

# You've Got to Have Faith: How Employers Can Avoid Punitive Damages After *Kolstad*



On June 22, 1999, the U.S. Supreme Court handed down a landmark decision that will affect virtually every federal employment discrimination action throughout the country. In *Kolstad v. American Dental Association*,<sup>2</sup> the Court ruled that employees who sue for job discrimination under Title VII of the Civil Rights Act of 1964 cannot recover for punitive damages if their employer made good faith efforts to comply with the law. The case arose when Carole Kolstad claimed that her employer, the American Dental Association, discriminated against her based on her gender by failing to promote her. Kolstad was an attorney for the dental association and was one of two candidates in the running for a promotion to the second-ranking position in the Association's Washington office. The other candidate, a male lawyer with the Association, Tom Spangler, received the promotion over Kolstad.

At trial before a jury, Kolstad claimed that the entire selection process was a sham. She urged that Spangler had been chosen for the position even before the formal selection process began and that this "preselection" procedure suggested an intent by the Association to discriminate on the basis of sex. Kolstad also introduced testimony at trial that Leonard Wheat, the acting head of the Washington office who had recommended that Spangler be selected for the post, had told sexually offensive jokes and had referred to certain prominent professional women in derogatory terms. In addition, Wheat allegedly refused to meet with Kolstad for several weeks regarding her interest in the position, and Kolstad

By Martin K. LaPointe

Martin LaPointe, a partner in the Chicago office of Oppenheimer Wolff & Donnelly, is a member of Oppenheimer's Labor and Employment Group. Mr. LaPointe is a former law clerk for the Honorable Charles R. Norgle, Sr. of the U.S. District Court for the Northern District of Illinois. He received his law degree from IIT Chicago-Kent College of Law.<sup>1</sup>

claimed that she had historically experienced difficulty gaining access to meet with Wheat.

At trial, the judge denied Kolstad's request for a jury instruction on punitive damages. The jury concluded that the Association had discriminated against Kolstad on the basis of sex and awarded her back pay totaling \$52,718. The appeals court agreed with the trial judge that Kolstad could not recover punitive damages in the case. On this issue, the appellate court held that she could not show "egregious" violations of Title VII, so a jury could not consider punitive damages.<sup>3</sup> However, by a 7 to 2 margin, the Supreme Court rejected the "egregiousness" standard for imposing punitive damages on employers in discrimination actions. Instead, the Supreme Court declared that employers can be held liable under Title VII if they intentionally discriminated "with malice or with reckless indifference" to workers' rights.

The Supreme Court's analysis, however, did not stop there. The Court went one step further in fashioning an entirely new standard for imposing liability for punitive damages in employment cases. In the context of discussing the issue of imputing liability to an employer for the acts of its managers, the Court, this time by the narrowest 5 to 4 margin, arrived at the new "good faith" standard, which perhaps provides employers with more certainty than the "egregiousness" standard in avoiding punitive damages. Interestingly, the imputation of liability and "good faith" standard issues had not even been briefed by the parties in *Kolstad*.<sup>4</sup>

The Court focused on one of the four ways to impute liability for punitive damages, *i.e.*, where an employee acting in a "managerial capacity" committed the wrong while "acting in the scope of employment"<sup>5</sup> and found that applying the "scope of employment" rule in the Title VII punitive damages context would reduce the incentive for employers to implement anti-discrimination policies. The Court reasoned that if an employer has made efforts to educate itself and its managers with respect to Title VII's requirements, then an employer's later violation of those requirements can be inferred to have been committed with malice or reckless indifference. Recognizing that Title VII was

an effort to promote prevention as well as remediation, the Court momentarily rejected the "scope of employment" agency principle in the punitive damages context and held that an employer would not be vicariously liable for punitive damages if it had made good faith efforts to comply with Title VII.<sup>6</sup>

Unfortunately, the Court failed to articulate who has the burden of demonstrating good faith efforts. In discussing the matters to be remanded, the Court stated only that it "may also be necessary to determine whether the [employer] had been making good faith efforts to enforce an anti-discrimination policy."<sup>7</sup> Although it may seem logical that the employer would have the burden to show its good faith efforts at compliance to avoid punitive damages, it is generally the plaintiff's burden to establish entitlement to any types of damages.

Be that as it may, the Supreme Court in *Kolstad* provided employers with a significant defense to federal discrimination cases: employers can avoid punitive damages for their managers' acts if they make good faith efforts to comply with the law. Although *Kolstad* specifically applied to a case under Title VII, its ruling will likely carry over to cases under the Americans with Disabilities Act (ADA), which incorporated the statutory remedial scheme of Title VII, and the Age Discrimination in Employment Act. It remains to be seen whether any state courts or agencies will follow *Kolstad*'s directives as to punitive damages. In any event, by rejecting the perhaps vague "egregious" standard, and instead applying the "maliciousness or reckless" standard coupled with the "good faith" construct, the Supreme Court arguably rendered a more favorable ruling than even anticipated by the defendant in *Kolstad*. In doing so, the Court provided a virtual "roadmap" to employers for avoiding punitive damage awards. The other consequence of this decision, of course, is that employers now have a tremendous incentive to focus on prevention measures in combating discrimination.

The underlying theme of *Kolstad* is consistent with *Faragher v. City of Boca Raton*,<sup>8</sup> and *Burlington Industries, Inc. v. Ellerth*,<sup>9</sup> two Supreme

Court decisions handed down just last year regarding sexual harassment. In *Faragher* and *Ellerth*, the Court provided employers with an affirmative defense to avoiding liability for the sexual harassment carried out by supervisors. The affirmative defense requires the employer to show that: (1) it adopted written policies and a remedial scheme designed to prevent harassment from occurring; and (2) the plaintiff-employee unreasonably failed to utilize those remedial procedures. It seems evident now with *Kolstad*, against the “backdrop” of *Faragher* and *Ellerth*, that the Supreme Court has embarked on a mission to provide employers with specific remedial guidelines to follow the law, which, if they do, will tend not only to promote the objectives of the discrimination laws by encouraging employers to root out discrimination and harassment, but ultimately provide employers with less exposure to discrimination and harassment lawsuits.

To establish “good faith” efforts to comply with the law, employers must, at a minimum, adopt strong anti-discrimination policies that clearly explain that discrimination or harassment of any kind will not be tolerated, and provide official channels and procedures for reporting discrimination and harassment internally. Indeed, the *Kolstad* Court appeared to imply that an employer’s good faith promulgation of anti-discrimination policies is the crucial step in guarding against the imposition of punitive damages.<sup>10</sup> Employers should also provide training for managers on discrimination and harassment issues, not only on a “one time” basis, but periodically throughout their tenure. In these important ways, employers may attempt to evince their good faith efforts to comply with the discrimination laws. The real test will be for small employers who, many times, for various reasons, do not have written policies in place and do not generally conduct formalized training.

Of course, the courts will now struggle with the “what is enough” question in judging employers’ efforts to comply with Title VII. Ironically, in some cases, the “good faith” standard enunciated in *Kolstad*, which focuses more on the employer’s independent efforts to comply with the law and not on the manager’s conduct

in question, may allow employers to insulate themselves from liability for punitive damages by constructing a “facade of compliance.” An employer may have what appear to be strong anti-discrimination written policies and procedures, but yet not do everything possible to prevent and root out insidious discrimination bubbling under the surface of its well-crafted policies. Courts, of course, will closely scrutinize an employer’s efforts in this regard to ensure more than just a cursory compliance has occurred; but, to be sure, this creates one area of uncertainty in future employment litigation even as the Supreme Court attempted to provide more certainty in creating a “good faith” safe harbor for employers. By in large, however, the Court’s decisions in *Kolstad*, *Ellerth*, and *Faragher* should ultimately reduce the number of discrimination and sexual harassment claims that are actually litigated, by providing clear guidelines on what employers can do in advance to comply with the discrimination laws.

In yet another example of the Supreme Court’s recent constrictions of the scope of the employment laws, the Supreme Court’s ADA decisions in *Sutton v. United Airlines, Inc.*,<sup>11</sup> *Murphy v. United Parcel Services, Inc.*<sup>12</sup> and *Albertsons, Inc. v. Kirkingburg*,<sup>13</sup> significantly reduced the reach of the ADA by holding that the use of corrective measures, such as eyeglasses, medications, and artificial devices, may be considered in assessing whether an individual is “disabled” under the statute. These decisions may in fact reduce the number of disability discrimination cases. However, there may be a counterbalance to the impact of these decisions. Aside from the applicability of *Kolstad*’s punitive damages standard to ADA cases, the Supreme Court has not offered any clear guidelines for employers who are attempting to navigate the very complex and treacherous strictures of the ADA. Applying *Kolstad*’s directives to disability discrimination cases may be even more difficult.

In certain instances, even with strong EEO policies, management may limit the opportunities for impaired individuals based on what it believes is best for those individuals, when in fact,

its actions are a product of stereotypic attitudes toward individuals with certain physical or mental impairments. Given the inherent complexities of the ADA and the narrowing of plaintiffs' opportunities for recovery under the Supreme Court's recent decisions of *Kolstad*, *Faragher*, and *Ellerth*, the result may be yet another redirection of employment litigation—the plaintiffs' bar may concentrate its efforts on disability discrimination actions, rather than face employers armed with anti-discrimination policies and procedures that shield them from exposure for “traditional” discrimination and sexual harassment.

In any event, in the Title VII context, where the Supreme Court has offered ample guidance, it is imperative that employers heed the Court's directives. Employers who now choose to ignore *Kolstad's* admonition to make “good faith” efforts to comply with the law may be left reel-

ing from punitive damage awards, and the courts stating resoundingly, “we told you so.” ♦

## Endnotes

---

- <sup>1</sup> The author would like to thank Lynn Geerdes, an associate at the Chicago office of Oppenheimer Wolff & Donnelly, for her contributions to this column.
- <sup>2</sup> 119 S. Ct. 2118 (1999).
- <sup>3</sup> 139 F3d 958, 965 (D.C. Cir. 1998).
- <sup>4</sup> See 119 S. Ct. at 2130 (Stevens, J., dissenting).
- <sup>5</sup> Restatement (Second) of Agency §217 C.
- <sup>6</sup> *Kolstad*, 119 S. Ct. at 2126-29.
- <sup>7</sup> *Id.* at 2130.
- <sup>8</sup> 118 S. Ct. 2275 (1998).
- <sup>9</sup> 118 S. Ct. 2257 (1998).
- <sup>10</sup> The Court quoted from the case of *Harris v. L & L Wings, Inc.*, 132 F3d 978, 984 (4th Cir. 1997) (“good faith . . . institution of a written sexual harassment policy goes a long way towards dispelling any claim about the employer's ‘reckless’ or ‘malicious’ state of mind”).
- <sup>11</sup> 119 S. Ct. 2139 (1999).
- <sup>12</sup> 119 S. Ct. 2133 (1999).
- <sup>13</sup> 119 S. Ct. 2162 (1999).