence was insufficient to support the punitive damages award.¹⁸ Referencing the statutory standard that punitive damages are awarded in cases where an employer has acted with malice or reckless indifference to an employee's federally protected rights,¹⁹ the court acknowledged that it had not yet had an occasion to determine the evidentiary burden this standard imposed.²⁰ For purposes of the case before it, the court stated it would assume that Baty needed to show something more than intentional discrimination, and found that she had carried this burden.²¹ The court cited three factors leading it to conclude that a reasonable jury could find Willamette acted with malice or reckless indifference: first, that management did not adequately respond to plaintiff's complaints despite knowledge of serious problems with harassment in the workplace; second, that Willamette conducted a sham investigation in the face of such complaints; and third, that management actually condoned the harassment.²² Thus, the court essentially held that the plaintiff was entitled to punitive damages upon a showing that the employer failed to make good faith efforts to investigate and respond to her complaints, and that high-level management was aware of and implicitly condoned the offending conduct.²³

The Fifth Circuit reversed an award of punitive damages based upon similar

12. 172 F.3d 1232, 1245 (10th Cir. 1999).

13. *Id.* at 1236.

14. *Id.* at 1236-38.

15. *Id.*

16. *Id.* at 1239-40.

17. *Id.* at 1240.

18. *Baty*, 172 F.3d at 1240.

19. See the Civil Rights Act of 1991, 42 U.S.C. §1981a(10)(1).

20. *Baty*, 172 F.3d at 1244.

21. *Id.*

22. *Id.* at 1244-45.

23. See also *Cadena v. Pacesetter*, 224 F.3d 1203, 1212 (10th Cir. 2000) (analyzing pre-*Kolstad* cases for examples of actions indicating employer engaged in good faith efforts, or failed to do so).

reasoning. In *Patterson v. P.H.P. Healthcare*,²⁴ the court found that (1) all of the discriminatory acts in question were solely acts of a low-level supervisor, not of a corporate officer; (2) the employer provided a handbook that expressly established a policy of nondiscrimination and explained how employees could complain about discriminatory practices to the company and distributed memos throughout the workplace setting out the procedures for making complaints to headquarters; (3) there was no evidence that the employer took any action inconsistent with its nondiscrimination policy; and (4) the plaintiffs did not utilize the complaint procedures in an attempt to notify the employer about the discriminatory conduct of the supervisor, nor was there evidence that the employer otherwise had notice of the discriminatory conduct.²⁵ Such evidence demonstrated that the employer did not act with malice or reckless disregard for the law and, therefore, its good faith efforts did not warrant an award of punitive damages.²⁶ Hence, in this case, the court found that plaintiffs were not entitled to punitive damages because the evidence showed that the employer had a non-discrimination policy (including complaint procedures), the employer adequately publicized the policy, the plaintiff failed to follow the policy, and there was no evidence that the employer engaged in conduct inconsistent with the policy. These facts demonstrated the employer's good faith efforts.

In *Kimzey v. Wal-Mart*,²⁷ the Eighth Circuit upheld an award of punitive damages based on evidence that both the plaintiff's supervisor and the store manager took part in the sexual harassment, that the plaintiff's complaints to the harassers and two other Wal-Mart managers went uninvestigated, and that other female employees voiced similar complaints to which management failed to respond – all in violation of Wal-Mart's anti-harassment policy.²⁸ Once again, an employer's adherence, or failure to adhere, to its own nondiscrimination policies is determinative in a court's decision concerning the sufficiency of evidence supporting an award of punitive damages.²⁹

Because the above-described decisions predate *Kolstad*, they tend to discuss the appropriateness of imposing punitive liability in terms of the sufficiency of the evidence demonstrating an employer's malice or reckless indifference to the federally protected rights of its employees, rather than in terms of an employer's good faith efforts to comply with federal nondiscrimination laws. The key factors

24. 90 F.3d 927 (5th Cir. 1996).

25. *Id.* at 944.

26. The Eleventh Circuit similarly held that an employer was not liable for punitive damages under the malice or reckless indifference standard where there was no evidence that senior company officials were involved in or ratified the discriminatory conduct and there was evidence that the employer publicized its anti-harassment policy, took plaintiff's complaints seriously, reprimanded the offending supervisor, and offered to reinstate the plaintiff. *See Reynolds v. CSX Transportation*, 115 F.3d 860, 869 (11th Cir. 1997).

27. 107 F.3d 568 (8th Cir. 1997).

28. *Id.* at 575-76.

29. *See also Harris v. L&L Wings*, 132 F.3d 978, 984 (4th Cir. 1997) (discussing employer's failure to investigate plaintiff's complaints combined with the company president's testimony disavowing responsibility for preventing harassment in the workplace sufficient to find reckless disregard for employee's rights).

have remained remarkably consistent among cases decided before and after *Kolstad*. These factors demonstrate that employers must provide evidence of the following to raise a sufficient defense to vicarious liability for punitive damages:

- An employer must have a comprehensive nondiscrimination and anti-harassment policy, including procedures for lodging complaints;
- The policy must be well publicized and readily available to employees and management;
- The employer should conduct training regarding the policy, available to all staff and mandatory for managers;
- The employer must thoroughly investigate complaints lodged pursuant to the policy;
- The employer must take remedial measures where there is evidence that the complained of conduct may have occurred;
- Senior management officials must be made aware that any knowledge they have regarding possible discriminatory or harassing conduct must be acted upon swiftly and in good faith.³⁰

III. THE KOLSTAD DECISION

Before 1991, successful plaintiffs in Title VII cases were only entitled to equitable remedies.³¹ Since Congress passed the Civil Rights Act of 1991, employers have faced additional “monetary” liability in the form of compensatory and punitive damages³² for “intentional” violations of Title VII or the American’s with Disabilities Act (ADA).³³ In *Kolstad v. American Dental Association*,³⁴ the United States Supreme Court articulated the circumstances under which punitive damages can be awarded for violations of Title VII or the ADA.

Carole Kolstad was one of two employees competing for a promotion in the

30. Because senior management officials may be viewed as the employer’s proxy or alter ego, their discriminating conduct may preclude a good faith efforts defense and provide a basis for imposing direct liability on their discriminatory conduct for punitive damages. See *infra* notes 54-59 and accompanying text.

31. Equitable remedies include economic relief such as back pay, front pay, reinstatement, interest and injunctive relief.

32. Compensatory damages are awarded for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses. Punitive damages are awarded to punish the employer for committing acts of willful discrimination and to deter the employer and others from engaging in such misconduct in the future. The 1991 Civil Rights Act caps the amount of compensatory and punitive damages for which an employer may be liable, depending upon the employer’s size. The cap ranges from \$50,000 for employers employing between 14 and 101 employees to \$300,000 for an employer with more than 500 employees. 42 U.S.C. § 1981a(b)(3).

33. See 42 U.S.C. § 1981a(a)(1). Compensatory and punitive damages (known collectively as “monetary” damages) are available in “disparate treatment” cases which require a showing of intentional discrimination. Monetary damages are not available in “disparate impact” cases – cases that do not require a showing of “intent” to discriminate on the part of the employer. *Id.* at § 1981a(a)(1). To prevail in a disparate impact case, plaintiffs must show that the employer’s policies or practices disadvantaged a protected class of employees. Likewise, monetary damages are not available in “mixed motive” cases in which the employer demonstrates that it would have taken the same employment action absent the impermissible motivating factor. 42 U.S.C. § 2000e-5(g)(2)(B), see also *Sheppard v. Riverview Nursing Center*, 88 F.3d 1332, 1334 (4th Cir. 1996).

34. 527 U.S. 526 (1999).

Washington, D.C. office of the American Dental Association (Association).³⁵ When the other employee, Tom Spangler, was selected over her, Kolstad sued the Association in federal district court, alleging that she was passed over because of her gender in violation of Title VII.³⁶ The jury ruled in her favor, awarding her \$52,718 in back pay.³⁷ The district court, however, refused to allow the jury to consider an award of punitive damages because it didn't believe that Kolstad had proved that she was not promoted because of her sex.³⁸ Kolstad appealed to the District of Columbia Circuit Court of Appeals, claiming the district court should have allowed the jury to consider her claim for punitive damages.³⁹ A split panel of the D.C. Circuit agreed with Kolstad and reversed the district court.⁴⁰ Following a rehearing *en banc*, a divided Court of Appeals affirmed the district court's decision *not* to allow the jury to determine punitive damages.⁴¹

The Supreme Court decided to hear the case to resolve the conflict among the circuit courts concerning the circumstances under which punitive damages may be awarded in Title VII cases.⁴² In a 7-2 decision, the Court found that in the 1991 Act "Congress plainly sought to impose two standards of liability – one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive award."⁴³ The higher standard, as articulated by Congress, is a showing that the employer acted with "malice or

35. *Id.* at 530.

36. *Id.* at 531.

37. *Id.* at 532.

38. The district court observed that the only substantial evidence adduced by the plaintiff favorable to her case was evidence that the male employee who received the promotion was "pre-selected", *i.e.*, he was destined to get the job no matter who else applied, but that such pre-selection did not establish that the plaintiff's gender was the motivating factor in pre-selecting the male candidate. *Kolstad v. American Dental Ass'n*, 912 F. Supp. 13, 14 (D.D.C. 1996). The appellate court, sitting *en banc*, pointed out that while evidence of pre-selection may be relevant to the question of discriminatory intent, by itself pre-selection is neither illegal nor unusual. *Kolstad v. American Dental Ass'n*, 139 F.3d 958, 969 (D.C. Cir. 1998) (hereinafter "*Kolstad II*").

39. *Kolstad v. American Dental Ass'n*, 108 F.3d 1431 (D.C. Cir. 1997) (hereinafter "*Kolstad I*").

40. *Id.* at 1439.

41. *See Kolstad II*, 139 F.3d 958 (D.C. Cir. 1998). The *en banc* court agreed with the district court that the issue of punitive damages was properly withheld from the jury because there was insufficient evidence of "egregious misconduct" on the part of the employer. *Id.* at 965.

42. Before the Supreme Court decided *Kolstad*, lower courts applied various standards to determine an employer's liability for punitive damages. The majority of circuits required proof of something more than mere intentional discrimination. *See e.g.*, *Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627, 636 (7th Cir. 1996) (stating that punitive damages standard is a "higher hurdle" than that for underlying discrimination); *Karcher v. Emerson Elec.*, 94 F.3d 502, 509 (8th Cir. 1996) (same); *Turic v. Holland Hospitality*, 85 F.3d 1211, 1216 (6th Cir. 1996) (same); *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 508 (1st Cir. 1996) (same). Several circuits required evidence of egregious or outrageous conduct before holding employers liable in punitive damages for the conduct of their employees. *See, e.g.*, *Harris v. L&L Wings*, 132 F.3d 978, 982 (4th Cir. 1997) ("Punitive damages are an 'extraordinary remedy,' to be reserved for egregious cases"); *Ngo v. Reno Hilton Resort Corp.*, 140 F.3d 1299, 1304 (9th Cir. 1998) (eligibility for punitive damages requires evidence of conduct more egregious than intentional discrimination). However, the Second Circuit Court of Appeals determined that nothing more than proof of intentional discrimination was required to submit the issue of punitive liability to the jury. *Luciano v. Olsten Corp.*, 110 F.3d 210, 219-20 (2d Cir. 1997) (no additional evidence needed for punitive damages).

43. *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 534 (1999).

reckless indifference” to the employee’s federally protected rights.⁴⁴ In *Kolstad*, the Court attempted to give life to this standard by exploring both the legislative intent and historical meaning to the terms “malice” and “reckless indifference.”

A. *Egregiousness Not Required*

The Supreme Court rejected the “egregiousness” standard previously adopted by several Circuits to determine the propriety of punitive damages.⁴⁵ The Court explained that while egregious or outrageous acts may serve as proof of malice, the presence or absence of egregious conduct is not determinative of whether punitive damages should be awarded in a given case.⁴⁶ In the Court’s view, Congress specifically chose to use the terms “malice” and “reckless indifference” as those terms were used and applied in a 1983 Supreme Court case, *Smith v. Wade*.⁴⁷ In *Wade*, the Court held that a jury could assess punitive damages *without* a showing of actual malice or evil intent in a § 1983 civil rights action.⁴⁸ *Kolstad*, therefore, effectively placed the bar for imposing punitive damages on employers in civil rights actions at a threshold showing of reckless indifference.

B. *The Reckless Indifference Threshold*

Relying on case law and historical sources in analyzing the term reckless indifference, the Court concluded a plaintiff must demonstrate that the employer discriminated “in the face of a perceived risk that its actions [would] violate federal law to be liable in punitive damages.”⁴⁹ The Court underscored that both malice and reckless indifference pertain to the *employer’s knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination*.⁵⁰ This distinction is important because today it is difficult for *any* employer to claim either: a) that it is unaware of federal anti-discrimination laws, or b) that such ignorance is not evidence itself of an employer’s reckless indifference to an employee’s federally protected rights.

C. *Exceptions to the “Perceived Risk” Standard*

The Court indirectly acknowledged that its newly articulated standard for imposing punitive damages is met upon a showing of intentional discrimination. It did so by identifying the limited circumstances in which intentional discrimination *does not* give rise to punitive damages liability under the perceived risk standard.⁵¹

44. *Id.* (citing to 42 U.S.C. § 1981a(b)(1)).

45. *Id.* at 534-35.

46. *See* *Iacobucci v. Boulter*, 193 F.3d 14, 26 (1st Cir. 1999) (interpreting *Kolstad*’s holding with regard to egregious conduct).

47. *Kolstad*, 527 U.S. at 535 (discussing *Smith v. Wade*, 461 U.S. 30 (1983)).

48. *Id.*

49. *Id.* at 536. Thus, a plaintiff must meet the “perceived risk” standard to show reckless indifference on the part of the employer.

50. *Id.* at 535 (emphasis added).

51. *Id.* at 536-37.

The Court set out four scenarios in which an employer would not meet the standard of “discrimination in the face of a perceived risk” of violating federal rights: (a) where the employer is unaware of the relevant federal prohibition (*i.e.*, ignorance);⁵² (b) where the employer discriminates with the distinct belief that its discrimination is lawful (*i.e.*, mistake of law); (c) where the employer may reasonably believe that its discrimination satisfies a bona fide occupational qualification (“BFOQ”) defense or some other statutory exception to liability; or (d) where the plaintiff’s theory of discrimination is novel or otherwise poorly recognized.⁵³ Perhaps because the Supreme Court recognized that these defenses to the perceived risk standard would shield an insignificant number of employers from punitive liability,⁵⁴ it went on to discuss other avenues by which employers may avoid liability for punitive damages.

D. Direct Versus Vicarious Liability for Punitive Damages

Integral to analyzing liability for punitive damages under the perceived risk standard is determining whether the *employer itself* discriminated in the face of a perceived risk that its actions might violate federal law.⁵⁵ Under such circumstances, employer liability for punitive damages appears to be direct.⁵⁶ *Kolstad* supports this conclusion, albeit indirectly, in its discussion of the issues to be considered on remand.⁵⁷ The Court specifies that if, on remand, it is

52. Though not yet tested, ignorance of well established civil rights laws is likely to be a difficult exception to meet without implying “reckless indifference” on the part of the employer to federal laws - by virtue of the fact that the employer must have affirmatively attempted to remain ignorant or intentionally failed to inquire about laws that clearly apply to it.

53. *Kolstad*, 527 U.S. at 536-37.

54. For an elaboration of the narrow scope of these exceptions, see the D.C. Circuit Court’s discussion in *Kolstad II*, 139 F.3d at 967-68.

55. See *Passantino v. Johnson & Johnson*, 212 F.3d 493, 516 (9th Cir. 2000) (suggesting that a determination of the status of the malfeasing employee(s) is crucial to the outcome of the *Kolstad* punitive liability analysis, because the good faith defense potentially is available where the conduct is undertaken by an agent and liability is vicarious, while it is not available for the acts of a principal or other sufficiently senior executive and liability is direct).

56. Judge Tatel, writing for the dissent in *Kolstad II*, notes that “if the person discriminating is the same as the employer—in a sole proprietorship, for example—there is no difference between the employer’s awareness of its legal obligations and the employee’s” [thus, the employer acted in the face of a perceived risk of violating federal law and is therefore directly liable in punitive damages]. Judge Tatel further illuminates direct versus vicarious liability by observing that “where a gap exists in the agency relationship between the agent and the entity being held liable, *i.e.*, where the employee making the hiring or firing decision does not constitute the employer’s entire decision-making apparatus, the punitive damages inquiry requires the jury to examine the employer’s awareness of the law”. *Kolstad II*, 139 F.3d at 974 (emphasis added). In other words, where the offending employee “constitutes the employer’s entire decision-making apparatus” the employee and employer are one in the same and the employer is susceptible to direct liability for punitive damages. *Id.*

Other courts have noted implicitly and explicitly that *Kolstad* did nothing to change the established rule that an individual, such as a principal, who is sufficiently senior in a corporation, must be treated as the corporation’s proxy for purposes of liability, and imputing the employee’s discriminatory conduct to the employer is unnecessary. See *Passantino v. Johnson & Johnson*, 212 F.3d 493, 516-17 (9th Cir. 2000); *Lowery v. Circuit City*, 206 F.3d 431, 442 (4th Cir. 2000) (“If it cannot be said that a principal of the employer actually engaged in the discriminatory conduct at issue, the plaintiff must offer evidence sufficient to impute liability for punitive damages from the individual who did so to the employer”).

57. *Kolstad*, 527 U.S. at 546.

determined that the executive director, the Association's highest-level official, made the discriminatory decision not to promote the plaintiff, then the sole question concerning the employer's liability for punitive damages is whether the executive director acted with malice or reckless indifference, *i.e.*, whether he discriminated in the face of a perceived risk that his actions violate federal law.⁵⁸ If, on the other hand, the determination on remand is that a lower level manager actually made the discriminatory promotion decision, the court must examine not only (1) whether the manager acted in the face of a perceived risk that he was violating federal law, but also (2) whether the manager was acting in a managerial capacity and in the scope of his employment, and (3) whether the good faith efforts defense has been met.⁵⁹ The Supreme Court did not raise these last two issues when discussing the inquiry to be made if the executive director was the actual decision maker because the agency and good faith efforts analyses are not necessary in cases where the employer has direct, rather than vicarious liability for punitive damages.⁶⁰

1. The Agency Analysis

The law of Agency governs whether the act of an employee may be imputed to the employer, resulting in vicarious liability to the employer.⁶¹ For this reason, the *Kolstad* Court took some pains to set out the type of agency relationships under which employee conduct may be imputed to the employer.⁶² If the existence of such an agency relationship cannot be established, the employer cannot be held liable for punitive damages.⁶³

Citing the Restatement (Second) of Agency, the Supreme Court addressed the proper legal standards for imputing vicarious liability for punitive damages.⁶⁴ An agent's misconduct can be imputed to the principal for purposes of awarding punitive damages if: (a) the principal authorized the doing and the manner of the act; (b) the agent was unfit and the principal was reckless in employing him; (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.⁶⁵ While it did not explore further the various agency principles it cited, the Court did shed some light on what constitutes an employee serving in a managerial capacity. "In making this determination, the court should review the type of authority that the employer has given to the employee, the amount of discretion that the employee has in what is done and how it is accomplished."⁶⁶

58. *Id.*

59. *Id.*

60. See *Passantino*, 212 F.3d at 516-17 (analyzing *Kolstad's* applicability to high-level management officials).

61. See *Kolstad*, 527 U.S. at 539-41.

62. *Id.* at 542-43.

63. *Id.* at 541-42.

64. *Id.* at 542-43.

65. *Id.*

66. *Id.* at 543 (citations omitted).

The Court summarized by stating that an employee acting in a managerial capacity “must be important, but perhaps need not be the employer’s top management, officers, or directors, to be acting in a managerial capacity.”⁶⁷

The Court also adopted the Restatement of Agency’s “scope of employment” requirement, which provides that even intentional torts are within the scope of an agent’s employment if: (1) the conduct is the kind the employee is employed to perform, (2) the conduct occurs substantially within the authorized time and space limits, and (3) the conduct is actuated, at least in part, by a purpose to serve the employer.⁶⁸ Citing the Restatement, the Court explained that as long as these criteria are met, an employee acts within the scope of his employment even if he engages in acts “specifically forbidden” by the employer and uses “forbidden means of accomplishing the results.”⁶⁹

Even where the employee who engaged in the intentional discrimination is found to be “acting in a managerial capacity within the scope of his employment,” *Kolstad* provides one last opportunity for an employer to avoid vicarious liability for punitive damages by allowing the employer to demonstrate that it made “good faith efforts to comply with Title VII.”⁷⁰

E. Kolstad’s Good faith efforts Defense

Recognizing that the punitive damages liability standard dictated by agency law gives employers *less* incentive to educate themselves and their employees about anti-discrimination laws,⁷¹ the *Kolstad* Court articulated a “good faith efforts” defense to the imposition of punitive damages.⁷² In a closely divided (5-4) decision, the Court ruled that even if a plaintiff satisfies the criteria described above – that is, demonstrates that a manager or supervisor engaged in unlawful discrimination with the knowledge that those actions might violate the law – the plaintiff cannot collect punitive damages from the employer (as an entity) if the manager’s actions “are contrary to the employer’s good faith efforts to comply with Title VII.”⁷³ The Court explained that such an approach was consistent with Title VII’s objective of motivating employers to detect and prevent Title VII

67. *Kolstad*, 527 U.S. at 543.

68. *Id.* at 543-44 (citations omitted).

69. *Id.* at 544.

70. *Id.* at 545. The Court made it clear that the so-called “good faith efforts” defense is available as a defense to *vicarious liability* on the part of the employer, and made no mention of its availability in cases of *direct liability*. *Id.* (“We agree 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’”) (citing to *Kolstad v. American Dental Ass’n*, 139 F.3d 958, 974 (D.C. Cir. 1998) (Tatel, J., dissenting) (emphasis added)). This supports the view some courts have taken that intentional discrimination on the part of senior company officials can result in direct liability to the employer for punitive damages. *Id.*

71. The Court noted that the agency principles it cited “reduce the incentive for employers to implement anti-discrimination programs. In fact, such a rule would likely exacerbate concerns among employers that section 1981a’s “malice” and “reckless indifference” standard penalizes those employers who educate themselves and their employees on Title VII’s prohibitions.” *Kolstad*, 527 U.S. at 544.

72. *Id.* at 544-45.

73. *Id.* at 545 (quoting *Kolstad II*, 139 F.3d at 974) (Tatel, J., dissenting).

violations.⁷⁴ The principles underlying common law limitations on vicarious liability – that it is improper to award punitive damages against one who himself is personally innocent – further informed the Court’s decision.⁷⁵

In explicating the meaning of “good faith efforts”, the Court indicated that an employer demonstrates that it “never acted in reckless disregard of federally protected rights” where it has undertaken good faith efforts at Title VII compliance.⁷⁶ The Court did not otherwise delineate the parameters of the good faith efforts defense.⁷⁷ The remainder of this article focuses on how the lower courts have interpreted this exception to an employer’s vicarious liability for punitive damages.

IV. TENTH CIRCUIT DECISIONS

A. *EEOC v. Wal-Mart*

The Tenth Circuit Court of Appeals was one of the first circuit courts to analyze what an employer must do to satisfy *Kolstad*’s good faith efforts defense.⁷⁸ In *Equal Employment Opportunity Comm’n v. Wal-Mart Stores, Inc.*,⁷⁹ the Court considered the defense in the context of a claim of discrimination asserted under the Americans with Disabilities Act (“ADA”).⁸⁰ Eduardo Amaro (“Amaro”), was employed by Wal-Mart Stores, Inc. (“Wal-Mart”) in its receiving department.⁸¹ Amaro was hearing impaired and, therefore, sometimes needed the assistance of an interpreter when attending meetings and training sessions.⁸² A few years after he was hired, he left a mandatory training session because the video tape used in the session was not “closed captioned” and an interpreter was not present.⁸³ He refused to attend the session even after his supervisor offered to have a co-worker “finger-spell” for him.⁸⁴ The next day, management decided to

74. *Id.*

75. *Id.* at 544 (citing to RESTATEMENT (SECOND) OF TORTS).

76. *Id.* (citing to 139 F.3d at 974 (Tatel, J., dissenting) and *Harris v. L&L Wings*, 132 F.3d 978, 983-84 (4th Cir. 1997) for the proposition that, in some cases, the existence of a written policy instituted in good faith has operated as a total bar to employer liability for punitive damages and that the institution of a written sexual harassment policy has gone a long way towards dispelling any claim about the employer’s “reckless” or “malicious” state of mind).

77. In writing *Kolstad*, the Court appeared to rely in large part upon Judge Tatel’s dissenting opinion in *Kolstad II*. The analysis follows the same framework set out in Tatel’s dissent, and the opinion cites Tatel’s dissent on several occasions. Judge Tatel’s dissent provides some specific examples of actions an employer might undertake in making good faith efforts to comply with Title VII, including: hiring staff and managers “sensitive” to Title VII responsibilities; requiring effective EEO training; and requiring objective hiring and promotion standards. *Kolstad II*, 139 F.3d at 974.

78. The *Kolstad* decision was rendered on June 22, 1999. The Tenth Circuit decided the *EEOC v. Wal-Mart* case on August 23, 1999.

79. 187 F.3d 1241 (10th Cir. 1999).

80. *Id.*

81. *Id.* at 1243.

82. *Id.*

83. *Id.*

84. *Id.*

transfer Amaro to the maintenance department to perform janitorial work.⁸⁵ Although he asked that an interpreter explain the reasons for the transfer, his initial request was denied.⁸⁶ The reasons were later explained in a handwritten note but Amaro insisted that Wal-Mart use an interpreter.⁸⁷ He was then suspended after he threatened to file a complaint with the EEOC.⁸⁸ Following the suspension, an interpreter was hired to explain the transfer to Amaro but he still refused to accept the transfer and his employment was immediately terminated.⁸⁹

Amaro sued Wal-Mart claiming its actions violated the ADA.⁹⁰ He won \$3,527.29 in compensatory damages and convinced the jury to punish Wal-Mart with an award of punitive damages in the amount of \$75,000.⁹¹ Wal-Mart asked the Tenth Circuit to throw out the punitive damages award for a number of reasons, one of which included the argument that the actions of the managers who supervised Amaro were contrary to company policy.⁹² Wal-Mart specifically argued that it could not be held liable for punitive damages because it circulated an ADA compliance manual and the actions of Amaro's supervisors violated the rules in the manual.⁹³ Wal-Mart also relied on a company policy describing equality and respect for the individual.⁹⁴ The Tenth Circuit was not convinced.

The Court upheld the award of punitive damages because Wal-Mart had not taken the necessary steps to educate its work force about what was required and prohibited by the ADA.⁹⁵ The Court observed that Amaro's immediate supervisor testified during her deposition that she was not aware of *any law* requiring employers to offer reasonable accommodations until *three years* after Amaro was terminated.⁹⁶ She also testified that she had received *no training* about disability discrimination.⁹⁷ Further, the personnel manager responsible for training at the store where Amaro worked testified that during her seven years of employment as a manager, she had received *no training* in employment discrimination or the requirements of the ADA, had never discussed the ADA with the employees whom she supervised, and did not have a copy of Wal-Mart's ADA handbook.⁹⁸ The Court characterized the testimony of Wal-Mart's management personnel as reflecting a "*broad failure*" on the part of Wal-Mart to educate its employees about the requirements of the ADA and to prevent

85. *Walmart Stores, Inc.*, 187 F.3d at 1243.

86. *Id.*

87. *Id.* at 1244.

88. *Id.*

89. *Id.* Wal-Mart actually rehired Amaro in June 1993, approximately five months after his employment had been terminated. Nevertheless, the EEOC filed suit on his behalf in October 1993.

90. *Id.* at 1244.

91. *Walmart Stores, Inc.*, 187 F.3d at 1244.

92. *Id.*

93. *Id.* at 1246.

94. *Id.* at 1249.

95. *Id.*

96. *Id.*

97. *Walmart Stores, Inc.*, 187 F.3d at 1249.

98. *Id.*

discrimination in the work place.⁹⁹ Accordingly, *Kolstad's* good faith efforts defense could not shield Wal-Mart from liability for punitive damages.

B. *Knowlton v. Teltrust*

One week before the Tenth Circuit rendered its decision in *EEOC v. Wal-Mart*, it also relied on *Kolstad* when considering a claim for punitive damages in a case alleging sexual harassment. In *Knowlton v. Teltrust Phones, Inc.*,¹⁰⁰ the employer did not specifically assert that its good faith efforts barred an award of punitive damages. However, the case illustrates the type of conduct which demonstrates a clear failure to exercise good faith efforts to comply with Title VII.

Ms. Pierre Knowlton ("Knowlton") worked as a sales representative for Teltrust Phones, Inc. ("Teltrust").¹⁰¹ In September 1992, she complained to Teltrust's management that her supervisor, Mark Neihart ("Neihart"), had been sexually harassing her since she was hired in October 1990.¹⁰² Knowlton alleged that Neihart subjected her to various acts of harassment, including but not limited to: vulgar language, sexually explicit jokes, and repeated propositions for sex.¹⁰³ Because of Knowlton's complaint, Teltrust transferred Neihart to another position within the company.¹⁰⁴ However, Knowlton claimed that she feared retaliation from Neihart and, therefore, resigned from Teltrust.¹⁰⁵ She later sued Teltrust for sexual harassment.¹⁰⁶

Following a trial, Knowlton was awarded compensatory damages in the amount of \$75,000.¹⁰⁷ The judge who presided over the trial, however, refused to allow the jury to consider whether Knowlton was entitled to recover punitive damages from Teltrust.¹⁰⁸ He decided that Knowlton had not offered enough evidence to demonstrate that Teltrust had recklessly disregarded her rights under Title VII.¹⁰⁹ The Tenth Circuit disagreed.

In finding that the jury should have been allowed to consider Knowlton's claim for punitive damages, the Court focused on the fact that based on the testimony of other Teltrust employees, Teltrust's management was well aware of Neihart's alleged inappropriate conduct directed towards other female employees at the time Knowlton lodged her complaint.¹¹⁰ One female co-worker testified that prior to terminating her employment, Neihart "pinned her up against a wall and made a sexual advance."¹¹¹ Although she complained to the Chief Financial

99. *Id.*

100. 189 F.3d 1177 (10th Cir. 1999).

101. *Id.* at 1180-81.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Knowlton*, 189 F.3d at 1180-81.

107. *Id.* at 1181.

108. *Id.* at 1186.

109. *Id.*

110. *Id.* at 1186-87.

111. *Id.* at 1187.

Officer and the harassment stopped for a while, it reoccurred when the Chief Financial Officer was terminated from Teltrust.¹¹² The Chief Financial Officer also testified that she had spoken several times about Neihart's inappropriate behavior to the President and that he discounted the complaints noting that "[t]he women in this company are always too emotional."¹¹³ Further evidence included testimony from Neihart's immediate supervisor who also claimed that he spoke with the President and other members of management about Neihart's inappropriate behavior before Knowlton made her complaint.¹¹⁴ Her immediate supervisor also acknowledged that he had observed Neihart's use of foul language.¹¹⁵ He chastised Neihart by stating "shame on you, that is very inappropriate," but never formally reprimanded Neihart for his behavior.¹¹⁶ The Court also characterized management's response to Knowlton's complaint as "unresponsive" because even though Neihart was transferred to another position within the company, Knowlton would still come into contact with him when performing her job duties.¹¹⁷ The court concluded that the trial court should have allowed the jury to consider Knowlton's claim for punitive damages because of management's unmistakable awareness that Neihart was creating a hostile work environment and because Neihart's transfer did not effectively prevent further contact between Neihart and Knowlton.¹¹⁸

C. *Deters v. Equifax*

In *Deters v. Equifax Credit Information Services, Inc.* ("Equifax"),¹¹⁹ the Tenth Circuit Court of Appeals addressed an employer's attempt to assert the good faith efforts defense where the manager designated to enforce the company's anti-discrimination and harassment policies actually observed the alleged harassment.¹²⁰ The Plaintiff, Sharon Deters ("Deters"), worked for Equifax in its Lenexa, Kansas office from August 1994 through October 1995.¹²¹ During that time period, she performed various administrative duties for the Assistant Department Managers ("ADMs"), who supervised the Equifax debt collectors.¹²² Jim Taylor ("Taylor") was the General Manager of the Lenexa office.¹²³ His responsibilities included hiring, firing, discipline and approving salaries for the entire staff.¹²⁴ Equifax also had *designated* Taylor as the person responsible for implementing its human resources policies, including its sexual harassment

112. *Knowlton*, 189 F.3d at 1187.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Knowlton*, 189 F.3d at 1187.

119. 202 F.3d 1262 (10th Cir. 2000).

120. *Id.* at 1267.

121. *Id.* at 1266.

122. *Id.*

123. *Id.*

124. *Equifax*, 202 F.3d at 1267.

policy.¹²⁵

Deters claimed that, at some time during her employment, she was subjected to harassment by two ADMs, a debt collector and her supervisor.¹²⁶ The alleged harassment by the ADMs included twisting her arm, calling her a *f'ing B*, telling crude jokes, leering at her, and making bets with her supervisor about who was going to sleep with her first.¹²⁷ Deters also claimed her supervisor would call her home at all hours of the night and ask her to go out even after she told him that she was engaged, grabbed and kissed her on one occasion, and stared at her chest and asked her if she wanted to take her jacket off.¹²⁸ Deters alleged that the debt collector would often touch or squeeze her hand and state, "I love redheads."¹²⁹ He also pushed her skirt up and rubbed her leg on one occasion before she could fight him off.¹³⁰

Deters alleged that each time she complained to Taylor about the harassment, he told her that he would take care of it.¹³¹ She also alleged that he told her that the ADMs and debt collectors were *revenue producers*; that she needed to remember she was a "*non-revenue person*," that the harassing conduct was a by-product of the personality type necessary to be a collector, and that the collector who harassed her was just being friendly.¹³² Deters later quit her job and sued Equifax under Title VII.¹³³ Based on the evidence presented during trial, the jury initially awarded Deters \$5,000 in compensatory damages and \$1,000,000 in punitive damages!¹³⁴ The court reduced the punitive damages award to \$295,000.¹³⁵

Equifax argued that the punitive damages award should be thrown out because Taylor's conduct was contrary to its sexual harassment policy.¹³⁶ In other words, his alleged failure to respond adequately to Deters' complaints was contrary to Equifax's good faith efforts to comply with Title VII.¹³⁷ When considering this argument, the court focused on the fact that Equifax had

125. *Id.*

126. *Id.* at 1266-1267.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Equifax*, 202 F.3d at 1267.

131. *Id.*

132. *Id.*

133. *Id.* at 1262.

134. *Id.* at 1266.

135. *Id.*

136. *Equifax*, 202 F.3d at 1270. Equifax also argued that Taylor did not act with the state of mind (malice or recklessness) necessary to support an award of punitive damages when he responded to Deters' complaints and, therefore, it should not be required to pay Deters any punitive damages. *Id.* at 1268-1269. As support for the argument, it claimed that Taylor was unaware of the extent of the harassment suffered by Deters and that he merely failed to communicate effectively with his staff. *Id.* The Court rejected this argument, finding that Deters presented ample evidence during the trial that she had consistently complained to Taylor and that Taylor personally observed some of the harassment directed at Deters. *Id.* at 1269. The Court also relied upon the evidence of Taylor's alleged failure to respond to her complaints, as well as his efforts to explain and/or excuse the harassing conduct and thereby protect the "revenue producers." *Id.*

137. *Equifax*, 202 F.3d at 1270.

designated Taylor as the person responsible for implementing and/or enforcing its sexual harassment policy in the Lenexa office.¹³⁸ Because of the designation, the court concluded that Equifax was *directly liable* for Taylor's alleged inadequate response to Deters' complaints.¹³⁹ Equifax, therefore, could not assert that its good faith efforts to comply with Title VII, through its policies or otherwise, prevented it from being held responsible for paying Deters the punitive damages that were based on Taylor's conduct.¹⁴⁰ The court recognized that *Kolstad's* good faith efforts defense is unavailable in situations where a manager, who *knew or should have known* about the alleged harassment, is designated as responsible for implementing the company's anti-harassment policy and fails to respond adequately to an employee's complaints about the harassment.¹⁴¹

D. Cadena v. Pacesetter

The most recent Tenth Circuit decision to construe the adequacy of an employer's good faith efforts is *Cadena v. The Pacesetter Corp.*¹⁴² The Plaintiff, Lynn Cadena ("Cadena"), had been employed as a telemarketer in Pacesetter's Lenexa, Kansas office.¹⁴³ She claimed that several months after she was hired, one of the telemarketing managers, Charles Bauersfeld ("Bauersfeld"), subjected her to a "steady barrage of severe sexual harassment."¹⁴⁴ Some of the alleged harassment included the following: a statement by Bauersfeld that Cadena needed to go out with him "so that he could have more wet dreams about her", asking her if she was getting enough sex when she was having a problem performing her job duties, and asking her to show her breasts to a co-worker in order to "get him going". When Cadena became upset with his statements and behavior, he allegedly told her: "Honey, I didn't mean anything by it. You know, you are one of my favorite sweethearts."¹⁴⁵ Cadena also alleged that Bauersfeld physically harassed her while she was conducting her telemarketing duties by massaging her lower back, putting his arms around her, touching her hair and the front of her body.¹⁴⁶

Following the "you are one of my favorite sweethearts" statement, Cadena reported the manager's conduct to one of the other managers who responded by telling her that "there is nothing nobody can do about it."¹⁴⁷ He also allegedly told her that the General Manager of the Lenexa office and individuals at corporate headquarters were aware of the manager's conduct but that nothing could be done

138. *Id.* at 1270-71.

139. *Id.*

140. *Id.*

141. *Id.*

142. 224 F.3d 1203 (10th Cir. 2000).

143. *Id.* at 1206.

144. *Id.*

145. *Id.* at 1206-07.

146. *Id.*

147. *Id.* at 1207.

because the manager “made too much money for Pacesetter.”¹⁴⁸ He also told Cadena that if she was unhappy with the situation, she should simply consider quitting.¹⁴⁹ Cadena attempted to contact the General Manager of the office but was unable to reach him. She later decided to resign from her position.¹⁵⁰

Cadena’s complaint was not brought to the attention of the General Manager until after she resigned.¹⁵¹ He responded by questioning Bauersfeld about his conduct and then interviewing Cadena, who informed him of all of the problems she had experienced while working with Bauersfeld.¹⁵² The General Manager responded by trying to downplay the manager’s actions. He also offered Cadena a raise if she would return to work and drop her sexual harassment complaint.¹⁵³ Cadena later submitted a letter to the General Manager describing the incidents of sexual harassment, the company’s failure to address the problem, and indicated that she did not intend to return to work.¹⁵⁴ He called her again and advised her that Bauersfeld had been written up and that he would be fired if another incident occurred.¹⁵⁵ Nevertheless, Cadena did not return to work and instead sued Pacesetter for sexual harassment.¹⁵⁶ Following her trial, the jury awarded her \$50,000 in compensatory damages and \$700,000 in punitive damages.¹⁵⁷ The entire damage award was later reduced by the district court to \$300,000.¹⁵⁸

Pacesetter appealed the jury’s verdict on punitive damages to the Tenth Circuit and argued that Bauersfeld’s alleged harassing conduct should not be imputed to Pacesetter because the conduct was contrary to Pacesetter’s good faith efforts to prevent sexual harassment and comply with Title VII.¹⁵⁹ In support of its argument, Pacesetter argued that it maintained a strong policy against sexual harassment and that it adequately trained its employees to comply with the policy and Title VII.¹⁶⁰ The court rejected Pacesetter’s argument based upon the trial and deposition testimony of its own managers.¹⁶¹ Although the manager responsible for conducting sexual harassment training testified at trial that she discussed the topic of sexual harassment at meetings with her co-workers on a monthly basis, her testimony was contradicted by another telemarketing manager who testified that no such monthly training sessions occurred.¹⁶² The manager

148. *Cadena*, 224 F.3d at 1207.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 1207.

153. *Id.*

154. *Cadena*, 224 F.3d at 1207.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 1209.

160. *Cadena*, 224 F.3d at 1210.

161. *Id.*

162. *Id.*

responsible for conducting sexual harassment training also testified during her deposition that she thought a male supervisor could not commit sexual harassment if he exposed his genitalia to a female subordinate or grabbed her breasts "so long as he apologized after the incident."¹⁶³ The court also relied on evidence presented at trial which suggested that Pacesetter knew about Bauersfeld's harassing conduct and simply failed to take any action to stop it.¹⁶⁴ Under these facts, the court determined that there was sufficient evidence for a jury to conclude that Pacesetter did not make good efforts to comply with Title VII and, therefore, was not entitled to a judgment in its favor on punitive damages.¹⁶⁵

V. OTHER FEDERAL CIRCUIT AND DISTRICT COURT DECISIONS

A. Circuit Court Decisions

The Fifth Circuit was also one of the first circuit courts to address whether an employer's good faith efforts complied with the standard announced in *Kolstad*.¹⁶⁶ In *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*,¹⁶⁷ the jury awarded plaintiff \$100,000 in punitive damages in a suit brought under Title VII and 42 U.S.C. § 1981.¹⁶⁸ The plaintiff, a white female, claimed that Wal-Mart terminated her employment because she was dating an African-American male.¹⁶⁹ The district court, however, entered judgment as a matter of law for Wal-Mart on plaintiff's claim for punitive damages.¹⁷⁰ On appeal, the Fifth Circuit reversed the district court's ruling, reinstating punitive damages in the amount of \$75,000.¹⁷¹ However, the Fifth Circuit also granted a rehearing on the issue of punitive damages because of the Supreme Court's decision in *Kolstad*.¹⁷²

Upon rehearing, the Fifth Circuit held that the *Kolstad* decision was not such a sudden shift in the law as to require submission of additional evidence.¹⁷³ The parties were, however, allowed to brief the issue of punitive damages.¹⁷⁴ Because the district court considered the case based on law that the Fifth Circuit deemed to be "in line" with the *Kolstad* decision, the Fifth Circuit upheld its ruling that the managers acted with the requisite malice or reckless disregard of federal rights.¹⁷⁵ The question remained whether, after the *Kolstad* decision, Wal-Mart could be

163. *Id.* at 1210.

164. *Id.*

165. *Id.*

166. The Fifth Circuit's decision in *Deffenbaugh-Williams v. Wal-mart Stores, Inc.*, 188 F.3d 278 (5th Cir. 1999), was decided on August 31, 1999, just over two months after the Supreme Court issued the *Kolstad* decision. See *supra* note 3.

167. *Deffenbaugh*, 188 F.3d 278 (5th Cir. 1999).

168. *Id.* 280-81.

169. See the prior decision at 156 F.3d 581, 586 (5th Cir. 1998).

170. *Id.*

171. *Deffenbaugh*, 188 F.3d at 286.

172. *Id.* at 284.

173. *Id.*

174. *Id.* at 281.

175. *Id.* at 285-286.

vicariously liable despite its good faith efforts to comply with federal law.¹⁷⁶ The court found that Wal-Mart's minimal investigation and simple procedure of encouraging employees to report complaints was not enough to establish the good faith defense.¹⁷⁷ Further, the plaintiff produced evidence at trial that her District Manager "left uncontradicted" a statement made during a lunch meeting by the Plaintiff's prior supervisor that she would "never move up with the company being associated with a black man."¹⁷⁸ The Court concluded that this additional evidence in combination with the District Manager's implicit ratification of the supervisor's statement and an ineffective response to the Plaintiff's complaints gave the jury "wide latitude" to infer that Wal-Mart's anti-discrimination policy was "poorly enforced."¹⁷⁹ As a result, Wal-Mart's good faith efforts defense was rejected and it was ordered to pay \$75,000 in punitive damages.¹⁸⁰

In *Blackmon v. Pinkerton Security & Investigative Services*,¹⁸¹ the district court entered judgment as a matter of law and withdrew a punitive damages award of \$100,000 granted to the plaintiff by a jury.¹⁸² The evidence at trial demonstrated that Plaintiff was subjected to frequent sexual harassment while employed as a security guard.¹⁸³ She later suffered adverse employment actions after she complained about the harassment.¹⁸⁴ Further, the evidence showed that the investigation into her complaints was woefully inadequate.¹⁸⁵ On appeal, the Eighth Circuit remanded the case for reinstatement of the punitive damages award, holding that the plaintiff had met the standards for punitive damages on her Title VII claim as set forth in *Kolstad*.¹⁸⁶ Although the employer did not assert the good faith efforts defense, the case clearly illustrates a lack of good faith by the employer. Specifically, the court held that Pinkerton had:

[A]cted with malice and reckless indifference to [the plaintiff's] federally protected rights when it: (1) failed to investigate [the plaintiff's] complaints and institute prompt remedial action even after appellant complained to three successive levels of supervision; (2) repeatedly retaliated against her for complaining of sexual harassment by reprimanding her, demoting her, fostering an environment in which her co-workers were openly hostile to her, and finally terminating her; (3) attempted to escape legal liability by soliciting information against appellant to prove she caused the harassment; and (4) attempted to escape legal liability for terminating [the plaintiff] by firing another employee at the same time.¹⁸⁷

The court clarified that including information about complaining employees

176. *Id.* at 286.

177. *Deffenbaugh*, 188 F.3d at 286.

178. *Id.* at 280.

179. *Id.* at 286.

180. *Id.*

181. 182 F.3d 629 (8th Cir. 1999).

182. *Id.*

183. *Id.* at 635.

184. *Id.*

185. *Id.*

186. *Id.* at 637.

187. *Blackmon*, 182 F.3d at 636.

in investigations is not necessarily evidence of malice or reckless indifference.¹⁸⁸ However, the court found that Pinkerton “did not conduct an even-handed, good-faith investigation, in which information about [the plaintiff] was but a part.”¹⁸⁹ Instead, the investigation “consisted almost exclusively of looking for unfavorable information about [the plaintiff].”¹⁹⁰ Considering the fact that the company had conducted a “sham” investigation and otherwise failed to comply with Title VII, plaintiff was entitled to punitive damages under *Kolstad*.¹⁹¹

In *Lowery v. Circuit City Stores*,¹⁹² the Fourth Circuit presented a thorough analysis of nearly every aspect of the Supreme Court’s decision in *Kolstad*. In determining whether the punitive damages awarded against Circuit City should be vacated, the appellate court noted that the evidence established: (1) that the supervisor (Ms. Turner) responsible for the challenged employment action (failure to promote) intentionally refused to promote plaintiff Lowery because of her race (African-American) in the face of a perceived risk that doing so would violate federal law (Turner had taken a training course offered by the employer regarding federal anti-discrimination laws);¹⁹³ (2) that Turner served Circuit City in a managerial capacity (Turner managed a department with 21 employees, she had authority and full discretion in hiring and promotion decisions, and she had full discretion in organizing her department in any way she wanted);¹⁹⁴ and (3) that Turner was acting within the scope of her employment in refusing to promote Lowery (making promotion decisions is the type of conduct Circuit City hired Turner to perform, she acted on her promotion decisions during working hours, and her promotion decisions were undertaken, at least in part, for the purpose of serving Circuit City).¹⁹⁵

The Fourth Circuit went on to explain that it would nonetheless vacate the jury’s punitive damages award if it concluded that a reasonable juror could only find that Circuit City engaged in good faith efforts to comply with § 1981.¹⁹⁶ The court pointed out that the good faith exception relies on the notion that the existence and enforcement of an anti-discrimination policy shows that the employer itself never acted in reckless disregard of federally protected rights.¹⁹⁷

Circuit City produced evidence showing it had a comprehensive nondiscrimination policy that provided three distinct avenues by which employees could complain about discriminatory conduct. Circuit City also demonstrated that it educated its workforce on this policy by including the policy in its employee handbook, by distributing posters on the policy to all of its stores, by conducting

188. *Id.* at 636 & n.7.

189. *Id.*

190. *Id.*

191. *Id.* at 637.

192. 206 F.3d 431 (4th Cir. 2000).

193. *Id.* at 443.

194. *Id.* at 444.

195. *Id.* at 445.

196. *Id.*

197. *Id.*

employee training on the policy, and by requiring every manager and supervisor to attend a week-long training which included education on federal anti-discrimination laws.¹⁹⁸

The court then catalogued the evidence undermining Circuit City's claim that it made good faith efforts to comply with federal anti-discrimination laws.¹⁹⁹ First, the court underscored that there was evidence that two of Circuit City's "top executives" harbored racial animosity towards African-Americans.²⁰⁰ Second, there was evidence that one of the top executives "buried" internal reports indicating a lack of promotional opportunities for minorities and women and that a sizable number of Circuit City associates believe that minorities are not treated the same as white associates.²⁰¹ Third, the court pointed to the testimony of African-American associates that they feared retaliation by Circuit City if they utilized the complaint procedures outlined in the anti-discrimination policy and that those who had complained felt they had been intimidated by Circuit City's management in response.²⁰² Finally, the court pointed to the subjective and unstructured promotion system at Circuit City as evidence of a tool used by management to effect its disparate promotion policy.²⁰³ Based on the conflicting evidence of Circuit City's good faith efforts, the court was not persuaded that a reasonable juror could only conclude that Circuit City engaged in good faith efforts to comply with § 1981. Thus, the punitive damages award stood.²⁰⁴

The Eighth Circuit has also assessed the viability of an employer's good faith efforts defense. In *Ogden v. Wax Works*,²⁰⁵ plaintiff Ogden prevailed at trial on her claims of sexual harassment and retaliation.²⁰⁶ On appeal, Wax Works argued, *inter alia*, that the evidence was insufficient to support the jury's award of punitive damages.²⁰⁷ As evidence of its good faith efforts, Wax Works pointed to its written sexual harassment policy and its policy of encouraging employees with complaints to contact the home office.²⁰⁸ The appellate court determined that such evidence did not suffice, as a matter of law, to establish good faith efforts.²⁰⁹

The court went on to describe the evidence it believed impugned Wax

198. *Lowery*, 206 F.3d at 445.

199. *Id.* at 445-46.

200. *Id.* One of the top executives was the Vice President of Corporate Planning, who allegedly told Lowery she would do better at a company that was more receptive to minorities and women and indicated that Pepsi-Cola was an option because it tended to place minorities in decision-making roles. *Id.* at 439. The other top executive was the Senior Vice President of Human Relations, who allegedly told Lowery that he believed sales at stores with black managers went down and, allegedly told another employee that there were few minorities in decision-making roles at Circuit City and he did not see that changing because there were so few minorities of the caliber required for promotion. *Id.*

201. *Id.* at 439, 446.

202. *Lowery*, 206 F.3d at 446.

203. *Id.*

204. *Id.*

205. 214 F.3d 999 (8th Cir. 2000).

206. *Id.* at 1002.

207. *Id.*

208. *Id.* at 1010.

209. *Id.*

Works' good faith efforts claim.²¹⁰ Substantial evidence indicated that Wax Works "minimized" the plaintiff's complaints.²¹¹ In response to her complaints, Wax Works conducted a " cursory" investigation focusing primarily on Ogden's performance rather than the complained of conduct.²¹² Ultimately, Wax Works forced Ogden to resign after management informed her that the investigation was over, that the offending supervisor was "an asset" to the company and that there was no reason to fire him.²¹³ When Ogden asked the Regional Manager if she could continue working under the offending supervisor given her complaints, he indicated that she could not.²¹⁴ Ogden was thereby forced to resign her position,²¹⁵ and her supervisor was not disciplined.²¹⁶ In light of Wax Works' failure to respond effectively to the plaintiff's complaints, its written anti-discrimination policies were found insufficient to demonstrate its good faith efforts to comply with Title VII.²¹⁷

B. District Court Decisions

1. Cases Recognizing the Good Faith Efforts Defense

In *Lintz v. American General Finance, Inc.*,²¹⁸ two former female employees of American General Finance, Inc. ("American Finance"), Susan Lintz ("Lintz") and Connie Diecidue ("Diecidue") sued American Finance for sexual harassment allegedly committed by their supervisors.²¹⁹ Following a trial of their claims, the jury found that both women had been subjected to sexual harassment but only awarded compensatory damages of \$25,000 to Diecidue.²²⁰ The jury also declined to award punitive damages to either plaintiff.²²¹

In post trial motions, Lintz asked, among other things, that the trial court grant her a new trial on punitive damages.²²² In rejecting her request, the court noted the following with respect to the evidence offered by American Finance concerning its "good faith efforts" defense:²²³

In support of their "good faith" defense, defendants introduced evidence through several management employees that plaintiff Lintz never complained about sexual harassment in the workplace until after she resigned her employment. Although Ms. Lintz testified that she did report the harassment, the jury assessed the

210. *Id.*

211. *Ogden*, 214 F.3d at 1010.

212. *Id.*

213. *Id.* at 1004-05, 1010.

214. *Id.* at 1005.

215. *Id.* at 1010.

216. *Id.*

217. *Ogden*, 214 F.3d at 1010.

218. 76 F. Supp. 2d 1200 (D. Kan. 1999).

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 1204-05.

223. *Id.* at 1207-08.

credibility of all witnesses. Based on the testimony of defendants' witnesses, the jury could have concluded, in determining whether to award punitive damages, that Ms. Lintz never reported sexual harassment to any of defendants' management-level employees. In addition, defendants presented evidence that they acted promptly and appropriately in the face of plaintiff Diecidue's complaints about sexual harassment. In that regard, the undisputed evidence at trial demonstrated that Ms. Diecidue did not complain about sexual harassment until after she resigned. Defendants' evidence demonstrated that defendants began an immediate investigation into Ms. Diecidue's allegations of sexual harassment as soon as those allegations were discovered in her exit questionnaire. According to several witnesses, the investigation included interviews of employees and the removal of Mr. Johansen from the workplace. Ultimately, defendants terminated the employment of Mr. Johansen based on Ms. Diecidue's complaints. In short, there was ample evidence before the jury to support its finding that punitive damages were not warranted here.²²⁴

The district court in *Hull v. Apcoa/Standard Parking Corp.*²²⁵ ("Standard"), reached a similar conclusion before trial in a case involving a male who claimed that he was sexually harassed by his female supervisor.²²⁶ Standard asked the district court to grant summary judgment in its favor on all of the plaintiff's claims, including his claim for punitive damages.²²⁷ In reaching its decision to grant summary judgment in favor of Standard on the claim for punitive damages, the court discussed the *Kolstad* decision and how Standard established its "good faith efforts" to comply with Title VII.²²⁸ It observed that Standard had a nondiscrimination and anti-harassment policy in effect during Hull's employment, that the policy adequately described the steps an employee could take to report harassment and discrimination, and that Hull received a copy of the policy and attended a training session where the policy was covered.²²⁹ Like the court in *Lintz*, this court also concluded that Hull did not make his complaint known to other managers or the human resources department.²³⁰ Accordingly, Standard was entitled to summary judgment on Hull's claim for punitive damages.²³¹

224. *Lintz*, 76 F. Supp. 2d at 1207-08.

225. 2000 WL 198881 (N.D. Ill. Feb. 14, 2000).

226. *Id.*

227. *Id.*

228. *Id.* at *14.

229. *Id.* at *14-15.

230. *Id.*

231. *Hull*, 2000 WL 198881, at *14-15. Other district court decisions decided since the *Hull* case relied upon similar facts to grant summary judgment in favor of the employer on the plaintiff's claim of punitive damages. See *Woodward v. Ameritech Mobile Communications*, 2000 WL 680415 (S.D. Ind. March 20, 2000). (In granting the company's request that the court dismiss the plaintiff's claim for punitive damages because of its good faith efforts, the court first considered the plaintiff's failure to report the store manager's alleged harassing behavior to the appropriate human resources representative; the fact that the company policy gave employees an alternative reporting mechanism for reporting any alleged harassment by their immediate supervisors; her refusal to discuss any incidents of alleged harassment with the company's EEO representative; and the signed forms acknowledging her receipt of the company's policies and attendance at a two-day sexual harassment training session); *Fuller v. Caterpillar, Inc.*, 124 F. Supp. 2d 610 (E.D. Ill. 2000). (In deciding that Caterpillar had no liability for punitive damages because it had made good faith efforts to comply with

2. Cases Rejecting the Good Faith Efforts Defense

The following cases clearly illustrate situations that employers must avoid in order to comply with the good faith efforts standard announced in *Kolstad*.

In *Miller v. Kenworth of Dothan, Inc.*,²³² ("Kenworth") the plaintiff, Bradley Miller ("Miller"), who is Mexican-American, worked for Kenworth in the Parts Department of its tractor-trailer dealership located in Dothan, Alabama.²³³ Although Miller only worked for Kenworth for a little over three months before he was terminated, he claimed that he was subjected to racial harassment during his employment which caused a hostile work environment in violation of Title VII and 42 U.S.C. § 1981.²³⁴ He based his racial harassment claim on alleged derogatory statements by the Shop Foreman who, according to Miller, referred to him in racially derogatory terms on an almost daily basis, and even in the presence of the Service Manager.²³⁵ He also claimed that Kenworth fired him in retaliation for his threat to sue Kenworth for race discrimination.²³⁶ After he sued Kenworth, a jury rendered a verdict in his favor on the hostile work environment claim and awarded him \$25,000 in compensatory damages and \$50,000 in punitive damages.²³⁷ Kenworth filed various motions with the court asking that the court essentially overrule the jury's verdict and find in its favor.²³⁸ The court rejected all of Kenworth's arguments.²³⁹ It specifically discussed why Miller had presented sufficient evidence to support the award of punitive damages and why Kenworth could not rely upon the "good faith efforts" defense recognized in *Kolstad*.²⁴⁰

In reaching its decision to uphold the award of punitive damages, the court found that there was sufficient evidence presented at trial of the Service Manager's actual knowledge of the harassment directed at Miller. The court also found that the Service Manager essentially "said nothing and did nothing" in response to Miller's complaints about the harassment, and that he was ignorant of Kenworth's personnel policies.²⁴¹ The court went on to explain that because it had

Title VII, the Court relied upon Caterpillar's response to the plaintiff's complaint of sexual harassment, its dissemination and posting of its sexual harassment policies, and its training sessions in which *all employees*, supervisory and non-supervisory, were required to attend) (emphasis added); *Jaudon v. Elder Health, Inc.*, 2000 WL 1918691 (D. Md. Dec. 19, 2000). (In granting summary judgment in favor of Elder Health on plaintiff's claim for punitive damages, the court relied upon the fact that the human resources director promptly investigated the plaintiff's complaint of alleged sexual harassment and issued a written warning to the alleged harasser; the company had published its policies concerning sexual harassment and equal opportunity and had posted Title VII notices in all employee break rooms advising its employees that gender discrimination in the workplace was prohibited; and the alleged harassment stopped after plaintiff contacted human resources.) *Id.*

232. 82 F. Supp. 2d 1299 (M.D. Ala. 2000).

233. *Id.* at 1302.

234. *Id.*

235. *Id.* at 1303.

236. *Id.* at 1302.

237. *Id.*

238. *Miller*, 82 F. Supp. 2d at 1306.

239. *Id.* at 1306 & 1310.

240. *Id.* at 1306-10.

241. [T]he court finds that there was ample evidence from which a jury could conclude that Mr. Brooks heard Mr. Galpin call Plaintiff derogatory names. That is, Plaintiff testified that

a deficient anti-harassment policy, Kenworth could not claim that the Service Manager's actions were contrary to its good faith efforts to comply with Title VII.²⁴² The policy prohibited discrimination but failed to inform employees about what they should do if they in fact were ever subjected to discrimination.²⁴³ Kenworth also failed to inform its employees about the policy and management-level employees, including the President, testified that they *never* read Kenworth's sexual harassment policy.²⁴⁴ Under such circumstances, the court had no choice but to reject Kenworth's argument that it made good faith efforts to comply with Title VII.

Another district court rejected the employer's argument that it made good faith efforts to comply with the law simply because it distributed an anti-discrimination policy. In *Copley v. Bax Global, Inc.*,²⁴⁵ a former employee of Bax Global claimed that his employment was terminated because he is *not Hispanic*.²⁴⁶ The trial court denied the employer's motion for summary judgment and the case proceeded to trial.²⁴⁷ The jury returned a verdict in favor of the plaintiff, awarding him \$500,000 in compensatory damages and \$1 million in punitive damages.²⁴⁸ The company argued in post-trial motions that it should not be liable for the punitive damages because it made good faith efforts to comply with the law.²⁴⁹ As an example, the company argued that it had in place a company-wide non-discrimination policy and, therefore, could not be subjected to an award of punitive damages.²⁵⁰ In rejecting the argument, the court cited cases standing for the proposition that simply having a non-discrimination policy in place is insufficient to invoke the good faith efforts defense.²⁵¹ The court went on to note that, "[f]or the good faith effort exception to apply, there must be a policy of non-discrimination both in *words and in practice*."²⁵² The court also observed that the evidence presented by the plaintiff at trial demonstrated that Bax Global's highest management officials made a calculated decision to terminate the plaintiff's

Mr. Brooks was "in the shop" when the name calling occurred and that Mr. Brooks or other management employees were "there" when Mr. Galpin was calling Plaintiff racial names. (Tr. at 43, 72) . . . Accordingly, the court finds that the evidence supports a finding that Mr. Brooks had actual knowledge of the harassment." *Id.* at 1307. The Court also observed "that, when Plaintiff mentioned the name calling to Mr. Brooks, Mr. Brooks said nothing and did nothing in response." *Id.* at 1308. He also never reported Miller's complaints to his supervisors and "never bothered to read any of Kenworth's policies." *Id.*

242. *Miller*, 82 F. Supp. 2d at 1310-11.

243. "[W]hile Kenworth's Workplace Conduct Policy prohibits 'the use of . . . discriminatory remarks or name calling,' . . . , it does not provide any procedures that an employee should take if he or she is the victim of the proscribed conduct." *Id.* at 1311.

244. *Id.* at 1311 (emphasis added).

245. 97 F. Supp. 2d 1164 (S.D. Fla. 2000).

246. *Id.* at 1166.

247. *Id.*

248. *Id.* at 1167.

249. *Id.* at 1168.

250. *Id.*

251. *Copley*, 97 F. Supp. 2d at 1169.

252. *Id.* (emphasis added).

employment in order to replace him with an individual of Hispanic descent.²⁵³ Such actions clearly demonstrated a violation of the defendant's own non-discrimination policy and federal law and, therefore, precluded the defendant from utilizing *Kolstad's* good faith exception to punitive damages.²⁵⁴

As noted previously in *Kenworth*, an employer cannot satisfy *Kolstad's* good faith efforts defense if one of its own managers is unfamiliar with the company's procedures for reporting harassment.²⁵⁵ The district court in *Mays v. Union Camp Corp.*²⁵⁶ addressed an employer's motion for summary judgment on the issue of punitive damages in the context of a claim of race discrimination. The plaintiff, who is African-American, claimed that the company failed to promote him to several temporary "set-up" supervisor positions because of his race.²⁵⁷ After he filed his complaint, the company moved for summary judgment on a number of his claims, including his claim for punitive damages.²⁵⁸

The company argued that any denial of promotions to Mays was contrary to its good faith efforts to comply with Title VII.²⁵⁹ As an example of its good faith efforts, the company pointed to its EEO policy, its internal complaint procedure, and the EEO training that it frequently gave its employees and managers.²⁶⁰ Nevertheless, the Court rejected the company's alleged good faith efforts because it was not convinced that its management employees were well informed about the company's EEO policy.²⁶¹ In reaching its decision, it relied primarily upon the deposition testimony of the Assistant Maintenance Superintendent who was involved in at least one of the promotion decisions contested by the plaintiff.²⁶² The record in the case revealed that complaints of discrimination had been brought to the attention of the superintendent and when asked why he did not investigate a specific complaint, he testified that he "did not know where to go with it."²⁶³ This testimony alone undermined the employer's contention that it undertook good faith efforts to comply with Title VII.²⁶⁴

VI. MAKING THE CASE FOR GOOD FAITH EFFORTS

The Court in *Kolstad* recognized that there are certain situations "where intentional discrimination does not give rise to punitive damages."²⁶⁵ Those include: (a) where the employer is simply unaware of the anti-discrimination laws; (b) the employer believes that "its discrimination is lawful"; (c) the plaintiff is

253. *Id.*

254. *Id.*

255. *See supra* note 152.

256. 114 F. Supp. 2d 1233 (M.D. Ala. 2000).

257. *Id.*

258. *Id.* at 1233-34.

259. *Id.* at 1250.

260. *Id.*

261. *Id.*

262. *Mays*, 114 F. Supp. 2d at 1250.

263. *Id.*

264. *Id.*

265. *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 536-37 (1999).

pursuing a “novel” or “poorly recognized” theory of liability; or (d) the employer believes that it has a bona fide defense to charges of discrimination because of its occupational qualifications or statutory exceptions.²⁶⁶ Most employers are never in a position to claim that they fall within any of these exceptions.²⁶⁷ Thus, they must be prepared to make the best case they can for why they have established their good faith compliance with Title VII and other statutes prohibiting discrimination and harassment in the workplace. Before discussing the necessary steps employers must take to credibly argue that their good faith efforts bar an award of punitive damages, it is important to first recognize the circumstances in which the courts *will not* entertain such an argument.

A. *Circumstances Where the Courts Will Not Consider the Defense*

As noted *supra*, *Kolstad's* good faith efforts defense to punitive damages applies in situations involving vicarious liability – the employer’s liability is imputed based on the conduct of its agents.²⁶⁸ The defense, therefore, will not apply in situations where the court can impose direct liability for punitive damages.²⁶⁹ The *Kolstad* Court recognized this implicitly when it instructed the lower court to consider the good faith efforts defense *only* if the discriminatory promotion decision was made by the lower-level manager.²⁷⁰ Whereas if the decision maker was the executive director (the employer’s highest level executive), the Court specified that the only pertinent inquiry concerning the propriety of punitive damages is whether the executive director acted with malice or reckless indifference in making the promotion decision.²⁷¹ As the Fourth Circuit observed in *Lowery*, the *Kolstad* defense will not be considered if one acting as a *principal* of the company engages in the discrimination.²⁷² The other circumstance recognized by the Tenth Circuit in the *Deters* case is where the company *designates* a specific manager as responsible for enforcing the company’s anti-discrimination/harassment policies, and the manager fails to adequately respond to discrimination or harassment of which he/she *knew or should have known*.²⁷³ Finally, the Ninth Circuit in *Passantino* observed that an employer’s good faith efforts are irrelevant in circumstances where high-level managers acting as *proxies* engage in the alleged discrimination.²⁷⁴

Unfortunately, neither *Lowery* nor *Passantino* specifically describe the circumstances in which an agent of a company will be deemed to have been acting

266. *Id.*

267. *But see* Gile v. United Airlines, Inc., 213 F.3d 365, 375-76 (7th Cir. 2000). The Seventh Circuit reversed an award of punitive damages in the amount \$500,000 because the defendant wrongfully believed that the plaintiff was not disabled under the ADA.

268. *See supra* notes 56-71 and accompanying text.

269. *See supra* note 61 and accompanying text.

270. *Kolstad*, 527 U.S. at 546.

271. *Id.*

272. *See supra* note 57.

273. *See supra* notes 137-41 and accompanying text.

274. *See supra* note 57.

as a “principal” or “proxy” for purposes of imposing liability for punitive damages.²⁷⁵ Nevertheless, the clear message from *Kolstad* and these cases is that the defense will not apply if a high-level executive or someone designated to enforce the company’s anti-discrimination policies, actually engages in or ratifies discriminatory or harassing conduct.²⁷⁶

B. Circumstances in Which Courts Are Likely to Reject the Defense

It is difficult to anticipate every circumstance that may cause courts to reject or accept an employer’s argument that its good faith efforts should bar punitive damages. However, based on the cases discussed in this article, the facts making it unlikely that the defense will be recognized include the following:

- The employer has a policy in place addressing workplace discrimination, but the policy is deficient or the policy is not adequately disseminated or publicized.²⁷⁷
- The employer has not educated or trained its employees and managers concerning its policies or about the requirements/prohibitions of the laws prohibiting discrimination/harassment.²⁷⁸
- The employer was aware of the discrimination/harassment and failed to promptly and adequately respond to the employee’s complaints.²⁷⁹
- The employer minimized the employee’s complaints, made statements indicating a preference for the person who was the subject of the complaint, or made the employee feel as if he/she might suffer retaliation for complaining.²⁸⁰
- The employer’s investigation of the complaint of workplace harassment/discrimination is a “sham,” conducted in an unfair manner or is otherwise deficient.²⁸¹
- Managers responsible for enforcing the company’s policies or training employees concerning the requirements and prohibitions of the anti-discrimination laws are themselves ignorant about the same or the company’s anti-discrimination policies.²⁸²

These are the primary facts highlighted by the relevant cases which, if supported, will undermine an employer’s efforts to obtain summary judgment on a plaintiff’s claim for punitive damages or to convince the trial court not to allow the jury to consider the claim. Employers should also familiarize themselves with the factors that the Equal Employment Opportunity Commission believes support an

275. See *supra* note 57.

276. See *supra* notes 57, 61 and accompanying text.

277. See *supra* notes 242-45 and accompanying text.

278. See *supra* notes 96-99 and accompanying text.

279. See *supra* notes 111-19, 137 and accompanying text.

280. See *supra* notes 132-33, 148-54 and accompanying text.

281. See *supra* notes 188-91 and accompanying text.

282. See *supra* notes 96-100, 164, 245, 262-64 and accompanying text.

award of punitive damages.²⁸³

C. Steps to Ensure the Defense Is Available

1. Establish Adequate Policies

The cases describing when the *Kolstad* defense is recognized provide several examples of what employers can do to avoid punitive damages awards. The obvious first step is to ensure that the company has in place adequate policies addressing workplace discrimination and/or harassment. Even *Kolstad* recognized that "the existence of a written policy instituted in good faith has operated as a total bar to employer liability for punitive damages."²⁸⁴ The determination of whether a policy is adequate involves several considerations. One of the most important, however, as reflected in the decisions addressing the *Kolstad* defense, is whether the policy clearly describes the procedure for reporting or otherwise putting the employer on notice about discrimination or harassment in the workplace.²⁸⁵ Employers have successfully disposed of claims for punitive damages at the summary judgment stage of a case where the employer's policy was adequate and the complaining employee failed to follow the company's procedure for reporting incidents of discrimination or harassment.²⁸⁶

2. Educate Managers and Non-Managers

The next essential step is to ensure that all employees, including management personnel, are fully informed about the company's anti-discrimination policies. A well drafted and complete policy must be "instituted in good faith" in order to qualify for the *Kolstad* defense.²⁸⁷ This goal can only be accomplished by making sure that personnel at all levels in the company are familiar with *and* understand how the policies work. As noted in the cases discussed in this article, a manager or employee's ignorance of anti-discrimination policies will preclude the good faith efforts defense.²⁸⁸ Moreover, the company must ensure that those who are designated to educate or train employees concerning the requirements and prohibitions outlined in the anti-discrimination

283. The EEOC's Enforcement Guidance Manual addressing compensatory and punitive damages lists the following factors, which in the EEOC's opinion, are relevant to a consideration of whether punitive damages should be imposed against the employer: (1) the degree of egregiousness and nature of the respondent's conduct; (2) the nature, extent and severity of the harm to the complaining party; (3) the duration of the discriminatory conduct; (4) the existence and frequency of similar past discriminatory conduct; (5) evidence that the respondent planned and/or attempted to conceal or cover up the discriminatory practices or conduct; (6) the employer's actions after it was informed of discrimination; (7) proof of threats or deliberate retaliatory action against complaining parties for complaints to management or for filing a charge. See *Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991*, No. N-915.002 (July 14, 1992).

284. *Kolstad*, 527 U.S. at 544.

285. See *supra* note 244 and accompanying text.

286. See *supra* notes 224-25, 230-32 and accompanying text.

287. *Kolstad*, 527 U.S. at 544.

288. See *supra* notes 96-99, 164, 245, 262-64 and accompanying text.

laws, are well versed in those subjects. In other words, someone who does not understand the concept of reasonable accommodation or what constitutes sexual harassment, should not be training other managers or employees.²⁸⁹ Further, employers should require both managers and non-managers to attend periodic training courses which address the company policies and the laws prohibiting discrimination and harassment in the workplace.²⁹⁰ Such attendance should be confirmed in writing through a sign-in sheet or otherwise, and the sign-in sheets or other documentation should be kept in the employee's personnel file.

3. Educate the High Level Executives

As noted earlier, courts will *not* consider the good faith efforts defense if the circumstances require imposing direct liability, such as when someone acting as a "proxy" or "principal" of a corporation engages in discriminatory or harassing conduct. Because the CEO's and COO's of many corporations are often too busy to attend seminars and other training sessions given to lower-level managers, employers must make a concerted effort to ensure that these individuals receive the same information and training as the lower-level managers and non-managers. The most embarrassing moment of any high-level executive's career is when he or she expresses ignorance of the company's anti-discrimination policies and/or the requirements of Title VII during the course of litigation, either at trial or during a deposition. Further, such testimony will undoubtedly be used to impose direct liability for punitive damages or to at least undermine the company's claim that it exercised good faith efforts to comply with Title VII.

VII. CONCLUSION

There is no ready formula prescribing the good faith efforts necessary to preclude a jury's consideration of punitive damages for intentional discrimination. What is certain, however, is that courts considering claims under Title VII, the ADA, and other anti-discrimination statutes expect employers, at a minimum, to have adequate policies prohibiting workplace discrimination and to make good faith efforts to implement the policies. Moreover, all personnel from the CEO to the line employee should be familiar with the policies and the procedures for reporting harassment or discrimination in the workplace. Although the practical burden of complying with the mandate of *Kolstad* may be high, there typically is no other viable option for employers facing liability for punitive damages.

289. See *supra* notes 96-99, 164 and accompanying text.

290. It is also imperative to educate managers and other responsible personnel as to the appropriate manner in which an investigation into alleged workplace discrimination or harassment should be conducted. The good faith efforts defense will not apply in situations where an investigation is conducted in an inappropriate manner. See *supra* notes 188-92 and accompanying text.