

ELIMINATING THE NEED FOR CAPS ON TITLE VII DAMAGE AWARDS: THE SHIELD OF *KOLSTAD V. AMERICAN DENTAL ASSOCIATION*

*Michael C. Harper**

INTRODUCTION.....	477
I. THE COMPROMISE OF THE 1991 ACT: CAPPED DAMAGES	480
II. AGENCY PRINCIPLES FOR EMPLOYER LIABILITY UNDER TITLE VII.....	485
A. Employer Liability for Compensatory Damages ...	485
B. Employer Liability for Punitive Damages.....	489
III. REPLACING THE DAMAGE CAPS WITH THE <i>KOLSTAD</i> SHIELD	494
A. A Better Fit with Statutory Goals	494
B. Clarifying the Meaning of <i>Kolstad</i>	496
CONCLUSION.....	506

INTRODUCTION

Senator Kennedy’s extraordinary career as a legislator reflected his special combination of principled commitment to particular progressive goals and a pragmatic understanding of the compromises that must be made to take significant steps toward those goals. This combination was especially important for his role in shepherding the Civil Rights Act of 1991 (1991 Act) to enactment.¹ The 1991 Act critically refurbished the promise of discrimination-free employment opportunities made in Title VII of the Civil Rights Act of 1964 (Title VII).² Its enactment would not have been possible without Senator Kennedy’s ability and willingness to negotiate a compromise acceptable to several essential Republican and conservative Democratic legislators. The capping of the new compensatory and punitive damage remedies pro-

* Professor of Law and Barreca Labor Relations Scholar, Boston University School of Law. I thank Michael Riordan for research assistance.

1. Civil Rights Act of 1991, Pub. L. No. 012-166, 105 Stat. 1071 (codified as amended in scattered sections of 2, 16, 29, and 42 U.S.C. (2006)).

2. 42 U.S.C. §§ 2000e-1 to -17 (2006).

vided for Title VII actions by the 1991 Act was vital to that compromise.³ Senator Kennedy's acceptance of caps as necessary in 1991, however, did not mean that he was satisfied with the caps' restrictions on the more effective Title VII compensatory and punitive damages remedial options offered by the 1991 Act. Senator Kennedy continued to offer amendments to remove the caps from the 1991 Act's remedial provision through the last full Congress in which he served.⁴

Despite Senator Kennedy's persistent and principled opposition to the limits on damages set by the 1991 Act, he was never able to convince Congress that capping punitive damages was unnecessary to protect employers from the possibility of undeserved bankruptcies or effective financial ruin.⁵ The business community and some members of Congress, whose support was critical to the passage of the 1991 Act, expressed concern that by granting extraordinary punitive damages to appealing discrimination victims, juries might effectively shut down employers who sincerely wanted to comply with the non-discrimination commands of Title VII.⁶ In response to this concern, the caps were set at different levels depending on the size of the employer, based on the assumption that larger employers could afford to pay larger amounts without the threat of financial ruin.⁷ In a further expression of concern that punitive damages not be too freely imposed, Congress also required that plaintiffs seeking these damages demon-

3. For the story of the development of the legislation, see Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991*, 46 RUTGERS L. REV. 1 (1993).

4. See Civil Rights Act of 2008, S. 2554, 110th Cong. § 4 (2007) (incorporating the Equal Remedies Act of 2007, S. 1928, 110th Cong. § 2 (2007)). For Senator Kennedy's first introduction of legislation to remove the caps, see the Equal Remedies Act of 1991, S. 2062, 102d Cong. (1991).

5. Senator Kennedy spoke against the compromise he accepted as necessary to the enactment of the 1991 Act a few days after the legislation was signed by then President George H.W. Bush on November 21, 1991. See 137 CONG. REC. S18375 (daily ed. Nov. 26, 1991) (statement of Sen. Edward Kennedy) ("The standard of proof and the definition of intentional discrimination are identical under the Civil Rights Act of 1991 and the long-standing race discrimination statute [§ 1981, which has no caps]. There is no reason to expect significantly more litigation, or significantly larger jury awards under the 1991 Act.").

6. See Govan, *supra* note 3, at 107–24, 186–88. As stated by the Second Circuit Court of Appeals, "the purpose of the cap is to deter frivolous lawsuits and protect employers from financial ruin as a result of unusually large awards. See 137 CONG. REC. S15478-79 (1991) (statement of Sen. Dale Bumpers); 137 CONG. REC. S15472 (1991) (statement of Sen. Robert Dole).

7. See Govan, *supra* note 3 at 107–08, 230.

strate an employer's "malice or . . . reckless indifference" toward the plaintiff's rights to be free of discrimination.⁸

Congress should now reconsider whether the rationale of protecting innocent employers from financial ruin provides adequate reason to retain the caps that Senator Kennedy hoped would be only a temporary qualification of the damage remedy provided by the 1991 Act. This reconsideration should take place in the light of the Supreme Court's seminal decision in *Kolstad v. American Dental Association*,⁹ which set conditions for employer liability for punitive damages under Title VII for the malicious or recklessly indifferent discriminatory acts of the employer's agents. The Court held that regardless of the degree of even a managerial agent's culpability, the agent's employer is not liable for punitive damages under Title VII if the agent's discriminatory decisions or actions "are contrary to the employer's good faith efforts to comply with Title VII."¹⁰ This holding obviates the need for damage cap protection of innocent employers, and should enable employers to shield themselves from the threat of punitive damages by adopting and implementing reasonable anti-discrimination policies. It should be read to make vulnerable to such damages only those employers whose controlling owners and managers fail to demonstrate good faith through reasonable efforts to restrain discrimination by agents. In other words, *Kolstad* exposes only those controlling owners and managers whose operations no reasonable member of Congress would want to defend—at least overtly—as worthy of protection from the threat of even a financially devastating verdict.

Notwithstanding the apparent intent of the *Kolstad* Court to protect reasonable employers from punitive damages, the Court's shield has been punctured by many lower court decisions that ignore the distinctions the Court drew between the standards for employer liability for compensatory damages and those for employer liability for punitive damages.¹¹ In reviewing the need for caps on the Title VII damage remedy, however, Congress would not have to accept the lower courts' weakening of *Kolstad*'s protection. That weakening could be

8. 42 U.S.C. § 1981a(b)(1).

9. 527 U.S. 526 (1999).

10. *Id.* at 545.

11. *See infra* text accompanying notes 103–35. *Kolstad* has proven to be the rare Title VII Supreme Court decision that has been re-interpreted by the lower courts to help plaintiffs. This may be because *Kolstad* is about standards for liability after a statutory violation has been found, while most Title VII doctrine formulated by the Court concerns standards for determining whether there has been a statutory violation. Interpreting the latter doctrine to assist plaintiffs generally would burden lower courts with more trials and decisions.

corrected if Congress—in the pragmatic mode of Senator Kennedy—were to balance the original concern that motivated the caps with the dual principles of full victim compensation and effective deterrence that initially moved the senator to work for uncapped damage remedies. Congress could formulate a codification of *Kolstad* to confine the imposition of punitive damages only to culpable employers acting in bad faith. Doing so would eliminate the need to limit either the punitive damages that could be imposed on such employers or the compensation that could be granted to victims of a Title VII violation. Therefore, codifying *Kolstad* would better serve not only the compensatory and deterrent goals of Title VII, but also the objective of protecting well-meaning employers from the financial ruin that could result from the grant of even capped punitive damages to multiple employees.

This article argues for an amendment to Title VII that, in the tradition of Senator Kennedy, addresses the legitimate concerns of the responsible employer community while also ensuring fulfillment of the compensatory and deterrent goals of Title VII. Part I briefly recounts the story of the 1991 Act, including the reasons for the new damage remedies and the caps limiting that remedy. Part II explains the principles developed by the Supreme Court for employer liability under Title VII for the discriminatory actions of agents. This part stresses the different standards articulated by the Court in *Kolstad* for employer liability for punitive damages. Part III explains how some lower courts have misinterpreted and weakened *Kolstad*, highlighting the misunderstandings that Congress should address in new legislation that eliminates the caps on Title VII damages. The conclusion briefly describes why Congress might legislate amendments to Title VII in response to *Kolstad* to achieve the compensatory and deterrent goals of the legislation and of Senator Kennedy.

I.

THE COMPROMISE OF THE 1991 ACT: CAPPED DAMAGES

Two legal developments explain the enactment of the Civil Rights Act of 1991. The impetus provided by both is reflected in the formal findings and purposes of the 1991 Act itself.¹² First, Congress intended “to respond to recent decisions of the Supreme Court,” including *Wards Cove Packing Co. v. Antonio*,¹³ which Congress

12. Civil Rights Act of 1991, §§ 2, 3, Pub. L. No. 012-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981 note (2006)).

13. 490 U.S. 642 (1989).

deemed to have “weakened the scope and effectiveness of Federal civil rights protections.”¹⁴ The 1991 Act accomplished this in two ways: by codifying the disparate impact cause of action¹⁵ first pronounced by the Court twenty years earlier in *Griggs v. Duke Power Co.*,¹⁶ and by reversing or modifying the holdings of several other decisions of the Court in its 1988–89 term.¹⁷

Second, Congress appreciated the need to provide more “appropriate remedies for intentional discrimination and unlawful harassment in the workplace.”¹⁸ This need became apparent in light of the disparity between the legal damages the Court made available for race discrimination in private employment through its interpretation of section 1981¹⁹ and the limited equitable relief available for sex and other proscribed forms of employment discrimination available under section 706(g) of Title VII.²⁰ The lack of legal damages available for sex discrimination suits became more salient after the Court’s 1986 decision in *Meritor Savings Bank v. Vinson*,²¹ which approved a cause of action for hostile work environment sexual harassment. The theory of discrimination recognized by the Court in *Meritor* encompassed the disparate treatment of women resulting in an “abusive working environment,” even without any formal or tangible change in employment status.²² If this discrimination did not result in constructive discharge,²³ such disparate treatment could not be remedied by the equitable relief available under section 706(g) because such relief could

14. Civil Rights Act of 1991, §§ 2(2), 3(4).

15. See Civil Rights Act of 1991, § 105 (adding subsection (k) to 42 U.S.C. 2000e-2 (2006)).

16. 401 U.S. 424 (1971); see Civil Rights Act of 1991, § 3(2).

17. See, e.g., Civil Rights Act of 1991, § 101 (overturning the holding in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989)); *id.* § 107 (modifying the holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)); *id.* § 108 (modifying the holding in *Martin v. Wilks*, 490 U.S. 755 (1989)); *id.* § 112 (modifying the holding in *Lorance v. AT&T Techs.*, 490 U.S. 900 (1989)).

18. *Id.* § 3(1).

19. 42 U.S.C. § 1981 (2006). This section was originally enacted as part of the Civil Rights Act of 1866. The Civil Rights Act of 1866, ch. 31, §1, 14 Stat. 27.

20. 42 U.S.C. § 2000e-5(g)(2)(A) (2006).

21. 477 U.S. 57 (1986).

22. *Id.* at 66–67.

23. Under *Meritor* and its progeny, to be actionable under Title VII discriminatory harassment must be sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment. *Id.* at 67; see also, e.g., *Oncale v. Sundowner Offshore Servs., Inc.* 523 U.S. 75, 78 (1998) (“[P]rohibition of harassment . . . forbids only behavior so objectively offensive as to alter the ‘conditions’ of the victim’s employment.”); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (“Conduct. . .not severe or pervasive enough to create an objectively hostile or abusive work environment. . .is beyond Title VII’s purview.”).

provide no more than reinstatement to a discriminatorily denied employment status, with complementary back pay for the interim period of lost compensation. By contrast, victims of intentional race discrimination in private employment, including victims of racial harassment, were given the opportunity to collect legal damages by the Court's confirmation that section 1981's guarantee of rights to contract for all citizens equal to those "enjoyed by white citizens"²⁴ included the right to contract for employment with private employers.²⁵

As part of the 1991 Act, Congress acted to at least mitigate the disparity created by this set of legal developments by enacting a new section, 1981a.²⁶ This new section enables a victim of intentional discrimination made unlawful under Title VII to recover, in addition to the equitable relief available under section 706(g), compensatory and punitive damages if she cannot recover such damages under section 1981. Congress also included a provision making these damage remedies applicable to the Americans with Disabilities Act (ADA), which had been enacted a year earlier.²⁷ Section 1981a also codifies an express limitation of punitive damages to cases in which an employer "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."²⁸ Most significantly, as part of a compromise that the sponsors of the legislation accepted to ensure its enactment, section 1981a includes a provision capping the "sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded" to levels that vary based on the number of employees of the responsible employer.²⁹

24. Section 1981 provides, in pertinent part, that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . ." The Court has held this provision to proscribe "ancestry or ethnic" discrimination, but not unrelated forms of discrimination such as sex, religion, age, or even national origin. *See Saint-Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987).

25. After holding in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436–39 (1968), that private discrimination is covered by § 1982, a companion provision to § 1981 from the same 1866 statute, the Court suggested in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459–61 (1975), that § 1981 also reaches private discrimination in contracting. It expressly so held the following year in *Runyon v. McCrary*, 427 U.S. 160, 169 (1976).

26. 42 U.S.C. § 1981a (2006).

27. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213.

28. 42 U.S.C. § 1981a(b)(1).

29. *Id.* § 1981a(b)(3). Section 1981a is not limited to Title VII or ADA actions against employers, and both statutes also proscribe discrimination by employment

The limit is \$50,000 for an employer with more than fourteen and fewer than 101 employees; \$100,000 for an employer with more than 100 and fewer than 201; \$200,000 for an employer with more than 200 and fewer than 501 employees; and \$300,000 for an employer with more than 500 employees.³⁰ The caps have not been raised since the enactment of the 1991 Act. As they do not apply to the damage remedy that remains available under section 1981 to victims of race discrimination, the caps continue the divergent treatment of such discrimination from other forms of proscribed employment discrimination, including that based on sex.

As chairman of the Senate's Labor and Human Resources Committee and the Democratic Senate majority's primary negotiator with the White House of President George H.W. Bush, Senator Kennedy played a key role in structuring the legislative compromise that became the 1991 Act—including its new remedy of capped compensatory and punitive damages. The first formulation of the legislation that would become the 1991 Act was introduced in 1990 with an unlimited remedy for compensatory and punitive damages, as well as an associated right to trial by jury.³¹ Even before the first cloture vote on this legislation in the Senate, however, Senator Kennedy had to agree to accept some sort of limit on at least the punitive damage awards,³² as some senators expressed concern that unlimited punitive damages could lead to the demise of at least small economic operations.³³ As Senator Kennedy eventually argued forcefully to the House-Senate conference—which was formed to reconcile the versions of the 1990 legislation passed by the two chambers—a cap on punitive damages for all businesses had to be accepted as the price of obtaining support from some Senate Democrats.³⁴ Nevertheless, Congress could not overcome President Bush's veto of the reconciled legislation³⁵ and had to try again the following year, after the mid-term elections.

agencies and labor organizations. Section 1981a, however, provides no set limitations on damages for such actions.

30. *Id.* The number of employees is to be calculated based on employment "in each of 20 or more calendar weeks in the current or preceding calendar year." *Id.*

31. H.R. 4000, 101st Cong. § 8 (1990); S. 2104, 101st Cong. § 8 (1990).

32. *See* 136 CONG. REC. S9928–29 (daily ed. July 18, 1990) (statement of Sen. David Boren).

33. *See id.* at S9907–09 (statement of Sen. Dale Bumpers); *id.* at S9928 (statement of Sen. David Boren).

34. *See* Govan, *supra* note 3, at 123–24.

35. 136 CONG. REC. S16562 (daily ed. Oct. 2, 1990) (statement of Pres. George H.W. Bush) (Civil Rights Act of 1990—Veto).

When it was first introduced in 1991, the new legislation also did not include any limit on punitive damages.³⁶ The business community, however, was now more mobilized against the new damage remedy, and it became clear that some type of cap on at least punitive damage awards would have to be included in order for the legislation to be enacted.³⁷ Conservatives also strongly opposed the legislation because it purported to reject the Court's attempt in *Wards Cove* to weaken or at least limit the disparate impact cause of action,³⁸ and the threat of another presidential veto loomed. Senator Kennedy ultimately chose to work with Senator John Danforth, one of the leading Republican advocates for a meaningful civil rights act,³⁹ who was attempting to achieve a compromise with the White House through proposals that included limits on compensatory as well as punitive damages.⁴⁰ Senator Kennedy negotiated with Senator Danforth and the White House to obtain the strongest legislation possible.⁴¹ As part of this compromise, multiple levels of caps on damages were set based on the employer's size.⁴² Senator Kennedy might have achieved a better deal on the damage remedy, but the negotiations also concerned the legislation's treatment of the Court's decisions from the 1988–89 term, including *Wards Cove*.

Senator Kennedy's acceptance of the compromise was an expression of his pragmatism. His introduction of legislation a few weeks later to remove the caps was an expression of his principled commitment to providing remedies for sex and other forms of proscribed discrimination that were equivalent to the remedies provided in section 1981 for race discrimination.⁴³ The Supreme Court's post-1991 treatment of employer liability for damages under Title VII suggests how Senator Kennedy's pragmatism and principle could work together to justify eliminating the caps without exposing relatively innocent employers to potentially unlimited punitive damages.

36. See H.R. 1, 102d Cong. (1991).

37. See Govan, *supra* note 3, at 173–74; 186–87.

38. See *id.* at 70.

39. Senator Danforth had attempted to broker a compromise between the White House and the liberal Democratic leadership in the previous Congress. See *id.* at 61–64.

40. See *id.* at 206–07.

41. See *id.* at 225–30.

42. Civil Rights Act of 1991, § 102, Pub. L. No. 012-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981a(b)(3) (2006)).

43. See *supra* text accompanying notes 25–32.

II.

AGENCY PRINCIPLES FOR EMPLOYER LIABILITY
UNDER TITLE VIIA. *Employer Liability for Compensatory Damages*

As explained above, development of the Title VII harassment cause of action for discriminatory hostile work environments highlighted the need to reconsider Title VII remedies. It also illuminated the importance of articulating doctrine to define an employer's liability for the discriminatory practices of its agents. Title VII makes it "an unlawful employment practice for an employer" to engage in discrimination on the basis of "race, color, religion, sex, or national origin";⁴⁴ it does not directly prohibit discrimination by an employer's agents. Since the definition of employer includes "any agent" of an employer otherwise covered by the act,⁴⁵ however, the courts had no difficulty finding an employer liable for formal decisions, such as discharges, promotions, or hiring rejections, made in the name of the employer by authorized agents.⁴⁶ The courts did not need to choose whether to label the employer's liability either as "direct" (i.e., because the decisions were made for the employing company by an agent with authority to do so) or "indirect" or "vicarious" (i.e., because the decisions were made by agents within the scope of their employment duties).

Discriminatory hostile work environment harassment, however, posed problems for courts because such harassment not only is not committed in the name of the employer, but also is generally not committed by agents within the scope of their employment. Instead, such actions generally are "an independent course of conduct not intended by the employee to serve any purpose of the employer."⁴⁷ In *Meritor Savings Bank*, the Court stated that while in some cases agency principles may be the basis for employer liability under Title VII for their agents' harassments of employees, these principles do not make employers "always automatically liable for sexual harassment by their supervisors."⁴⁸

44. 42 U.S.C. § 2000e-2(a) (2006).

45. *Id.* § 2000e(b).

46. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 799–800 (1973) (assuming without discussion that corporate employer is responsible for refusal to hire by its authorized employee-agent).

47. RESTATEMENT (THIRD) OF AGENCY § 707(2) (2006). *But see, e.g., Primeaux v. United States*, 102 F.3d 1458, 1462–63 (8th Cir. 1996); *Lyon v. Carey*, 533 F.2d 649, 655 (D.C. Cir. 1976) (expanding agency law principles to find sexual assaults within the scope of employment).

48. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986).

The issue of an employer's liability for its agents' discriminatory harassment became much more salient after the 1991 Act provided for a meaningful damage remedy for such harassment. The lower courts had special difficulty reaching a consensus on the standard for employer liability for hostile work environment harassment committed by supervisors against subordinates, whether or not the harassment included unrealized threats of formal adverse decisions within the scope of the supervisor's authority. It took the Supreme Court only seven years after passage of the 1991 Act to resolve the lower courts' debate. It did so in two cases, one involving overt unrealized threats of formal discriminatory adverse decisions, *Burlington Industries, Inc. v. Ellerth*,⁴⁹ and one involving harassment without such overt threats, *Faragher v. City of Boca Raton*.⁵⁰ In two separate decisions,⁵¹ with somewhat different analyses of why the various approaches of the lower courts and the Restatement Second of Agency did not strike the best balance, the Court pronounced a new and carefully phrased identical holding for what it termed an employer's "vicarious" liability for discriminatory harassment by its supervisors not involving the formal—or what it termed "tangible"⁵²—decisions for which the employer's Title VII liability was always clear:

49. 524 U.S. 742, 742–43 (1998).

50. 524 U.S. 775 (1998). The Court in *Faragher* stressed that supervisors' threats of formal sanctions need not be overt to be present:

[N]eat examples illustrating the line between the affirmative and merely implicit uses of power are not easy to come by in considering management behavior. Supervisors do not make speeches threatening sanctions whenever they make requests in the legitimate exercise of managerial authority, and yet every subordinate employee knows the sanctions exist

Id. at 805.

51. The Court did not join the cases and assign them to the same chambers for an opinion, presumably because the justices were not certain the same holding should apply until after the opinions were completed. As framed by several decisions of the judges of the Seventh Circuit sitting *en banc* in *Ellerth*, the issue in that case was at least in part whether unrealized threats should classify a case as one involving "quid pro quo" harassment for which there should be unqualified employer vicarious liability. See *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490 (7th Cir. 1997) (noting that there were at least three different opinions on the issue of *quid pro quo* liability). Justice Kennedy's opinion for the Court in *Ellerth* concluded that the nature of the actions taken by the supervisor rather than the *quid pro quo* classification should determine the standard for employer liability. *Ellerth*, 524 U.S. at 754.

52. The Court in *Ellerth* defined a tangible employment action as "an official act of the enterprise, a company act." *Ellerth*, 524 U.S. at 762. The Court stressed this definition in a later case, *Pennsylvania State Police v. Suders*, 542 U.S. 129, 140–41 (2004), in which it clarified for the lower courts that hostile environment harassment, even if it is so severe as to warrant a finding of constructive discharge, is not governed by the same automatic employer liability standard as are "tangible" decisions such as actual discharges. The *Suders* Court further stated:

When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.⁵³

The Court did not extend this holding to govern employer liability for co-worker discriminatory harassment of other employees. Instead, in both *Ellerth*⁵⁴ and *Faragher*,⁵⁵ the Court indicated satisfaction with the lower courts' consensus that employer liability for such harassment be governed by a negligence standard. This standard imposes liability on employers under Title VII for co-worker discriminatory harassment only if the employer knew or should have known of the harassment and failed to take appropriate corrective action.⁵⁶ The negligence standard, which continues to be applied by all courts for co-worker harassment, differs in three ways from the affirmative defense-qualified vicarious liability standard adopted by the Court in *Ellerth* and *Faragher* for the supervisory hostile environment standard. First, the affirmative defense requires proof of the harassed employee's unreasonable failure to respond, as well as the employer's unreasonable failure to exercise care.⁵⁷ Second, the affirmative defense imposes the burden of proof on the employer, while the negligence standard imposes the burden of proving the employer's lack of

Unlike injuries that could equally be inflicted by a co-worker, . . . tangible employment actions "fall within the special province of the supervisor," who "has been empowered by the company as . . . [an] agent to make economic decisions affecting other employees under his or her control." . . . Often, the supervisor will "use [the company's] internal processes" and thereby "obtain the imprimatur of the enterprise." Ordinarily, the tangible employment decision "is documented in official company records, and may be subject to review by higher level supervisors."

Id. at 144–45 (quoting *Ellerth*, 524 U.S. at 762).

53. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

54. *Ellerth*, 524 U.S. at 760.

55. *Faragher*, 524 U.S. at 799.

56. *Id.* at 799 (citing *Fleming v. Boeing Co.*, 120 F.3d 242, 246 (11th Cir. 1997); *Blankenship v. Parke Care Ctrs., Inc.*, 123 F.3d 868, 872–73 (6th Cir. 1997); *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 149 (2d Cir. 1997); *Yamaguchi v. U.S. Dept. of Air Force*, 109 F.3d 1475, 1483 (9th Cir. 1997); *Varner v. Nat'l Super Mkts., Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996); *McKenzie v. Ill. Dept. of Transp.*, 92 F.3d 473, 480 (7th Cir. 1996); *Andrade v. Mayfair Mgmt., Inc.*, 88 F.3d 258, 261 (4th Cir. 1996); *Waymire v. Harris Cnty.*, 86 F.3d 424, 428–29 (5th Cir. 1996); *Hirase-Doi v. U.S. West Commc'ns, Inc.*, 61 F.3d 777, 783 (10th Cir. 1995); *Andrews v. Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990)).

57. See *supra* text accompanying note 62.

care on the harassed employee.⁵⁸ Third, proving negligence requires proving causation—that the employer’s failure to exercise care made a difference to the harm suffered by the employee—while the vicarious liability standard for supervisory harassment does not.⁵⁹

Notwithstanding these differences, the affirmative defense-qualified vicarious liability standard for hostile environment supervisory harassment, like the negligence standard for co-worker harassment, enables employers to avoid liability for almost all hostile environment harassment through reasonable adoption and implementation of an anti-harassment policy. Because a single incident of harassment may be actionable if it is sufficiently severe, such as in the case of a sexual assault, there are cases where the second prong of the affirmative defense cannot be met because the employee may not have had a reasonable opportunity to invoke an employer’s reasonable system to control harassment.⁶⁰ Furthermore, some courts have understood that some subordinate employees may reasonably choose not to invoke a reasonable anti-harassment policy against an especially intimidating supervisor.⁶¹ However, decisions finding an employer with a reasonable anti-harassment policy liable for supervisory hostile environment harassment are rare. The Court in *Faragher* and *Ellerth* intended this insulation of reasonable employers. In both cases, it stressed that the affirmative defense provided incentives to employers, as well as employees, to avoid the harm the statute was primarily designed to prevent, rather than simply to redress harm.⁶² As stated in *Faragher*, credit should be given to “employers who make reasonable efforts to

58. Following the common law tradition, the lower courts assign the burden of proving the employer’s negligence to plaintiffs. *See, e.g.*, *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 401 (1st Cir. 2002); *Blankenship*, 123 F.3d at 872. Justice Thomas thus argued in his dissent in *Faragher* that the Court should have required the plaintiff to prove the defendant city’s negligence. *Faragher*, 524 U.S. at 810, 811 (Thomas, J., dissenting).

59. Justice Thomas also argued in his *Faragher* dissent that the city should have been given a chance to show any deficiency in its anti-harassment policy made no difference to the plaintiff’s treatment. *Id.*

60. *See, e.g.*, *Greene v. Dalton*, 164 F.3d 671, 674–75 (D.C. 1999) (finding even if defendant employer had a reasonable system, it could be liable under Title VII for rape if a reasonable person would not have come forward with a complaint earlier).

61. *See, e.g.*, *Doe v. Lansal, Inc.*, No. 08-CV-5983, 2009 U.S. Dist. LEXIS 119385, at *29–30 (N.D. Ill. Dec. 22, 2009) (finding a reasonable juror could conclude that the plaintiff had an “objective basis for her belief that approaching management would either be futile or result in her termination.”); *Johnson v. West*, 218 F.3d 725, 731–32 (7th Cir. 2000) (holding a reasonable employer may still be liable if an employee reasonably did not take advantage of the corrective system because of intimidation and threats from a harasser).

62. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998); *Faragher*, 524 U.S. at 805–07.

discharge their duty.”⁶³ Employers are thus strictly liable for materially adverse decisions imposed on their employees by agents acting with formal authority, but are only conditionally liable—generally because of some level of culpability—for the discriminatory harassment of their employees.⁶⁴

B. Employer Liability for Punitive Damages

In the term following the *Ellerth* and *Faragher* decisions, the Court again interpreted the damage remedy provided by the 1991 Act to encourage “employers to implement antidiscrimination programs.”⁶⁵ It did so by recasting other common law principles, in this instance, those imputing liability for punitive damages to principles for their agents’ discriminatory actions. The Court granted certiorari in *Kolstad v. American Dental Association*⁶⁶ to resolve a split among the courts of appeals regarding the meaning of the 1991 Act’s requirement that punitive damages be granted only when the plaintiff demonstrates that the employer discriminated “with malice or reckless indifference to the federally protected rights” of the plaintiff.⁶⁷ Some lower court decisions, such as the one the Court reviewed in *Kolstad*, had found that the “malice or reckless indifference” standard required proof that a defendant’s discriminatory conduct was egregiously bad.⁶⁸ The Supreme Court, however, held that the “terms ‘malice’ and ‘reckless’ ultimately focus on the actor’s state of mind,”⁶⁹ and for purposes of the 1991 Act’s punitive damage remedies “pertain to the employer’s knowledge that it may be acting in violation of federal law, not its

63. *Faragher*, 524 U.S. at 806.

64. One might argue that the *Ellerth* and *Faragher* decisions do not preclude strict employer vicarious liability for some supervisory non-tangible or even co-worker hostile work environment harassment that clearly is rendered within a narrowly defined scope of the harassers’ employment. A supervisor, for instance, may use crude sexist or racist language repeatedly in directing or evaluating employees in the discharge of their supervisory responsibilities. Co-workers also may use such language repeatedly in the course of discharging their own work responsibilities. But the Court in *Faragher* gave particular consideration to using the agency “scope of employment” definition to set the boundaries of employer liability for hostile work environment harassment, and then rejected it for supervisory harassment in favor of its affirmative defense-qualified standard, in part to preserve a negligence standard for co-worker harassment. *Faragher*, 524 U.S. at 800–06.

65. *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 544 (1999).

66. *Id.* at 529–30, 533.

67. 42 U.S.C. § 1981a(b)(1) (2006).

68. See, e.g., *Kolstad v. Am. Dental Ass’n*, 139 F.3d 958, 965 (D.C. Cir. 1998) (en banc), *vacated*, 527 U.S. 526 (1999); see also *Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627, 636 (7th Cir. 1996) (The “amount of punitive damages to which a plaintiff is entitled is determined by the degree of egregiousness” of conduct.).

69. *Kolstad*, 527 U.S. at 534–35.

awareness that it is engaging in discrimination.”⁷⁰ The egregiousness of the defendant’s conduct may be relevant to this state of mind, but a defendant may be subject to punitive damages regardless of the nature of its conduct where the law is clear and the discriminating actors cannot “reasonably believe” that their actions were legal under Title VII.⁷¹

This resolution of the issue in *Kolstad* was a victory for the plaintiff and for Title VII plaintiffs generally because it seemed to make punitive damages available in any standard case of intentional discrimination unless there was some debatable question of law that would allow the defendant to justify its conduct. Justice O’Connor’s opinion for five justices, however, offered employers a more certain way to avoid punitive damages, even in cases in which their agents acted egregiously, by pronouncing law on an additional issue not addressed by the parties: the standard for imposing punitive damages on an employer for the malice or reckless indifference of its discriminating agents.⁷²

Justice O’Connor began her explanation of this standard by stating that an “inquiry” into an employer’s liability for punitive damages “does not end” with a showing of malice or reckless indifference on the part of an employer’s agents.⁷³ This is so even where the allegedly discriminatory act was a formal, tangible adverse decision, such as the denial of a desired promotion in *Kolstad*,⁷⁴ for which the imposition of compensatory damages on the employer would not be an issue. Justice O’Connor continued the “inquiry” by stressing that, as expressed in the Restatement Second of Agency, the common law provides additional alternative conditions for imposing punitive damages on a principle even where compensatory damages can be imposed.⁷⁵ These alternative conditions are:

- (a) the principal authorized the doing and the manner of the act, or
- (b) the agent was unfit and the principal was reckless in employing him, or

70. *Id.* at 535.

71. *See id.* at 537–39.

72. *Id.* at 539–46. In an opinion for four justices, Justice Stevens criticized the *Kolstad* majority for its “decision to volunteer commentary on an issue that the parties have not briefed and that the facts of this case do not present.” *Id.* at 547 (Stevens, J., concurring in part and dissenting in part).

73. *Id.* at 539.

74. *See id.* at 530–31; *infra* text accompanying note 91.

75. *Id.* at 542–43 (quoting RESTATEMENT (SECOND) OF AGENCY § 217 C (1958)).

(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.⁷⁶

Justice O'Connor, however, found that these alternative conditions, or at least alternative (c), provide employers with inadequate protection from punitive damages. She explained that because an employee may act within the "scope of employment" when discharging duties for an employer even contrary to an employer's directions, under alternative (c) an employer "who makes every effort to comply with Title VII could be liable [for punitive damages] for the discriminatory acts of agents acting in a 'managerial capacity.'"⁷⁷ She asserted that this would be contrary to the common law principle against imposing punitive damages on the innocent and would "reduce the incentive for employers to implement antidiscrimination programs" and "educate themselves and their employees on Title VII's prohibitions."⁷⁸ In order to avert such effects, Justice O'Connor concluded for the Court that "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.'"⁷⁹

Justice O'Connor did not illuminate the Court's new principles for employer liability for punitive damages through application of the principles to the facts of *Kolstad*. She instead announced the Court's decision to remand, in part to give the parties "an opportunity to marshal the record evidence in support of their views on the application of agency principles."⁸⁰ Justice O'Connor's brief discussion of the issues of fact that the lower courts may have to face, in tandem with her explanation of the need for recasting agency principles, however, clarified the Court's intent for the principles.

First, the Court intended its new punitive damages liability principles to apply to Title VII cases where an agent's malicious or reckless intentional discrimination tainted a formal, tangible employment decision for which liability for compensatory damages would not be an issue. As suggested above, *Kolstad* itself was such a case. Carole

76. *Id.*

77. *Id.* at 544.

78. *Id.* at 544–45.

79. *Id.* at 545.

80. *Id.* at 546. The Court also remanded the question of whether the plaintiff could demonstrate the mental state of knowledge of possible illegality that the Court had determined is "requisite" to a finding of malice or reckless indifference. *Id.* at 546; *see also* text accompanying notes 73–77.

Kolstad, the plaintiff, claimed she had been denied a deserved promotion in the Washington office of the defendant American Dental Association (Dental Association) because of the sex-based bias of the two Dental Association executives involved in making the promotion decisions: Leonard Wheat, then-acting head of the Washington office, and William Allen, then serving as the Dental Association's acting highest executive officer in its central Chicago office.⁸¹ Justice O'Connor nonetheless directed the Court's liability principles to be applied to this claim, stating that on remand it might be necessary to determine not only whether the executive actually making the decision acted with malice or recklessness, but also whether he was serving in a managerial capacity and whether the Dental Association "had been making good faith efforts to enforce an anti-discrimination policy."⁸²

Second, Justice O'Connor's listing of the Dental Association's good faith standard as an issue that might have to be resolved on remand⁸³ confirms that the good faith shield to punitive damages liability offered to employers by the Court might be used even where the plaintiff can demonstrate that a senior executive of the employer, such as Wheat or Allen, acted with malice or recklessness toward the plaintiff's Title VII rights.⁸⁴ Justice O'Connor's approach to the factual issues in *Kolstad* confirms that the good faith shield is intended to protect employers from punitive liability for the mere failure to control actions against company policy by rogue agents, regardless of the importance or authority of these agents. Presumably, a chief executive officer's overt announcement that he or she did not intend to abide by a formal anti-discrimination policy, along with any governing board's failure to take action against the executive, would negate any claim of good faith. Yet a chief executive's covert act of malicious discrimination, whether in a tangible decision or through harassment, would not be the basis for punitive damages against a company that made good faith efforts to implement an anti-discrimination and harassment policy. As long as the chief executive is not a controlling owner of the company and thus treated as an employer rather than an employee under Title VII,⁸⁵ the executive, like any other managerial agent, can

81. *Kolstad*, 527 U.S. at 530–31. Justice Stevens in his dissenting opinion notes that Kolstad's evidence of this bias included the executives telling "sexually offensive jokes" and referring to "professional women in derogatory terms." *Id.* at 547, 551 (Stevens, J., concurring in part and dissenting in part).

82. *Id.* at 546.

83. *Id.*

84. *Id.*

85. *Cf. Clackamas Gastroenterology Assocs., P. C. v. Wells*, 538 U.S. 440, 445 (2003) (holding that controlling owners of a business are employers rather than em-

be viewed as a rogue agent acting—even within the scope of his or her employment duties—against the good faith efforts of the principal, the employer, to prevent discrimination.

Third, in addition to her analysis of the liability issue, Justice O'Connor's listing of the potential issues of fact in *Kolstad* suggests that the good faith shield is to be applied to supplement, rather than replace, the alternative conditions for punitive damages liability listed in § 217C of the Restatement Second of Agency.⁸⁶ Justice O'Connor states that the issue of the Dental Association's good faith *may* have to be resolved after answering questions about Wheat's service in a managerial capacity and his role in the challenged promotion decision.⁸⁷ Combined with Justice O'Connor's expressed concern with the "perverse incentives that the Restatement's 'scope of employment' rules create,"⁸⁸ this suggests that the employers' good faith defense to liability with respect to punitive damages becomes relevant in cases in which the plaintiff's claim for such damages can be based on involvement in malicious discrimination by a managerial agent acting in the scope of employment. This would be the case under the Restatement's alternative condition (c) or sometimes under (d).⁸⁹ Under alternative (a) and sometimes (d), punitive damages liability would derive from a formal authorization or ratification of the discrimination that would preclude a finding of good faith. Punitive damages liability under condition (b) derives from employer recklessness in employing a maliciously discriminating agent. If liability for punitive damages under Title VII can be based on such recklessness by a hiring agent whether or not the agent serves in a managerial capacity, this liability presumably would be subject to the employer's good faith defense. However, if the discriminating agent is not serving in a managerial capacity, and if there is no such recklessness or authorization or ratification, employer liability for punitive damages can be denied without consideration of the employer's good faith opposition to discrimination.

Finally, Justice O'Connor's use of the term "good faith" suggests that, like the standard for determining whether a discriminating agent acted with malice or recklessness, the shielding standard for employer punitive damages liability is subjective. The more flawed or inade-

employees under Title VII as well as the Americans with Disabilities Act); RESTATEMENT (THIRD) OF EMPLOYMENT LAW, § 1.03 (2009) (stating that "[u]nless otherwise provided by law, an individual is not an employee of an enterprise if the individual through an ownership interest controls all or a part of the enterprise").

86. See *Kolstad*, 527 U.S. at 546.

87. *Id.*

88. *Id.* at 545.

89. See *supra* text accompanying notes 76–77.

quate an employer's anti-discrimination efforts or policies, the more difficult it is to demonstrate that policies were adopted and implemented with a good faith intent to avert discrimination. In contrast to the standards for employer liability for hostile environment harassment adopted or approved in *Ellerth* and *Faragher*,⁹⁰ however, the good faith standard turns on intent and not on the objective reasonableness of the employer's anti-discrimination efforts. Thus, under *Ellerth* and *Faragher* a supervisor's or manager's negligence can establish that the employer is liable for compensatory damages for harassment because it did not reasonably implement a policy against supervisory harassment or did not appropriately respond to co-worker harassment. Under *Kolstad*, however, such negligence does not necessarily negate an employer's claim that it formulated and attempted to implement a policy against discrimination in good faith.

III.

REPLACING THE DAMAGE CAPS WITH THE *KOLSTAD* SHIELD

A. *A Better Fit with Statutory Goals*

As framed by the *Kolstad* Court, the standards for employer liability for punitive damages better serve the primary goals of the 1991 Act's caps on damages without sacrificing—to the same extent as caps—the damages action's potential to serve the deterrent and compensatory goals of Title VII. The *Kolstad* standards provide well-meaning employers at least as much protection from a potentially financially devastating verdict as the 1991 Act's caps on damages without the caps' arbitrary limits on justified damage remedies. On the one hand, the *Kolstad* standards, unlike the caps, protect well-meaning employers from all punitive damages. Even as capped by the 1991 Act, punitive damages may be financially significant, especially in an action by a large class of discrimination victims, each of whom can claim damages up to the cap limit. For instance, if the employer has over five hundred employees, each employee victim can claim damages as high as \$300,000.⁹¹

On the other hand, the *Kolstad* standards of liability for punitive damages, unlike the 1991 Act's caps on all damages, protect well-

90. See *supra* text accompanying notes 44–61.

91. See 42 U.S.C. § 1981a(b)(3)(D) (2006) (\$300,000 limit if employer “has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year”). The cap limitation is “for each complaining party,” even in cases brought by the EEOC. See *EEOC v. W. & O., Inc.*, 213 F.3d 600, 612–14 (11th Cir. 2000).

meaning employers without also denying full compensation to some innocent employees for harm resulting from the employers' failure to control discriminating agents. The failure of the 1991 Act's caps to distinguish between punitive and compensatory damages is one of the caps' major flaws. By formulating separate standards for employer liability for punitive damages from those set or approved in *Ellerth* and *Faragher* for compensatory damages, the *Kolstad* decision does not share the same flaw. The Court's liability standards, unlike the caps imposed by Congress, recognize that an innocent employee's claim against a well-meaning employer for full compensation for injuries caused by a manager's or supervisor's tangible or environmental discrimination is much stronger than the employee's claim that such a well-meaning employer should be penalized to encourage better oversight of rogue agents.

While a well-meaning employer could be significantly affected by recovery of compensatory damages by a large class of employee victims of the employer's agents' discrimination, each victim could also be significantly affected by an inability to be fully compensated for his or her losses. The standards for employer liability for compensatory damages set or approved in *Ellerth* and *Faragher*, unlike the arbitrary cap limits, account for the relative responsibility of even well-meaning employers for injuries to employees caused by the employers' discriminating agents. The *Ellerth* and *Faragher* standards do so by not imposing liability on an employer for compensatory damages when the employer has acted reasonably to prevent or mitigate the discrimination but the victimized employees have not acted reasonably.

Moreover, the *Kolstad* standards for employer liability for punitive damages are superior to the 1991 Act's caps in protecting well-meaning employers from the threat of financially devastating verdicts precisely because the *Kolstad* standards protect *only* well-meaning employers. By contrast, the caps protect all employers—even those whose owners and management had notice of malicious discrimination or harassment and either made no sincere attempt to control it or actually encouraged such activity by creating a discriminatory corporate culture. No advocate of the caps would openly defend the latter kind of employers or claim the caps are necessary to protect them from undeserved, financially devastating verdicts. The protection of such employers by the caps is in tension with Congress's desire, highlighted by the Court in *Kolstad*, to provide incentives "for employers to implement antidiscrimination programs" and "to educate their per-

sonnel on Title VII's prohibitions."⁹² As stated by the Court in *Faragher*, the protection of such employers undermines the statute's "primary objective" "to avoid harm" through deterrence and fails "to recognize the employer's affirmative obligation to prevent violations."⁹³

Kolstad thus provides the basis for a compelling argument that the caps on compensatory and punitive damages set in the 1991 Act are neither necessary nor appropriately fashioned to serve the deterrent and compensatory purposes of Title VII. The *Kolstad* standards for imposing liability for punitive damages on employers are better fashioned for these purposes and are adequate to protect well-meaning employers from excessive damage awards.

B. Clarifying the Meaning of *Kolstad*

Many lower court decisions after *Kolstad* have indeed shielded employers from liability for punitive damages based on the standards pronounced by the Supreme Court.⁹⁴ Other decisions have appropriately approved granting punitive damages against employers, based in part on adequate evidence that a managerial agent had engaged in malicious discrimination that was not contrary to some proven good faith effort of the employer to comply with the applicable anti-discrimination directive.⁹⁵ In *Lowery v. Circuit City Stores, Inc.*,⁹⁶ for instance,

92. *Kolstad*, 527 U.S. at 544–45.

93. *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (citations omitted).

94. See, e.g., *Dominic v. DeVilbiss Air Power Co.*, 493 F.3d 968, 976 (8th Cir. 2007) (finding punitive damages should not be submitted to jury where company generally implemented anti-harassment policy); *Ridley v. Costco Wholesale Corp.*, 217 F. App'x 130, 137–38 (3d Cir. 2007) ("Costco consistently made good faith efforts to implement and enforce its antidiscrimination policy"); *Harsco Corp. v. Renner*, 475 F.3d 1179, 1189–90 (10th Cir. 2007) ("Harsco Corporation submitted substantial evidence showing that the company established comprehensive policies and training procedures in an effort to comply with Title VII."); *White v. BFI Waste Servs., LLC*, 198 F. App'x 283, 287 (4th Cir. 2006) ("While the ineffectiveness of an antiharassment policy defeats an employer's affirmative defense [under *Ellerth* and *Faragher*] . . . , a policy's ineffectiveness alone cannot demonstrate the lack of good faith required for justifying an award of punitive damages."); *Marcano-Rivers v. Pueblo Int'l, Inc.*, 232 F.3d 245, 254 (1st Cir. 2000) (noting the "record is replete . . . with evidence that Pueblo instituted policies prohibiting any type of discrimination, trained its personnel to ensure equal treatment of employees with disabilities, and took good faith efforts to comply with the statute").

95. See, e.g., *West v. Tyson Foods, Inc.*, 374 F. App'x 624, 639 (6th Cir. 2010) (noting "evidence of widespread disregard of the policy by employees engaging in harassment, by supervisors in not reporting to HR incidents of harassment or failing to conduct follow-up investigations, by co-workers in not reporting incidents of harassment, and by HR managers in not investigating reports of harassment"); *Thomas v. Alabama Home Const.*, 271 F. App'x 865, 869 (11th Cir. 2008) (finding "no policies or procedures in place for employees to complain about being sexually harassed");

the court found adequate evidence that the employer's anti-discrimination policy was actually a "mask" for a general corporate policy "to keep African-Americans in low level positions."⁹⁷

Unfortunately for some employers, numerous lower court decisions have not applied the *Kolstad* standards strictly in accordance with the Court's apparent intent.⁹⁸ These decisions have allowed punitive damages against employers that the *Kolstad* Court and Congress intended to protect through the caps. Confusion in the lower courts, however, is not a reason for Congress to refrain from removing the caps in favor of the *Kolstad* standards. Rather, Congress could remove the caps and confirm the *Kolstad* standards through an express codification. Doing so would enable Congress to offer employers the kind of meaningful compromise that Senator Kennedy effectively struck during his senatorial career.

A review of lower court decisions since *Kolstad* indicates that Congress should address three interrelated mistaken interpretations of *Kolstad* as part of any legislation removing the caps on damages under Title VII. Furthermore, if Congress did not address these specific lower court mistakes when removing the caps, the Court itself might be moved to clarify *Kolstad* in response to the uncapping of the damage remedy.

First, some decisions have held that the good faith defense is unavailable where the plaintiff can prove malice on the part of a manager with authority to act in the name of the company.⁹⁹ Therefore, Con-

Goldsmith v. Bagby Elevator Co., Inc., 513 F.3d 1261, 1281–82 (11th Cir. 2008) (indicating "the antidiscrimination policy of Bagby Elevator was totally ineffective" and contained no training as well as finding the company president and owner acknowledged a lack of policy on discipline); Parker v. Gen. Extrusions, Inc., 491 F.3d 596, 604–05 (6th Cir. 2007) (stating jury could find lack of good faith based on testimony that employer's anti-harassment policy was not generally implemented or enforced); Lowery v. Circuit City Stores, 206 F.3d 431, 445–46 (4th Cir. 2000) (finding adequate evidence in record for reasonable juror to conclude that employer's overt anti-discrimination policy "was implemented in an effort to mask" "a secret corporate policy . . . to keep African-Americans in low level positions").

96. *Lowery*, 206 F.3d at 431.

97. *Id.* at 446.

98. *See, e.g.*, *EEOC v. Fed. Express Corp.*, 513 F.3d 360, 375 (4th Cir. 2008); *Swinton v. Potomac Corp.*, 270 F.3d 794, 811 (9th Cir. 2001); *Foster v. Time Warner Entm't Co.*, 250 F.3d 1189, 1197 (8th Cir. 2001); *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 516-17 (9th Cir. 2000); *Deters v. Equifax Credit Info. Servs., Inc.*, 202 F.3d 1262, 1271 (10th Cir. 2000). For a discussion of these cases, see text accompanying notes 99–131.

99. *See, e.g.*, *Passantino*, 212 F.3d at 517; *Deters*, 202 F.3d at 1271; *Hardman v. Autozone, Inc.*, No. 02-2291-KHV, 2004 U.S. Dist. LEXIS 2171, at *17–18 (Kan. Feb. 11, 2004); *Miller v. Rockford Register Star*, No. 98-C-50139, 2001 U.S. Dist. LEXIS 7586, at *13–14 (N.D. Ill. June 8, 2001).

gress should clarify that the employer's *Kolstad* good faith defense to liability for punitive damages applies to all claims based on the malice or reckless indifference of a managerial agent, regardless of the agent's level of discretion and responsibility.

For instance, in *Deters v. Equifax Credit Information Services, Inc.*,¹⁰⁰ the court denied the availability of the good faith defense because the plaintiff's case was based on the failure of the "final decision-making authority responsible for implementing the company anti-discrimination policy" in the plaintiff's office to respond to the plaintiff's complaints of sexual harassment by her co-workers.¹⁰¹ The court purported to justify denying the defense by asserting, "*Kolstad* was a case involving vicarious liability, unlike this case which is premised on a theory of direct liability."¹⁰² Whatever the distinction between direct and vicarious liability assumed by the *Deters* court, it cannot distinguish the facts of *Kolstad*. In *Kolstad*, the allegedly discriminatory decision makers, the Dental Association's chief executive and the director of the Washington office in which *Kolstad* worked had been delegated the discretion to make the promotional decision of which *Kolstad* complained.¹⁰³ This action was a tangible and formal decision for which the Dental Association, as the agents' employer and principal, would be liable for compensatory damages and other non-punitive relief, regardless of any anti-discrimination policy.¹⁰⁴ The employer's liability for non-punitive relief in *Deters* would be based on the negligent or intentionally discriminatory reaction of its managerial agent to the plaintiff's sexual harassment allegations. In both cases, the employers' liability for non-punitive damages would be based on their managerial agents' discharge of delegated authority within the scope of their employment. There is no reason why the two cases should be treated differently for purposes of punitive damages; if a manager's misuse of supervisory authority in a manner contrary to an employer's general good faith efforts to control discrimination should impose punitive damages on the employer, so should a manager's misuse of authority to promote for discriminatory reasons.¹⁰⁵

100. 202 F.3d 1262.

101. *Id.* at 1271.

102. *Id.*

103. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 530–31 (1999).

104. *See supra* text accompanying notes 45–54.

105. In *Cooke v. Stefani Management Services, Inc.*, 250 F.3d 564 (7th Cir. 2001), the court suggested that the *Deters* case involved "direct" liability because the plaintiff complained of the failure of a manager to control other discriminators, while in *Kolstad* the plaintiff alleged that the manager himself was the discriminator. *Id.* at 569. The *Cooke* court, however, like the *Deters* court, failed to explain why employers should have less protection from liability for punitive damages for a manager's

In another confused decision, *Passantino v. Johnson & Johnson Consumer Products, Inc.*,¹⁰⁶ a court of appeals panel attempted to justify denying employers the good faith defense in cases in which the agents charged with malice or reckless indifference “are sufficiently senior to be considered proxies for the company.”¹⁰⁷ The court did not explain the meaning of this phrase or how it could be applied; however, it did attempt to reconcile this limitation on *Kolstad* by claiming that Justice O’Connor’s discussion of the issues to be resolved on remand did not anticipate the good faith defense being relevant if the lower court determined that Allen, the Dental Association’s chief executive, had acted with malice or reckless indifference.¹⁰⁸ This seems a forced reading of Justice O’Connor’s opinion, and is inconsistent with her *Kolstad* opinion’s silence on any distinction between levels of managerial agents based on their degree of responsibility or seniority in the company.¹⁰⁹ The law of agency distinguishes instead between principals and agents, and agents are capable of imposing liability on their principals, regardless of the agents’ level of responsibility or authority.¹¹⁰ Since in the context of the employment discrimination laws the distinction between principals and agents is a distinction between employers and their agents, the only individual actors whose malice or recklessness cannot be shielded by the good faith defense should be those whose controlling ownership of a company or other entity qualifies them as employers rather than employees for purposes of the anti-discrimination laws.¹¹¹ Only malicious action by these individuals, or their authorization or ratification of the malice of their agents, should warrant punitive damages under *Kolstad* without the shield of the good faith defense.¹¹²

Second, Congress also should clarify that the *Kolstad* good faith defense is not defeated by proof that a rogue managerial agent—or even a conspiracy of several rogue managerial agents—failed to implement an anti-discrimination policy that other senior agents have established and attempted to implement in good faith. As much as the

failure to control other discriminators than for a manager’s own maliciously intentional discriminatory decision.

106. 212 F.3d 493 (9th Cir. 1999).

107. *Id.* at 517.

108. *Id.* at 516–17.

109. See *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 545–46 (1999).

110. See RESTATEMENT (THIRD) OF AGENCY § 7.03 (2006).

111. See *supra* note 85 and accompanying text.

112. The *Passantino* court’s confusion was also reflected in its analytical merging of the *Kolstad* good faith defense for punitive damages with the *Ellerth-Faragher* affirmative defense to any employer liability for supervisory hostile work environment harassment. See *Passantino*, 212 F.3d at 516–17.

Kolstad Court's good faith defense provides a shield from the rogue agents' own malicious harassment or other discrimination, it is also framed to provide a shield from punitive damages for employers whose rogue managerial agents, contrary to company policy, ignored other employees' malicious harassment or other discrimination. Some lower courts have resisted this reading by finding proof of the failure of a managerial agent—or a cabal of managerial agents—to implement an anti-discrimination policy sufficient to defeat an employer's claim of good faith.¹¹³ Such courts effectively abrogate the good faith defense, at least for claims that combine allegations against individuals at two levels of an employer's organizational structure, including those claims that defeat the *Ellerth-Faragher* affirmative defense by demonstrating a managerial agent's unreasonable response to complaints of harassment.

In *Foster v. Time Warner Entertainment Company*,¹¹⁴ for instance, the court held that the defendant employer was subject to punitive damages because “the mere existence of a policy [against discrimination] is not enough to establish good faith if there is evidence that managerial employees disregarded it in making employment decisions and issued a conflicting policy.”¹¹⁵ In this case, the managerial employees who “issued a conflicting policy” by telling the plaintiff that they would disregard the law and the company's policy were the same managerial employees whose intentional discrimination was the basis for the company's liability for compensatory damages: the manager of the local office where the plaintiff worked and that manager's superior, presumably a regional manager.¹¹⁶ Based on the Court's analysis in *Kolstad*, the company's general good faith should

113. See, e.g., *Foster v. Time Warner Entm't Co.*, 250 F.3d 1189, 1197 (8th Cir. 2001); *Swinton v. Potomac Corp.*, 270 F.3d 794, 811 (9th Cir. 2001); see also *Cadena v. Pacesetter Corp.*, 224 F.3d 1203, 1210 (10th Cir. 2000) (finding that regardless of employer's policies, managers' protection of valuable harasser was sufficient to defeat good faith defense); *Lopez v. Aramark Unif. & Career Apparel, Inc.*, 426 F. Supp.2d 914, 965 (N.D. Iowa 2006) (finding that even if employer had a good-faith policy, supervisors' failure to implement it for the plaintiff defeated a good faith defense).

114. 250 F.3d 1189 (8th Cir. 2001).

115. *Id.* at 1197.

116. *Id.* at 1192–93. The company policy that the managers told the plaintiff they would not implement was one that promised disabled employees “reasonable accommodation,” including flexible work schedules, as required by the ADA, 42 U.S.C. § 12112(B)(5) (2006). *Id.* at 1195. The jury found that the plaintiff was discharged by these managers in violation of 42 U.S.C. § 12203, the anti-retaliation provision of the ADA, for objecting to the managers' refusal to reasonably accommodate a disabled employee whom the plaintiff supervised. The court did not discuss whether the defendant employer had a good faith policy to control retaliation against employees for opposing actions made unlawful by the anti-discrimination laws.

have been available as a shield from punitive damages, even assuming that these managers were sufficiently important to satisfy alternative condition (c) of § 217C of the Restatement Second of Agency.¹¹⁷ Whether higher company officials sincerely wanted the formal anti-discrimination policy to be implemented cannot be determined from the mere fact that two company agents—on different managerial levels—did not implement it. Indeed, the *Foster* court's flawed premise—that disregard of an anti-discrimination policy by managerial agents is sufficient to negate an employer's good faith¹¹⁸—does not depend on the involvement of two levels of management; it could apply in any case in which the court could assert that a plaintiff suffered because of a manager's intentional refusal to implement a company anti-discrimination policy.

Other decisions have held a supervising manager's failure to control discriminatory harassment in a workplace for which she has been delegated responsibility to be a sufficient basis for punitive as well as compensatory damages, regardless of an employer's general good faith efforts to avoid such harassment. In *Swinton v. Potomac Corporation*,¹¹⁹ the court held that the employer did not have a good faith defense to punitive damages for the same reason that it was liable for compensatory damages for the harassment under *Ellerth* and *Faragher*: the victim's and the harassers' supervisor knew about the harassment and did nothing to stop it, even failing to report the abuse to higher management. The court concluded that the employer "cannot claim to have *implemented* its anti-harassment policy in good faith (even if it were conceived in good faith) when the very employee charged with carrying it out . . . did nothing to stop [the harassment], and never reported the repeated incidents to higher management."¹²⁰ Presumably this manager, the supervisor of the employer's shipping department where the victim worked, was not an owner of the business and was no more the alter ego of the employer than were Allen or Wheat, the top executives of the Dental Association in *Kolstad*.¹²¹ Yet the *Swinton* court, contrary to Justice O'Connor's stated concern in

117. See *supra* text accompanying notes 83–88.

118. *Foster*, 250 F.3d. at 1197.

119. 270 F.3d 794 (9th Cir. 2001).

120. *Id.* at 811.

121. See *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 530 (1999) (describing Allen as executive director in the association's Chicago office and Wheat as acting head of the Washington office).

Kolstad, found the supervisor's involvement negated any possibility that the employer made a good faith attempt to avoid harassment.¹²²

Third, Congress should clarify that the good faith defense turns on the employer's subjective attitude toward compliance with statutory anti-discrimination commands, not on the competence of its personnel officers or other agents in ensuring compliance in the litigated case. Lower courts have correctly required employers asserting a good faith defense to punitive damages to demonstrate implementation as well as promulgation of an anti-discrimination policy.¹²³ While the type of discrimination prevention and control efforts necessary to establish subjective good faith may vary based on an employer's size and sophistication, the mere formal promulgation of an unimplemented anti-discrimination policy does not demonstrate sufficiently sincere "good-faith efforts" to comply with the law. Some lower courts, however, have demanded not only that the employer's senior management sincerely attempted to implement an anti-discrimination mandate, but also that managerial agents who should have known of the discrimination involved in a particular case competently tried to control it.¹²⁴ Like the related assumption that an employer cannot be acting in good faith if some managers intentionally indulge or contribute to the discriminatory actions of subordinate employees, this demand of managerial competence in the plaintiff's particular case abrogates the good faith defense for those claims that an employer's personnel managers have not handled effectively.

Consider, for instance, the court's acceptance in *Equal Employment Opportunity Commission v. Federal Express Corporation* of an award of \$100,000 in punitive damages—in addition to \$8,000 in compensatory damages—against an employer for failing to provide a deaf package handler reasonable accommodation so he could understand what occurred at employee meetings and training sessions.¹²⁵ As set forth in its personnel manual, Federal Express Corporation (FedEx) had a policy mandating reasonable accommodation for dis-

122. The *Swinton* court also claimed that the employer was "not entitled to assert the good-faith defense" at all, based on decisions like *Deters*, which have imputed to the employer the actions of even "low-level supervisors . . . made responsible, pursuant to company policy, for receiving and acting on complaints of harassment." *Swinton v. Potomac Corp.*, 270 F.3d 794, 810 (9th Cir. 2001).

123. See, e.g., *Tisdale v. Fed. Express Corp.*, 415 F.3d 516, 532 (6th Cir. 2005); *Marcano-Rivera v. Pueblo Int'l, Inc.*, 232 F.3d 245, 254 (1st Cir. 2000); *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 446 (4th Cir. 2000).

124. See, e.g., *EEOC v. Fed. Express Corp.*, 513 F.3d 360, 374-75 (4th Cir. 2008); see also cases cited *infra* note 131 (finding lack of good faith based solely on failure to implement policy in plaintiff's particular case).

125. *Fed. Express Corp.*, 513 F.3d at 370.

abled employees.¹²⁶ FedEx apparently also provided at least some managers with training regarding compliance with the ADA.¹²⁷ Furthermore, FedEx's internal system for consideration of employee grievances encompassed discrimination and accommodation complaints.¹²⁸ The court nevertheless found that the jury had adequate evidence to reject the employer's claim of having made good faith efforts to comply with the ADA. This evidence demonstrated the failure of some officials in FedEx's national offices to respond to "alarm bells" in the particular case of the deaf package handler. The court held that "the jury was entitled to find that FedEx failed to sufficiently take affirmative steps to ensure the implementation of its ADA compliance policy *with respect to Lockhart*."¹²⁹ There was no evidence of any general failure by the employer to provide reasonable accommodations or otherwise implement its policy, and nothing to show that the employer had only a formal policy which it used to mask a practice of non-accommodation of the deaf or the disabled in general. The court instead was willing to uphold punitive damages on the basis of the failure of some officials in the employer's central office to control the non-accommodation of the particular plaintiff at one of its regional offices.¹³⁰ Such a decision transformed the *Kolstad* Court's subjective good faith standard into an objective standard of competence that cannot shield an employer from liability for punitive damages in any case where continuing managerial discrimination is not hidden from more senior managers.¹³¹

126. *Id.* at 374.

127. *Id.* at 375.

128. *Id.*

129. *Id.* (emphasis added).

130. Indeed, the court accepted the trial court's refusal to answer the jury's request for clarification of whether it was "to judge whether FedEx acted in good faith to comply with the law based on the company's stated policies and procedures, or on the (region's) performance complying with those policies and procedures." *Id.* at 370 n.6.

131. For another similar case where a court held that a jury could base a finding of lack of good faith solely on the employer's failure to investigate the plaintiff's particular complaint, notwithstanding its "ample, undisputed evidence that [the employer] formulated, disseminated, and trained employees on its antidiscrimination policies," see *Fischer v. United Parcel Serv.*, 390 F. App'x 465, 474 (6th Cir. 2010) (quoting *Fischer v. United Parcel Serv.*, No. 05-70366, 2008 U.S. Dist. LEXIS 25402, at *11 (E.D. Mich. Mar. 31, 2008)). The *Fischer* court rejected the employer's argument that *Kolstad* requires consideration of the employer's general "historical approach" to claims like those of the plaintiff to determine whether the violation in plaintiff's case was contrary to the employer's good-faith efforts to comply with the anti-discrimination law. *Id.*; see also *McInnis v. Fairfield Cmty., Inc.*, 458 F.3d 1129, 1138-39 (10th Cir. 2006) (finding a lack of good faith efforts to comply with Title VII based only on the managers' failure to stop retaliation in the plaintiff's particular sympathetic case); *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 860-61 (7th Cir. 2001)

The *FedEx* court's analysis, like that of the courts in *Deters*, *Pasantino*, and *Foster*, reflected an unwillingness to accept the distinction made by the *Kolstad* Court between the employer and its supervising managerial agents. This presumably derived from the courts of appeals' appreciation that most employers are legal entities such as corporations that only act through agents. Legal entities have no subjective intent and therefore cannot act directly in bad faith; only their agents can. The lower courts thus understood that the acts of agents in implementing an anti-discrimination policy must be relevant to the employer's good faith, because a facial policy against discrimination is meaningless if it is not implemented.

Nonetheless, a distinction can be made between the failure of a rogue agent or even a cabal of rogue agents and several other incompetent agents to implement an anti-discrimination policy in a particular case, on the one hand, and the general failure of the most senior managerial representatives of the owners of a company to carry out an anti-discrimination policy, on the other. Determining whether there has been a general failure to implement a policy requires consideration not only of managerial performance in the plaintiff's case, but also of managerial performance in other cases. Like the general failure to promulgate an anti-discrimination policy or to educate managers about such a policy, a pattern or practice of non-implementation reflects a lack of good faith throughout management. It thus makes a much stronger case for punitive damages than does the mere negligence—or even intentional failure—of some managers to control discrimination in a particular case. By adding the good faith defense to the punitive damages standard of the Restatement Second of Agency, the Court in *Kolstad* seemed to find this special remedy appropriate only for an employer's general dereliction,¹³² rather than the employer's failure in a particular case to avoid malicious discrimination, even by “managerial” agents “acting within the scope of employment.”¹³³

(finding a lack of good faith based solely on the managers' failure to correct harassment against the plaintiff); *Foster v. Time Warner Entm't Co.*, 250 F.3d 1189, 1196–97 (8th Cir. 2001) (finding a lack of good faith based only on two managers' failure to observe the company's policy on the ADA in the plaintiff's case). *But see Harsco Corp. v. Renner*, 475 F.3d 1179, 1189–90 (10th Cir. 2007) (“If failure of supervisors to comply with company policy were sufficient evidence to prove the lack of a good-faith effort to train, the *Kolstad* defense would be effectively eliminated.”); *White v. BFI Waste Servs., LLC*, 198 F. App'x. 283, 287 (4th Cir. 2006) (stating “evidence of ineffectiveness [with respect to plaintiffs], without more, fails to support an award of punitive damages”).

132. *See supra* text accompanying notes 84–88.

133. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 542 (1999).

The failure of supervising managers to respond to reports of discrimination in a particular case is of course relevant to the question of whether an employer's official anti-discrimination policy is actually being implemented in good faith. Indeed, *Kolstad* suggests that proof of a managerial agent's knowing involvement in discrimination while "acting in the scope of employment" makes punitive damages appropriate absent proof that these actions were "contrary to the employer's good-faith efforts to comply" with the law.¹³⁴ Many lower courts thus have appropriately interpreted the good faith defense as an affirmative one for the employer to prove.¹³⁵ Yet this does not mean that the Court in *Kolstad* wanted to make the defense meaningless in any case in which supervising managers participated in, indulged, or were otherwise neglectful toward particular discrimination warranting compensatory damages. The employer has to prove its general good faith implementation of an anti-discrimination policy, but it should have the opportunity to do so, notwithstanding the policy's failure in the particular case.¹³⁶

Interpreting *Kolstad* to grant employers such an opportunity obviates the caps on damages set in the 1991 Act. There is no reason to deny *or* limit punitive damages against an employer that cannot demonstrate that its managers' involvement in, or at least knowing neglect of, malicious or reckless discrimination against the plaintiff was contrary to, rather than reflective of, its standard operating procedures. The award of punitive damages is directed toward eliminating future discrimination rather than compensating victims for losses caused by past discrimination. Employers whose standard operating procedures neglect or even encourage discrimination condemned by Title VII or the ADA should be penalized for the discrimination such encouragement or neglect causes, regardless of the scope of the discrimination. Rather than being employers merely afflicted with rogue or incompetent agents, such employers are not sympathetic subjects

134. *Id.* at 543–46.

135. *See, e.g.,* *Zimmerman v. Associated First Capital Corp.*, 251 F.3d 376, 385 (2d Cir. 2001); *Romano v. U-Haul Int'l*, 233 F.3d 655, 670 (1st Cir. 2000); *Deffenbaugh-Williams v. Wal-Mart Stores*, 188 F.3d 278, 286 (5th Cir. 1999).

136. As suggested in some lower court opinions, relevant to such proof should be not only a "written non-discrimination policy," but also "an active mechanism for renewing employees' awareness of the policies through either specific education programs or periodic re-dissemination or revision of their written materials," supervisors being "trained to prevent discrimination," and "examples in which their anti-discrimination policies were successfully followed." *See* *Monteagudo v. Asociación de Empleados del Estado Libre*, 554 F.3d 164, 176–77 (1st Cir. 2009) (relying on *Romano*, 233 F.3d at 670).

for protection from the kind of unlimited damage awards that provide the most effective disincentives against discrimination.

It may also seem appropriate in a case like *FedEx* to use capped punitive damages as an incentive for senior management to improve implementation of an anti-discrimination policy. *FedEx* involved a large employer with very deep pockets and several managers who did not respond to “alarm bells” signaling that a statutory requirement of accommodation was not being met.¹³⁷ Larger employers, however, must employ more supervisors, each of whom could be a rogue or incompetent managerial agent acting contrary to a good faith anti-discrimination policy. The concern expressed by some members of Congress, and apparently compelling for Justice O’Connor and the *Kolstad* Court, as well—that innocent employers should not face financial ruin because of excessive damages they could not control—may be applicable to large employers as well. While financially secure large employers with discrimination policies implemented in good faith are not likely to face crippling verdicts, it is possible that a few discriminating managers in influential positions in a division of a large company could affect enough individual victims, each of whom can claim a maximum award of \$300,000, to have a significant effect on at least that division’s operations. When the choice is between full compensation of victims or saving the company’s division, the argument for the victims is certainly much stronger than when the choice is between awarding the victims additional windfall damages and protecting the entire company and its owners from the mistakes of rogue or incompetent managers.

CONCLUSION

As part of a legislative compromise eliminating the caps, Congress should codify the *Kolstad* standards for employer liability for punitive damages as well as the markedly different *Ellerth-Faragher* standards for employer liability for compensatory damages in discriminatory hostile work environment harassment cases. Incorporating both standards into section 1981a would enable Congress to distinguish between cases in which an employer’s fault derives from the actions of its controlling owners or from its general policies or practices, and cases in which fault derives from the dereliction of rogue or aberrant incompetent managers or supervisors. While fault in the former cases is the basis for liability for both compensatory and punitive damages, in the latter cases only compensatory damages are available.

137. *EEOC v. Fed. Express Corp.*, 513 F.3d 360, 367–69 (4th Cir. 2008).

It may be difficult to draft legislation codifying *Kolstad* with enough specificity to ensure that some lower courts would not continue to resist the distinction between compensatory and punitive damages in sympathetic cases, such as those where a victim of discrimination demonstrates the fault of rogue or incompetent senior managers or even responsible supervisors. However, codifying *Kolstad* would surely encourage employers in such cases to press the Court to elaborate on the meaning of the good faith defense, as framed by Congress.

Admittedly, a compromise that balances the removal of the caps on damages in section 1981a with even an unelaborated codification of *Kolstad* may not be politically feasible in the current polarized political environment. In today's Senate, even a principled pragmatist like Senator Kennedy might have difficulty finding a counterpart across the aisle like Senator Danforth with whom to work. Furthermore, a Congress sufficiently liberal to accept Senator Kennedy's challenge to remove the caps might not need or want to endorse the good faith defense to punitive damages established in *Kolstad*.

Congress's elimination of the caps on damages in section 1981a, however—based in part on an argument that the caps are not needed in light of the *Kolstad* shield—would likely encourage the Court's confirmation and elaboration of *Kolstad*, even without its codification. Employers would be expected to place more pressure on the entire federal judiciary to shield them from punitive damages in cases where the *Kolstad* defense could be applicable. If Congress removes the caps based on the availability of the *Kolstad* defense, the current Supreme Court would likely complete the compromise.

Being a skilled and principled pragmatist in the tradition of great legislators like Senator Kennedy entails a realistic assessment of the likely judicial reaction to the enactment of legislation. The legislative and judicial branches function best when each listens to the other. The *Kolstad* decision should have sent a clear message to Congress that the Court is sympathetic to the employer community's concerns about punitive damages. In response, Congress can and should eliminate the caps with the assurance that the Court will ensure the strength of the *Kolstad* shield.

