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ARTICLES

A UNIFORM STANDARD FOR EXEMPLARY DAMAGES IN EMPLOYMENT DISCRIMINATION CASES

*Judith J. Johnson**

I. INTRODUCTION

The standards for exemplary damages in employment discrimination cases are in disarray.[1] The major federal provisions that prohibit private employment discrimination, Title VII of the Civil Rights Act of 1964 ("Title VII"),[2] 42 U.S.C. § 1981 ("§ 1981"),[3] the Age Discrimination in Employment Act ("ADEA"),[4] and the Americans with Disabilities Act ("ADA"),[5] all have an indistinguishably worded standard for assessing exemplary damages: "reckless indifference to federally protected rights."[6]

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1. This article is a sequel to an article I published a few years ago in which I articulated an interpretation of the standard for assessing punitive damages under Title VII of the Civil Rights Act of 1964. *See* Judith J. Johnson, *A Standard for Punitive Damages Under Title VII*, 46 FLA. L. REV. 521 (1994) [hereinafter Johnson, *Punitive Damages*].
2. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1994).
3. 42 U.S.C. § 1981 (1994).
4. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1994).
5. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12,101-12,117 (1994).
6. 42 U.S.C. §§ 2000e-2(a), 1981a(b)(1), 12,117(a) (1994); *see infra* Part IV.

As I predicted in an earlier article,[7] the courts have had considerable difficulty in articulating a uniform standard for exemplary damages.[8] These problems have included the courts' conflicting interpretations of the standard for punitive damages, inability to articulate any standard at all, and arbitrary treatment of punitive damages claims.[9] The Supreme Court has granted a petition for writ of certiorari in *Kolstad v. American Dental Ass'n*[10] to resolve the conflict. Whether the problem will be solved or exacerbated will depend on whether the Court recognizes the advisability of a common standard for the ADEA, Title VII, the ADA, and § 1981. Because all four of these acts share a common body of law interpreting the meaning of discrimination, a common interpretation of exemplary damages would likewise be desirable.

In my earlier article, I recommended that the standard for punitive damages under Title VII be the same as that approved by the Supreme Court for liquidated damages, which are the equivalent of punitive damages, under the ADEA.[11] At that time, the Civil Rights Act of 1991,[12] which allowed imposition of punitive damages for the first time in Title VII and ADA cases, had been in effect for only three years, not long enough for the development of a critical mass of case law. The case law has developed quickly, and the confusion is evident.[13]

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7. Johnson, *Punitive Damages, supra* note 1.

8. *See infra* Part III.B.

9. *See id.*

10. 139 F.3d 958 (D.C. Cir. 1998), *cert. granted*, 119 S. Ct. 401 (1998).

11. Exemplary damages under the ADEA are liquidated damages, but the Supreme Court has held that such damages under the ADEA were designed to be punitive. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 125 (1985). The 1991 Civil Rights Act uses the term "reckless indifference" as opposed to *Thurston*'s "reckless disregard." *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1073; *Thurston*, 469 U.S. at 126. The difference in terminology is irrelevant. The Court in *Smith v. Wade*, 461 U.S. 30 (1983), used the term "reckless disregard," and there is no doubt that the standards under § 1981 and the 1991 Civil Rights Act should be the same. *See Kolstad*, 139 F.3d at 964 (communicating "[t]hat Congress ultimately enacted language similar to that employed in *Smith v. Wade*"); *infra* text accompanying notes 101-06.

I use the term "exemplary damages" throughout the article when I intend to refer to both punitive damages under § 1981 and the Civil Rights Act of 1991, and liquidated damages under the ADEA. When I am referring to one or the other, I generally use the terms punitive or liquidated damages.

12. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

13. *See infra* Part III.B.

The wording of the standard for exemplary damages under the ADEA is virtually identical to the wording of the standard for punitive damages under the Civil Rights Act of 1991 and the related statute, § 1981. Unfortunately, and although the wording of the standards is indistinguishable, the courts interpret it differently.[14] The courts are fairly uniform in their interpretation of the standard for exemplary damages under the ADEA,[15] but only after some years of the same sort of confusion occurring today under § 1981 and the Civil Rights Act of 1991. This article revisits and expands on the recommendation that the standard for punitive damages under Title VII be the same as the standard for exemplary damages under the ADEA, in light of recent case law under all four acts.

Under the ADEA,[16] § 1981,[17] Title VII[18] and the ADA,[19]

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14. *See infra* Parts III.B., IV.

15. *See infra* Part IV.D.

16. *See, e.g., Thurston*, 469 U.S. at 125.

17. *See* Smith v. Wade, 461 U.S. 30, 51 (1983). *Smith v. Wade* is a § 1983 case that has been universally applied to § 1981 as well. *See, e.g.,* Williamson v. Handy Button Mach. Co., 817 F.2d 1290, 1296 (7th Cir. 1987); Stallworth v. Shuler, 777 F.2d 1431, 1435 (11th Cir. 1985); Block v. R.H. Macy & Co., 712 F.2d 1241, 1246 (8th Cir. 1983).

Sections 1981 and 1983 are part of the Civil Rights Acts enacted after the Civil War to protect the newly freed slaves. *See* BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 668 (2d ed. 1983). Section 1983 affords a remedy for intentional discrimination, prohibited by the U.S. Constitution, *see id.* at 678, and § 1981 provides another remedy for private intentional discrimination, *see id.* at 668-78.

18. The punitive damage provision for Title VII reads as follows:

> (b) Compensatory and punitive damages
>
> (1) Determination of punitive damages—A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

42 U.S.C. § 1981a(b)(1) (1994).

19. The 1991 Civil Rights Act, which added compensatory and punitive damages as a remedy to Title VII, also added compensatory and punitive damages as a remedy for a violation of the ADA. *See* 42 U.S.C. § 1981a(a)(2) (1994). Section 1981a(a)(2) provides:

> (2) Disability—In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000e-5 or 2000e-16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 749a(a)(1) of title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an

the minimum standard for assessing exemplary damages is "reckless indifference" to federally protected rights.[20] Under the ADEA, exemplary damages are liquidated damages and are possible only if there is a willful violation.[21] According to the Su-

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> employment practice that is unlawful because of its disparate impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the requirements of section 791 of title 29 or the regulations implementing section 791 of title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

Id.

The only difference in the treatment of the ADA and Title VII by the 1991 Act is the provision of a good faith defense for the employer who has made good faith reasonable efforts to reasonably accommodate the plaintiff's disability. *See id.* § 1981a(a)(3). Section 1981a(a)(3) provides:

> (3) Reasonable accommodation and good faith effort—In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C. 12112(b)(5)] or regulations implementing section 791 of title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

Id.

20. Under the ADEA, the Court added the term "knowledge," as well as "reckless disregard." *See, e.g., Thurston*, 469 U.S. at 128. Under Title VII, the actual language includes "malice," as well as "reckless indifference." Because "knowledge" and "malice" are generally more culpable states of mind than recklessness, the latter is the salient standard. *See* Johnson, *Punitive Damages, supra* note 1, at 536-38; *infra* note 166.

Under § 1981, courts have interpreted the standard for punitive damages to be "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law." *Smith*, 461 U.S. at 51; *see also Williamson*, 817 F.2d at 1296; *Stallworth*, 777 F.2d at 1435; *Block*, 712 F.2d at 1246.

21. *See* Age Discrimination in Employment Act § 7(b), 29 U.S.C. § 626(b) (1994). Section 7(b) of the ADEA provides that certain provisions for remedies of the Fair Labor Standards Act apply to the ADEA and that liquidated damages, which are double damages, are available for willful violations. *See id.*

The same remedial provisions apply as well to the Equal Pay Act of 1963 ("EPA"), which is an amendment to the Fair Labor Standards Act. *See* Equal Pay Act of 1963 § 3(d)(1), 29 U.S.C. § 206(d)(1) (1994); 29 U.S.C. § 216 (actual remedial provisions). The EPA prohibits sex discrimination in pay for equal work. The EPA is another act that is related to Title VII. *See generally, e.g.,* County of Wash. v. Gunther, 452 U.S. 161 (1981). The willfulness standard is the same under the EPA and under the ADEA (reckless disregard to federally protected rights.) *Compare* McLaughlin v.

preme Court, the employer acts willfully when he recklessly disregards the plaintiff's rights under the ADEA.[22] Similarly, under Title VII, exemplary damages are punitive damages, and by statute may be imposed only for intentional violations that are in "reckless indifference to . . . federally protected rights."[23] Likewise, a violation of § 1981 requires proof of intentional discrimination, but the courts have interpreted the standard for punitive damages to be "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law."[24]

Section 1981, the ADEA, and the ADA have been closely associated with Title VII. Claims under § 1981, which provides another remedy for private intentional race-related employment discrimination,[25] have commonly been joined with Title VII claims. Courts in Title VII cases have frequently cited cases decided under § 1981 and vice versa.[26] After the 1991 Civil Rights Act, Title VII and § 1981 became more inextricably connected. The primary impetus for the addition of compensatory and punitive damages as a remedy for Title VII was that claimants could recover those damages for race, color, and national origin discrimination under § 1981, but damages were not available under Title VII for sex and religious discrimination.[27] Section 1981a of the 1991 Civil Rights Act now allows the plaintiff to recover compensatory and punitive damages in Title VII cases, provided that such damages are not recoverable under § 1981.[28] It is imperative, then, that the standard for

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Richland Shoe Co., 486 U.S. 128 (1988), *with Thurston*, 469 U.S. at 121. *See generally* JOEL W. FRIEDMAN & GEORGE M. STRICKLER, JR., THE LAW OF EMPLOYMENT DISCRIMINATION 948 (4th ed. 1997).

22. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 614 (1993) (quoting *Thurston*, 469 U.S. at 126).

23. 42 U.S.C. § 1981a(b)(1) (1994). For the full text of this provision, see *supra* note 18.

24. *Smith*, 461 U.S. at 30.

25. *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-60 (1975).

26. *See* Johnson, *Punitive Damages*, *supra* note 1, at 538.

27. *See* David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, 8 LAB. LAW. 849, 857 (1992). Relief under Title VII was originally limited to equitable relief. *See* 42 U.S.C. § 2000e-5(g) (1988).

28. *See* 42 U.S.C. § 1981a(a)(1) (1994). Section 1981a(a)(1) provides:

(a) Right of recovery

(1) Civil rights—In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C.

punitive damages be the same for both § 1981 and Title VII.

The connection between Title VII and the ADEA arises from the fact that the anti-discrimination provisions of the ADEA were taken virtually word for word from Title VII.[29] For this reason, the courts have commonly used Title VII cases to interpret the anti-discrimination provisions of the ADEA.[30] Similarly, the courts have used Title VII as an authoritative body of law for the ADA as well.[31] Furthermore, § 1981a, the damages provision of the 1991 Civil Rights Act, applies to the ADA,[32] as

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> 2000e-5, 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e-2, 2000e-3, 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

Id.

The provision for compensatory and punitive damages also applies to actions under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12,117(a) (1994), and to section 505(a)(1) of the Rehabilitation Act of 1973, 29 U.S.C. § 794a(a)(1) (1994). *See* 42 U.S.C. § 1981a(a)(2). The damages, however, are capped as follows:

> (3) Limitations—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 under this section, shall not exceed, for each complaining party—
> (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and
> (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and
> (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

Id. § 1981a(b)(3).

29. *See* Judith J. Johnson, *Semantic Cover For Age Discrimination: Twilight of the ADEA*, 42 WAYNE L. REV. 1, 8 nn.25 & 27 (1995) [hereinafter Johnson, *Semantic Cover*].

30. *See id.* at 11.

31. *See generally* FRIEDMAN & STRICKLER, *supra* note 21, at 1033-34.

32. *See* 42 U.S.C. § 1981a(a)(2) (1994). For the full text of this provision, see *supra* note 19.

well as to Title VII.[33] If the standard for exemplary damages under the Civil Rights Act of 1991 and § 1981 were interpreted to be the same as the standard for such damages under the ADEA, all of the major federal legislation that prohibit private employment discrimination would be interpreted consistently.[34]

The problem with all of these anti-discrimination provisions is that, in cases of disparate treatment, the defendant has engaged in intentional discrimination.[35] Such intentional misconduct necessarily requires more than mere recklessness. Accordingly, all the statutory schemes discussed above ostensibly require a less culpable state of mind for the imposition of exemplary damages than the state of mind necessary to find liability. Consequently, the courts have had trouble instructing a jury in an intentional discrimination case on when to assess punitive damages.[36] The problem is that the jury must be instructed that, in order to find the defendant liable, they must find that the defendant intentionally discriminated against the plaintiff on the basis of a prohibited characteristic (race, sex, etc.). Then, in order to award punitive damages, the jury must find that the defendant acted with "reckless indifference" to the plaintiff's rights. The difficulty for the judge is explaining to a jury how, even if the defendant specifically intended to discriminate, it did not necessarily act with reckless indifference to the plaintiff's rights.[37] The solution, as the Court has held

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33. *See* 42 U.S.C. § 1981a(a)(1) (1994). For the full text of this provision, see *supra* note 28.

34. This would also include the EPA because its liquidated damages provision is construed the same as the ADEA. *See generally* FRIEDMAN & STRICKLER, *supra* note 21, at 948. For a further discussion of the EPA, see *supra* note 21 and *infra* note 291.

35. *See* Johnson, *Punitive Damages*, *supra* note 1, at 534-35. Liquidated damages are not statutorily limited under the ADEA to cases of disparate treatment. In *Hazen Paper v. Biggins*, 507 U.S. 604 (1993), however, the latest case on the standard for liquidated damages, the Court cast doubt on whether the disparate impact model of proof applies at all to the ADEA. *See id.* at 610; *see also* Johnson, *Semantic Cover*, *supra* note 29, at 61. After *Hazen Paper*, "[t]here appears to be a trend among the circuit courts to reject the availability of impact claims in ADEA actions." FRIEDMAN & STRICKLER, *supra* note 21, at 990. Disparate impact does not require proof of intent to discriminate. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). Therefore, if unintentional discrimination is not possible under the ADEA, the problem is the same for the ADEA as it is for Title VII, which only imposes punitive damages in intentional discrimination cases.

36. *See* discussion *infra* Parts III.B., IV.D.

37. This difficulty is exacerbated by a renewed interest in the agency principles of

under the ADEA, is to distinguish between the defendant's state of mind with regard to the act of discrimination and the defendant's state of mind with regard to the law that prohibits the discriminatory act.

In order to illustrate the efficacy of this solution, this article will compare recent case law developed under the ADEA with recent case law developed under the 1991 Civil Rights Act and § 1981 to demonstrate that the difficulty in articulating a workable standard has apparently been solved under the ADEA, but not under the other anti-discrimination statutes.

In *Trans World Airlines, Inc. v. Thurston,*[38] the Court announced that the standard for determining a willful violation of the ADEA and awarding liquidated damages is "reckless disregard" of the plaintiff's federally protected rights.[39] After *Thurston,* the lower courts were unable to apply the standard correctly.[40] This situation continued even after the Court reiterated the *Thurston* standard in *McLaughlin v. Richland Shoe Co.*[41] More recently, the Supreme Court explained again in *Hazen Paper Co. v. Biggins*[42] that the standard was "reckless indifference," but clarified what that meant: "[i]f an employer incorrectly but in good faith and nonrecklessly believes that the statute permits a particular age-based decision, then liquidated

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Title VII. *See* discussion *infra* Part III.B. Some courts have held that punitive damages cannot be awarded against the company which did not know of the discriminatory acts of its supervisor. *See, e.g.,* Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927, 944 (5th Cir. 1996). Courts will generally attribute the conduct of the supervisory employees to the company for purposes of compensatory damages but may require more direct complicity by the highest officials of the company to support punitive damage awards, regardless of how egregious the violation was. *See id.* at 942. Because the courts generally cite the principles developed by the Supreme Court in *Meritor Savings Bank, F.S.B. v. Vinson,* 477 U.S. 57 (1986), for assessing supervisory liability, the Court's recent clarification of those principles should alleviate this problem. *See infra* notes 208-12 and accompanying text.

38. 469 U.S. 111 (1985).

39. *Id.* at 126.

40. *See Hazen Paper,* 507 U.S. at 615.

41. 486 U.S. 128, 133 (1988). After *Thurston,* the question had remained whether the standard for willfulness would apply as well to the question of whether to apply the longer statute of limitations for a willful violation. This case involved a Fair Labor Standards Act violation. At the time, the ADEA and the Fair Labor Standards Act were identical with regard to the consequences for a willful violation. *See generally* FRIEDMAN & STRICKLER, *supra* note 21, at 1023-24.

42. 507 U.S. 604 (1993).

damages should not be imposed."[43] After the *Hazen Paper* case, the courts generally have been able to apply the standard correctly. Why did resolution of the issue take so long? The "reckless indifference" standard for an intentional violation was simply unworkable until further refined by the Court in *Hazen Paper*.

This article re-asserts the desirability of the interpretation of the standard for liquidated damages under the ADEA as clarified by *Hazen Paper* and recommends that that interpretation be applied to the other anti-discrimination statutes, § 1981, the ADA, as well as Title VII.[44] In effect, punitive damages should be presumptively appropriate in all cases in which the defendant has intentionally discriminated, absent a showing that the employer believed in good faith based on reasonable grounds that he was not violating the statutory rights of the plaintiff.

The article explains the four principal anti-discrimination laws and the theories of discrimination generally in Part II. Part III discusses the historical development of the standard for punitive damages under the 1991 Civil Rights Act and § 1981 and frames the problem by presenting recent cases under the 1991 Civil Rights Act and § 1981. Part IV elucidates the solution by discussing the relevant Supreme Court cases under the ADEA and the recent interpretation of those cases by the lower courts. Part V recommends that the Supreme Court adopt the same standard for punitive damages under the Civil Rights Act of 1991 as it adopted for willful violations under the ADEA. Part VI concludes.

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43. *Id.* at 616.

44. The punitive damages provision of § 1981a requires that the plaintiff demonstrate reckless indifference. However, it is the position of this article that, having proven intentional discrimination, the plaintiff has demonstrated reckless indifference as well. It is not clear who bears the burden of persuasion of proving good faith in ADEA cases, but it is likely that the plaintiff bears the burden on this issue. *See* FRIEDMAN & STRICKLER, *supra* note 21, at 1029. The defendant, however, should be responsible for at least articulating a basis for good faith reasonable belief, regardless of who bears the ultimate burden of persuasion.

II. THE PRINCIPAL FEDERAL ANTI-DISCRIMINATION LAWS AND THEORIES OF DISCRIMINATION GENERALLY

A. *The Principal Federal Anti-Discrimination Acts*

1. Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act

Title VII of the Civil Rights Act of 1964[45] prohibits an employer from hiring, discharging or otherwise discriminating with regard to any term or condition of employment because of race, color, religion, sex, or national origin.[46] In 1967, Congress passed the ADEA to prohibit discrimination based on age.[47] Because the wording of the prohibitions against age discrimination in the ADEA was taken word for word from Title VII of the Civil Rights Act of 1964,[48] the ADEA now ostensibly provides the same basic protections from discrimination based on age for people over forty[49] that Title VII provides based on race, sex, religion, color and national origin.[50]

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45. 42 U.S.C. §§ 2000e to 2000e-17 (1994).

46. *See id.* §§ 2000e, 2000e-2(a) (1994 & Supp. 1995).

47. Congress originally passed the ADEA to prohibit discrimination based on age against persons aged 40 to 65. *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 12, 81 Stat. 602, 607. The upper age limit was raised to 70 in 1978, *see* Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, §§ 3(a), 12(a), 92 Stat. 189, and then removed altogether in 1986, *see* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 2(c), 100 Stat. 3342.

48. *See* Lorillard v. Pons, 434 U.S. 575, 584 (1978).

49. As set forth immediately below, the protections appear to be the same—but may be different in practice. *See* Johnson, *Semantic Cover*, *supra* note 29, at 8 n.26.

50. The ADEA provides, in pertinent part:

> It shall be unlawful for an employer:
>
> (1) to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's *age*;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's *age*.

Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a) (1994) (emphasis added).

Title VII provides, in pertinent part:

> It shall be *an* unlawful *employment practice* for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or other-

The main difference originally between the two Acts, for the purposes of this article, can be found in their remedies.[51] The remedial provisions of the ADEA were drawn from the Fair Labor Standards Act and provide for liquidated damages for willful violations.[52] The Supreme Court has held that the violation is willful if "the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA."[53]

> wise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's *race, color, religion, sex, or national origin;* or
>
> (2) to limit, segregate, or classify his employees *or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1994 & Supp. 1995) (emphasis added).

The italicized provisions above indicate the differences between Title VII and the ADEA. The only real difference between the two statutory provisions cited above is that the ADEA does not mention applicants, although discriminatory hiring is forbidden. The term "applicants" was added to Title VII in 1972 after *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and after the ADEA to "perfect the Title VII provisions dealing with . . . apprenticeship training." H.R. REP. NO. 92-238, at 19-20 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2155-56.

51. *See* Age Discrimination in Employment Act § 7(b), 29 U.S.C. § 626(b) (1994); Johnson, *Semantic Cover*, *supra* note 29, at 9 n.28.

In addition to the bona fide occupational qualification ("BFOQ") and seniority defenses also available under Title VII, Congress added other defenses to the ADEA that were not found in Title VII. *See* 42 U.S.C, § 2000e-2(e), (h) (1994). These include any action that the employer takes based on "reasonable factors other than age" or pursuant to a bona fide benefit plan, as well as discipline or discharge for good cause. Until the Civil Rights Act of 1991, the courts usually interpreted the ADEA consistently with Title VII, an approach that the courts considered appropriate and desirable. *See* Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985); Monce v. City of San Diego, 895 F.2d 560, 561 (9th Cir. 1990); MACK A. PLAYER, EMPLOYER DISCRIMINATION LAW 517 (1988); Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229, 230-31 (1990); *cf.* Lorillard v. Pons, 434 U.S. 575, 584 (1978). The BFOQ defense is not absolute under Title VII but only applies to sex, religious and national origin discrimination. *See* 42 U.S.C. § 2000e-2(e). There are defenses under Title VII which are not contained in the ADEA as well, such as action taken pursuant to a merit system or a system which measures quantity or quality of production or a professionally developed test. *See id.* § 2000e-2(h).

52. *See* Age Discrimination in Employment Act § 7(b), 29 U.S.C. § 626(b) (1994).

53. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 126 (1985).

Until recently, the remedies for Title VII were purely equitable and included such relief as backpay and reinstatement.[54] The Civil Rights Act of 1991 added a provision for compensatory and punitive damages for intentional discrimination when the defendant acts with "reckless indifference to the federally protected rights of an aggrieved individual."[55] Because the ADEA allows liquidated damages for "reckless disregard" when the conduct is prohibited by the ADEA,[56] obviously, the standards for exemplary damages under Title VII and the ADEA are virtually the same.[57] The lower courts, however, do not interpret the standards the same way.[58]

2. The Americans with Disabilities Act

The Americans with Disabilities Act, which prohibits discrimination based on disability, was also modeled on Title VII.[59] Although not taken word for word from Title VII as was the ADEA, the ADA contains the same basic concept of discrimination.[60] The courts have thus looked to the principles developed

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54. *See* 42 U.S.C. § 2000e-5(g) (1988).

55. 42 U.S.C. § 1981a(b)(1) (1994). For the full text of this provision, see *supra* note 18.

56. *See Thurston*, 469 U.S. at 126.

57. *See supra* note 11.

58. *See infra* Part III.B. *Compare* cases cited in Part III.B. *with* cases cited in Part IV (despite the similarity in drafting, courts continue to interpret the two acts with inconsistency).

59. *See* FRIEDMAN & STRICKLER, *supra* note 21, at 1033-34.

60. *See* 42 U.S.C. § 12,112(a) (1994). This section provides:

> Discrimination—
>
> (a) General rule
>
> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.
>
> (b) Construction
>
> As used in subsection (a) of this section, the term "discriminate" includes—
>
> (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;
>
> (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this

under Title VII to interpret the anti-discrimination provisions of the ADA,[61] and after the Civil Rights Act of 1991, the ADA and Title VII have a common authorization for damages.[62]

Under the ADA, the plaintiff must prove that he is a qualified person with a disability.[63] Once the plaintiff has shown the requisite disability, the defendant must show that he can-

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subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

Id.

61. *See generally* FRIEDMAN & STRICKLER, *supra* note 21, at 1033-34.

62. *See* 42 U.S.C. § 1981a(a)(2) (1994). For the full text of this provision, see *supra* note 19.

63. *See generally* FRIEDMAN & STRICKLER, *supra* note 21, at 1041-42.

not reasonably accommodate the plaintiff's disability without undue hardship.[64]

"Reasonable accommodation without undue hardship" is a concept which was developed under Title VII with respect to the prohibition against religious discrimination.[65] The difference between the application of the concept to the ADA is that undue hardship is much easier to show for religious discrimination than for disability discrimination.[66] The principle of reasonable accommodation is otherwise the same for both Acts. Therefore, the defendant may be guilty of discrimination not only in intentionally preferring a person of another religion or in preferring a non-disabled person, but the defendant may also be discriminating if he does not make certain concessions to the religious practices or the disability.[67]

There is one other difference in the application of the reasonable accommodation requirement of Title VII and the ADA. By statute under the ADA, if the defendant makes an offer of what he believes in good faith is a reasonable accommodation, then he cannot be assessed damages.[68] Therefore, the idea of good faith as a defense to punitive damages—the solution this article proposes—is not unknown under the Civil Rights Act of 1991. Unfortunately, other than the specific situation of a good faith offer to accommodate, the courts have not required proof of the employer's good faith to avoid punitive damages under the ADA.

3. Section 1981

Section 1981[69] was enacted after the Civil War to protect

64. *See id.* at 1050-51.

65. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 72 (1977) (providing a history of the development of the concept of "reasonable accommodation without undue hardship" under Title VII); *see also* Prewitt v. United States Postal Serv., 662 F.2d 292, 308 n.22 (5th Cir. 1981).

66. *See* FRIEDMAN & STRICKLER, *supra* note 21, at 1050.

67. *See Hardison*, 432 U.S. at 71-76.

68. *See* 42 U.S.C. § 1981a(a)(2) (1994). For the full text of this provision, see *supra* note 19.

69. 42 U.S.C. § 1981 (1994). Section 1981 provides, in pertinent part:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts,

the newly freed slaves.[70] Section 1981, which "on its face relates primarily to racial discrimination in the making and enforcement of contracts,"[71] also provides another remedy, in addition to Title VII for private intentional employment discrimination.[72] Under § 1981, the prohibited discrimination is limited to race, color, and national origin.[73] Section 1981 claims and Title VII are often joined because they provide different remedies for the same wrong.[74] Before the Civil Rights Act of 1991, § 1981 allowed the plaintiff to recover compensatory and punitive damages,[75] while the remedies under Title VII were limited to equitable relief.[76] The 1991 Civil Rights Act allows the plaintiff to recover damages in situations in which she cannot recover damages under § 1981. Presumably this means that plaintiffs can recover damages for sex and religious discrimination under Title VII and damages for race, color, and national origin discrimination under § 1981.[77] The consequence is that if a plaintiff wants to recover damages for race, color, or national origin discrimination under Title VII, he must sue under both Title VII and § 1981. As a result, there are fewer recent employment discrimination cases currently being decided under § 1981 alone.[78]

> to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id.

Section 1981 was reenacted as the Civil Rights Act of 1870 after the ratification of the Fourteenth Amendment. *See* SCHLEI & GROSSMAN, *supra* note 17, at 668.

70. *See* SCHLEI & GROSSMAN, *supra* note 17, at 678-85.

71. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459 (1975).

72. *See* SCHLEI & GROSSMAN, *supra* note 17, at 669-78.

73. *See id.* at 673-75.

74. The "'remedies available to the individual under Title VII are co-extensive with the indiv[i]dual's right to sue under the provisions of . . . § 1981, and that the two procedures augment each other and are not mutually exclusive.'" *Johnson*, 421 U.S. at 460 (citation omitted) (alteration in original) (quoting H.R. REP. NO. 92-238, at 19 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2154).

75. *See id.*

76. *See* 42 U.S.C. § 2000e-5(g) (1988).

77. *See* Cathcart & Snyderman, *supra* note 27, at 858.

78. *See generally* cases cited *infra* Part III.B.

B. *Theories of Discrimination*

The Supreme Court has developed two theories of discrimination under Title VII: disparate treatment[79] and disparate impact.[80] Both theories apply to the ADA,[81] while § 1981 only recognizes the disparate treatment theory.[82] The courts universally apply the disparate treatment theory to the ADEA,[83] but whether the disparate impact theory applies to the ADEA is less certain.[84]

Disparate treatment occurs when the employer intentionally discriminates against an employee based on race, sex, religion, color, or national origin under Title VII;[85] age under the ADEA,[86] disability under the ADA,[87] and race, color, and national origin under § 1981.[88] The only question under the disparate treatment theory is whether the employer intentionally treated the employee differently because of her protected status. On the other hand, the disparate impact theory applies to employment criteria that eliminate more persons of a certain protected class than others.[89] Proof of intent to discriminate is unnecessary in a disparate impact case;[90] rather, the proof is based on statistical analysis of the impact of the employer's employment criteria on a protected class.[91]

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79. *See generally* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
80. *See generally* Griggs v. Duke Power Co., 401 U.S. 424 (1971).
81. *See* FRIEDMAN & STRICKLER, *supra* note 21, at 1033-34.
82. *See* Johnson, *Punitive Damages*, *supra* note 1, at 528-39.
83. *See* Johnson, *Semantic Cover*, *supra* note 29, at 13-20.
84. *See supra* note 35.
85. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).
86. *See* PLAYER, *supra* note 51, at 517.
87. *See* FRIEDMAN & STRICKLER, *supra* note 21, at 1033-34.
88. *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-60 (1975); Cathcart & Snyderman, *supra* note 27, at 880-81.
89. *See generally* Griggs v. Duke Power Co., 401 U.S. 424 (1971); Steven L. Willborn, *The Disparate Impact Model of Discrimination: Theory and Limits*, 34 AM. U. L. REV. 799 (1985) (discussing the difference between the two theories).
90. *See Griggs*, 401 U.S. at 432.
91. *See* SCHLEI & GROSSMAN, *supra* note 17, at 98-102.

Under Title VII and the ADA, damages are available only in disparate treatment cases, not in disparate impact cases,[92] for which the remedy is equitable relief.[93] Section 1981 also applies only to cases of intentional discrimination (disparate treatment), and damages are part of the remedy allowed under § 1981.[94]

With regard to the ADEA, the Supreme Court has said, and many lower courts agree, that the disparate impact model may not be appropriate in an ADEA case.[95] If this is so, then the remedy for a violation of the ADEA, which may include liquidated damages, would be available only in the circumstances for which damages are available under the other anti-discrimination provisions, that is, for intentional discrimination.[96]

Whether or not the disparate impact theory applies to the ADEA, the problem remains in the differing standards required for proof of intentional discrimination and "reckless indifference" required for exemplary damages. Because the problem of different standards for determining the defendant's intent does not arise in disparate impact cases, this article will concentrate on the problem as it arises in disparate treatment cases.

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92. *See* 42 U.S.C. § 1981a(a)(1) (1994).

93. *See id.*; *infra* note 100.

94. *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460 (1975).

95. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993); *see also* Johnson, *Semantic Cover*, *supra* note 29 (in which I argue that disparate impact should apply to the ADEA); *supra* note 35; *cf.* Jan W. Henkel, *The Age Discrimination in Employment Act: Disparate Analysis and the Availability of Liquidated Damages after* Hazen Paper Co. v. Biggins, 47 SYRACUSE L. REV. 1183, 1193-1200 (1997).

96. Because disparate impact does not require any showing of illegal intent, if the disparate impact model was recognized as appropriate in an ADEA case, imposing liquidated damages based on a showing of reckless indifference to the plaintiff's rights would be easier to apply. In other words, because the plaintiff does not have to show intent to discriminate in a disparate impact case, liquidated damages would be appropriate upon a showing that the employer in fact had some illegal intent. *See* Johnson, *Punitive Damages*, *supra* note 1, at 535 n.21 (discussing the possible interpretations of the state of mind of one who engages in disparate impact discrimination).

III. THE STANDARD FOR PUNITIVE DAMAGES UNDER THE CIVIL RIGHTS ACT OF 1991 AND § 1981

A. *Historical Development of the Standard*

The 1991 Civil Rights Act allows recovery of punitive damages if the "respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[97] The "reckless indifference" state of mind required for punitive damages was new to Title VII and the ADA,[98] but not new to § 1981,[99] which is closely allied with Title VII.[100] Because § 1981 and Title VII provide different remedies for the same wrong, they are often considered together,[101] and § 1981 jurisprudence relating to punitive damages was the most natu-

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97. 42 U.S.C. § 1981a(b)(1) (1994). For the full text of this provision, see *supra* note 18.

98. It should be noted that both Title VII and § 1981 allow the imposition of punitive damages if the defendant acts with malice under Title VII or intent to discriminate under § 1981. As I discussed at length in my original article on a standard for punitive damages, because these states of mind are worse than mere recklessness, the salient state of mind is the minimum required for the imposition of punitive damages, reckless indifference, common to both acts. *See* Johnson, *Punitive Damages, supra* note 1, at 537.

"Malice with reference to punitive damages under Title VII also should comprehend a high degree of recklessness which indicates indifference to bringing about the statutorily proscribed result, the discrimination, as well as the specific intent to discriminate." *Id.* at 537.

99. 42 U.S.C. § 1981 (1994).

100. Section 1981 was enacted after the Civil War as the Civil Rights Act of 1866. Although "on its face [it] relates primarily to racial discrimination in the making and enforcement of contracts," the Supreme Court held that § 1981 "affords a federal remedy against discrimination in private employment on the basis of race." Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-60 (1975). "Congress noted 'that the remedies available to the individual under Title VII are co-extensive with the indiv[i]dual's right to sue under the provisions of . . . § 1981, and that the two procedures augment each other and are not mutually exclusive.'" *Id.* at 459 (quoting H.R. REP. NO. 92-238, at 19 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2154) (citation omitted) (alteration in original). When the amendment to Title VII providing for compensatory and punitive damages was passed, Congress again tied the two provisions together by stipulating that this recovery was only available if the plaintiff could not recover under § 1981. *See* 42 U.S.C. § 1981a(a)(1) (1994).

The remedies under Title VII and § 1981 were quite different before the Civil Rights Act of 1991. Section 1981 has always allowed the plaintiff to recover compensatory and punitive damages. *See Johnson*, 421 U.S. at 460. Title VII only afforded equitable relief before the 1991 Civil Rights Act. *See* 42 U.S.C. § 2000e-5(g) (1988).

101. *See Johnson*, 421 U.S. at 459.

ral source for a standard under Title VII. Furthermore, the standard for punitive damages applied to § 1981 was announced by the Supreme Court in *Smith v. Wade* to be "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law."[102] Therefore, under both Title VII and § 1981, the minimum standard for punitive damages is the "reckless disregard of protected rights." Because the remedial provision is the same for Title VII and the ADA, the ADA must also share in the same interpretation.[103]

The legislative history of the 1991 Civil Rights Act strongly indicates that it was intended to unify the standards for punitive damages for § 1981 and for Title VII. In *Patterson v. P.H.P. Healthcare Corp.*,[104] the Fifth Circuit cited this legislative history, saying that:

> [p]unitive damages were unavailable to Title VII plaintiffs until the enactment of the 1991 Amendments to the Civil Rights Act of 1964, 42 U.S.C. § 1981a. Congress's primary concern with enacting punitive damages under § 1981a(b)(1) was to unify the law under Title VII. In furtherance of this unification effort, Congress permitted the imposition of punitive damages under Title VII in the same general circumstances as punitive damage awards imposed by courts under § 1981. . . . *"Punitive damages are available under [§ 1981a] to the same extent and under the same standards that they are available to plaintiffs under 42 U.S.C. § 1981. No higher standard may be imposed."*[105]

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102. Smith v. Wade, 461 U.S. 30, 51 (1983). Although *Smith v. Wade* is a decision interpreting § 1983, the courts universally hold that the standard announced therein is applicable to § 1981 as well. *See, e.g.*, Williamson v. Handy Button Mach. Co., 817 F.2d 1290, 1296 (7th Cir. 1987); Stallworth v. Shuler, 777 F.2d 1431, 1435 (11th Cir. 1985); Block v. R.H. Macy & Co., 712 F.2d 1241, 1246 (8th Cir. 1983).

The language of the 1991 Civil Rights Act is somewhat different, but has essentially the same meaning. *Smith v. Wade* shunned the term "malice" because of its vagueness. *See Smith*, 461 U.S. at 39 n.8. Congress did use the term malice in the Civil Rights Act of 1991, despite the fact that *Smith v. Wade* had rejected this term and that the case applies to Title VII's most analogous provision, § 1981. So it is possible that Congress intended something different. Because the minimum standard, "reckless indifference," is the same for § 1981 and Title VII, however, what Congress meant in using the term malice is fairly irrelevant. For further discussion, see *supra* note 11.

103. *See supra* note 19. Courts are in agreement that the standard must be the same. *See* cases cited *infra* Part III.B.

104. 90 F.3d 927 (5th Cir. 1996).

105. *Id.* at 941 (emphasis added) (citations omitted).

The Supreme Court articulated in *Smith v. Wade* the standard for punitive damages which applies to § 1981: "that reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law, should be sufficient to trigger a jury's consideration of the appropriateness of punitive damages."[106] The Court clearly declined to require the threshold for punitive damages to be higher than that required for compensatory damages.[107] The only limitation the Court put on the standard was that the jury, in its discretionary moral judgment, must find that the conduct merits a punitive award.[108]

Although *Smith v. Wade* was a § 1983 case, the courts hold that the standard is applicable to § 1981 as well.[109] "Reckless disregard for the plaintiff's rights" is indistinguishable from "reckless indifference" to the plaintiff's rights, the standard for punitive damages under the 1991 Civil Rights Act. The courts have, in fact, acknowledged that the standards are virtually identical;[110] however, the fact that the courts have applied consistent standards has worked to the disadvantage of the law under both statutes. Applying the standard articulated in *Smith v. Wade*,[111] the courts have tried to distinguish between the defendant's intentional discrimination, necessary for liability, and its reckless indifference to the plaintiff's statutory rights, necessary for punitive damages.[112] The attempt has been notably unsuccessful, mainly because the courts have often required more evidence of the defendant's bad intent regarding the discriminatory act rather than focusing on the defendant's state of mind regarding the plaintiff's legal rights.[113]

106. *Smith*, 461 U.S. at 51.

107. *See id.* at 53.

108. *See id.* at 52.

109. *See* cases cited *supra* notes 17, 102.

110. *See, e.g., Patterson*, 90 F.3d at 927. For a discussion of why the difference in terminology is insignificant, see *supra* note 11.

111. *See Smith*, 461 U.S. at 56.

112. *See* Johnson, *Punitive Damages, supra* note 1, at Part III.C-D (providing earlier cases); *infra* Part III.B.

113. *See* Johnson, *Punitive Damages, supra* note 1, at Part III.C-D.

As set out in greater detail in my earlier article, under § 1981, many courts, although purporting to follow *Smith v. Wade,* have been unable to apply the standard correctly.[114] They have instead tended either to make the standard for punitive damages higher than reckless indifference to the plaintiff's rights[115] or to require some evidence of aggravating factors,[116] in direct contravention of the rule announced in

114. *See* Johnson, *Punitive Damages, supra* note 1, at Part III.C.2. In *Ngo v. Reno Hilton Resort Corp.*, 140 F.3d 1299, 1302-03 (9th Cir. 1998), *amended on petition for reh'g,* 156 F.3d 988 (9th Cir. 1998), the court acknowledged that *Smith v. Wade* was the authoritative interpretation of the standard and that it had rejected the argument that the standard for punitive damages must necessarily be higher than the standard for liability. The court acknowledged, however, that many lower courts had nevertheless interpreted *Smith v. Wade* to require a heightened evidentiary showing for punitive damages. The court then adopted the higher standard for Title VII. *See Ngo,* 140 F.3d at 1302-04. On petition for rehearing, the court amended the opinion to include a reference to *Kolstad v. American Dental Ass'n,* 139 F.3d 958 (D.C. Cir. 1988) (en banc). *See Ngo,* 156 F.3d at 988. The court also changed its reference to the number of circuit courts that require more than intentional discrimination from four to five. *See id.*

115. *See, e.g.,* Mitchell v. Associated Bldg. Contractors, Inc., 884 F.2d 1392, 1392 (6th Cir. 1989) (per curiam) (unpublished table decision) (full text available on Westlaw, No. 88-3953, 1989 WL 107734, at *2) (limiting punitive damages to cases involving discrimination that is "'malicious, willful *and* in gross disregard of the [plaintiff's] rights'" (emphasis added) (citation omitted) (quoting Jackson v. Pool Mortgage Co., 868 F. 2d 1178, 1181 (10th Cir. 1989))); Beauford v. Sisters of Mercy-Province of Detroit, Inc., 816 F.2d 1104 (6th Cir. 1987) (limiting punitive damages to cases involving egregious conduct or a showing of *willfulness or malice* on the part of the defendant).

116. *See, e.g,* Black v. Armstrong Rubber Co., 865 F.2d 1267 (6th Cir. 1989) (unpublished table decision) (full text available on Westlaw, No. 88-5387, 1989 WL 2116, at *2) (finding that there were insufficient subsidiary findings of fact in a bench trial to support an award of punitive damages, despite the fact that the court referred to plaintiff's testimony that she was subjected to verbal and physical racial abuse).

Smith v. Wade. Courts often simply cite the standard and, without further discussion, decide that the standard does[117] or does not apply.[118]

Some courts were able to apply the standard in accord with *Smith v. Wade* to § 1981 cases by looking at the purposes for punitive damages. For example, one district court said that, because punitive damages were designed to punish the defendant for outrageous conduct and to deter such future conduct by the defendant and others similarly situated, "[a] jury (or other fact-finder) must make a discretionary moral judgment that the policies of punishment and deterrence would be served

117. *See, e.g.,* Yarbrough v. Tower Oldsmobile, Inc., 789 F.2d 508 (7th Cir. 1986). Here, the court characterized the plaintiff's case without further explanation as a "close case for punitive damages" although the plaintiff, inter alia, was transferred to an inferior work area by the defendant supervisor for the stated reason that he did not want a black person in the front of the shop. When the owners of the company refused to remedy the situation, the court said that the defendants were callously indifferent to the plaintiff's protected rights. *See id.* at 510-14. In *Walters v. City of Atlanta*, 803 F.2d 1135 (11th Cir. 1986), the court decided that, although the jury had said all the defendants were responsible for the discrimination against the plaintiff, only one of the defendants acted with the requisite ill will or callous disregard for the plaintiff's rights. With regard to that defendant, the court found the requisite reckless disregard for the plaintiff's rights in the fact that this defendant had been the one who refused to hire the plaintiff because she was concerned about his race and who ultimately hired less qualified applicants. *See id.* at 1147-48. In *Erebia v. Chrysler Plastic Products Corp.*, 772 F.2d 1250 (6th Cir. 1985), the Sixth Circuit affirmed an award of punitive damages because the plaintiff had continually complained about racial harassment, and the defendants had failed to rectify the situation. Furthermore, one manager had threatened to hurt the plaintiff economically if he continued to complain. *See id.* at 1252. The court described this conduct as malicious. *See id.* at 1260. In *Block v. R.H. Macy & Co.*, 712 F.2d 1241 (8th Cir. 1983), the court decided that purposeful racial discrimination, required to find a violation of § 1981, and reckless indifference to the rights of the plaintiff could reasonably be inferred from the same evidence. The defendant's personnel managers knew that the plaintiff's supervisor was racially biased, but acceded to her request to discharge the plaintiff, without making any further inquiry. *See id.* at 1246-47. Also, two white employees engaged in the same conduct for which the plaintiff was discharged, but they were not disciplined. Furthermore, the defendant replaced the plaintiff with a white person. *See id.*

118. *See, e.g., Beauford*, 816 F.2d at 1108-09; Jackson v. McLeod, 748 F. Supp. 831, 836 (S.D. Ala. 1990).

by an award of punitive damages."[119] The problem is, however, that the court could not guide the jury as to when those conditions exist.[120]

This situation mirrors the confusion which occurred after the Court announced the "reckless disregard" standard for liquidated damages under the ADEA.[121] In addition, the same confusion is presently occurring in Title VII and ADA cases interpreting the "reckless indifference" standard for punitive damages under the 1991 Civil Rights Act.[122]

The reason for this confusion, as I explained in my earlier article, is that an intentional act of discrimination, required to establish liability under Title VII, the ADA, and § 1981, evinces a more culpable state of mind than the reckless conduct which is required for punitive damages.[123] Because punitive damages are in the nature of an extraordinary remedy to punish the

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119. Moffett v. Gene B. Glick Co., 621 F. Supp. 244, 287-88 (N.D. Ind. 1985), *overruled by* Reeder-Baker v. Lincoln Nat'l Corp., 644 F. Supp. 983 (N.D. Ind. 1986). The court decided that punitive damages were appropriate in this case in which the defendant had condoned the regular sexual harassment of the plaintiff. *See id.* at 288.

120. In another district court case, the court denied punitive damages on the basis that they would not serve a deterrent purpose because the events that led to the discrimination were unique and not likely to be repeated. *See* Mister v. Illinois Cent. Gulf R.R. Co., 790 F. Supp. 1411, 1424 (S.D. Ill. 1992).

In a Fifth Circuit case, the court, without citing *Smith v. Wade,* stated that the standard for awarding punitive damages was acting willfully *and* with gross disregard for the plaintiff's rights or acting maliciously, all without further discussion. *See* Jones v. Western Geophysical Co., 761 F.2d 1158, 1162 (5th Cir. 1985). The court then noted that the district court should evaluate "'the nature of the conduct in question, the wisdom of some form of pecuniary punishment, and the advisability of a deterrent.'" *Id.* at 1162 (quoting Lee v. Southern Home Sites Corp., 429 F.2d 290, 294 (5th Cir. 1990)). In analyzing the case under this standard, the court recognized that discrimination is an abhorrent practice, but that the company was taking steps to eliminate it and that the evidence was not clear that the defendant acted maliciously. *See id.*

In *Wulf v. City of Wichita,* 883 F.2d 842 (10th Cir. 1989), the Tenth Circuit provided a better reasoned distinction between the state of mind necessary to prove intentional discrimination as opposed to the state of mind necessary for an award of punitive damages. The court said that not every intentional violation subjects the defendant to punitive damages. *See id.* at 867. The defendant may have thought it was legitimate for him to discharge the plaintiff for inefficiency, but because the belief was objectively unreasonable, the defendant was nevertheless guilty of discrimination. The court, however, said that punitive damages require an assessment of the defendant's subjective state of mind. *See id.*

121. *See infra* Parts IV.A, IV.D.

122. *See generally infra* Part III.B.2.

123. *See generally* Johnson, *Punitive Damages, supra* note 1.

defendant for an evil act, courts are naturally inclined to require a finding that the defendant's state of mind was worse than the state of mind required for liability. However, because the defendant is liable when he acted with the intent to bring about the statutorily proscribed result, which is the most culpable state of mind in the law, his state of mind cannot be worse for the purposes of imposing punitive damages. Discrimination is itself egregious conduct. It is a great social and moral wrong, proscribed by federal law. Additional proof of bad conduct is not only unnecessary, but impossible to define.[124]

Intent to discriminate under Title VII, the ADA, § 1981, and the ADEA is simply intending to treat one person differently from another because of one of the statutorily prohibited bases for discrimination.[125] The "intent to discriminate" requirement of Title VII, the ADA and § 1981, which is the same for the ADEA, is akin to the purposeful or intentional state of mind in criminal law.[126] If the defendant intends to do the act that brings about the statutorily proscribed result, that is, he intends to treat people of different races differently because of their race, sex, etc., then the defendant has acted with specific intent comparable to purposefulness in criminal law.[127]

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124. *See infra* text accompanying notes 305-08.

125. *See* Johnson, *Punitive Damages, supra* note 1, at 534-35; *supra* text accompanying notes 85-88.

126. *See* Johnson, *Punitive Damages, supra* note 1, at 534-35.

127. I used a criminal law model in my earlier article because these definitions were most analogous to the states of mind required under the 1991 Civil Rights Act: malice, specific intent, and recklessness. *See id.* at 535.

> The states of mind relevant to Title VII, "intent to discriminate," "malice" and "reckless indifference," have close analogies to significant states of mind for criminal culpability. The purpose of punitive damages in an employment discrimination case is to "punish a wrongdoer for his outrageous conduct and to deter others from engaging in similar conduct." The purpose is penal, therefore, not remedial.
>
> Criminal law is the source of the idea that a person's culpability should be determined depending on his state of mind with regard to the criminally proscribed act. The advantage of interpreting states of mind with reference to the criminal law is that such states of mind are susceptible to concrete articulation. This would be useful, because vague ideas, such as "ill will," obscure the issue of punitive damages and inhibit uniform imposition of a standard.

Id. (citations omitted).

What causes the confusion is that the defendant meets the standard for punitive or liquidated damages if he is merely reckless, even though recklessness is an insufficiently culpable state of mind for liability for intentional discrimination under Title VII, the ADA, § 1981, or the ADEA.[128] Without an initial finding of intentional discrimination, the question of punitive damages never arises.

"Recklessness in criminal law is the subjective awareness of a high degree of risk that the criminally proscribed result will occur."[129] The courts are then presented with the undesirable possibility that the standard for punitive damages requires a less culpable state of mind than the state of mind required for liability. As the Court has recognized under the ADEA, however, distinction easily can be made. The statutory language relates recklessness to the defendant's state of mind with regard to the plaintiff's statutorily protected rights; therefore, there must be a difference between intentionally treating people differently because of race, for example, and doing so in reckless disregard of the law that prohibits the particular kind of discrimination.

Was Congress intending to allow the defendant to contend that it discriminated on purpose but did not mean to break the law? Surely not. Ignorance of the law has never been a defense in a Title VII case;[130] however, Congress may have intended to allow some ignorance of the nuances of the law to be a defense in this regard. As the Supreme Court said with regard to age discrimination, imposing exemplary damages on the defendant because he knew the ADEA was "in the picture" is an unacceptably low standard simply because virtually all employers are aware that age discrimination is prohibited.[131] The Court said there may, however, be cases in which the employer would have a good faith belief based on reasonable grounds that treating a person differently based on age was allowed by the law. Absent such a showing, the assumption is that the

128. *See* Johnson, *Punitive Damages*, *supra* note 1, at 537.

129. *Id.*

130. *See, e.g.*, McKinnon v. Kwong Wah Restaurant, 83 F.3d 498, 508 (1st Cir. 1996) (holding that ignorance of local custom is not a defense under § 1981).

131. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 127-28 (1985).

employer was at least reckless with regard to a violation of the law.[132]

The Court instructed in *Hazen Paper v. Biggins*:

> It is not true that an employer who knowingly relies on age in reaching its decision invariably commits a knowing or reckless violation of the ADEA. The ADEA is not an unqualified prohibition on the use of age in employment decisions, but affords the employer a "bona fide occupational qualification" defense, and exempts certain subject matters and persons. If an employer incorrectly but in good faith and nonrecklessly believes that the statute permits a particular age-based decision, then liquidated damages should not be imposed. . . . Once a "willful" violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation, or prove that age was the predominant, rather than a determinative, factor in the employment decision.[133]

The same rationale pertains to the Civil Rights Act of 1991. Title VII and the ADA are also not absolute prohibitions against discrimination based on the prohibited classifications. Both have various exemptions and defenses. If the defendant has intentionally discriminated against a person because of his race or other prohibited characteristic, absent a good faith reasonable belief that the discrimination was legal, he would have acted recklessly with regard to the plaintiff's statutory rights. That is, because all employers are aware that race discrimination is illegal, in order to impose punitive damages, the employer who discriminates must be subjectively aware of a high degree of risk that if he did the act he intended (treating people differently because of race), he would be discriminating in violation of the law.

The Court had adopted the same reckless indifference standard applied to § 1981 in *Smith v. Wade* as it later adopted and explained fully for the ADEA.[134] Congress must have been

132. *See id.* at 128-29.
133. Hazen Paper Co. v. Biggins, 507 U.S. 604, 616-17 (1993) (citations omitted).
134. *Compare Thurston*, 469 U.S. at 121, *with* Smith v. Wade, 461 U.S. 30 (1983).

aware of these Supreme Court decisions when it used the same language in the Civil Rights Act of 1991.[135]

To recover punitive damages under Title VII, the plaintiff must demonstrate that the defendant acted with malice or reckless indifference.[136] It is the position of this article that, once the plaintiff has shown that the defendant intentionally discriminated, the plaintiff has met this burden. It should be incumbent on the defendant to prove that he acted in good faith based on reasonable grounds.[137] The most obvious defense is that the defendant reasonably believed that the intentional discrimination did not violate Title VII because he was acting pursuant to a valid affirmative action plan[138] or a bona fide occupational qualification ("BFOQ").[139] As discussed below, the defense should not be applied so strictly. There should be other occasions in which the defendant may be only negligent, not reckless, or may believe incorrectly but in good faith, that he was acting legally.[140] In all these cases, he should not be punished by an award of punitive damages even though his defense to liability would fail.

The Court, under the ADEA and § 1981, and Congress, under the Civil Rights Act of 1991, could have required some aggravating circumstances to impose exemplary damages, such as a bad motive or a more outrageous act than intentionally discriminating. The Court, however, has expressly declined to follow

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135. *See* Kolstad v. American Dental Ass'n, 139 F.3d 958, 964 (D.C. Cir 1998), *cert. granted,* 119 S. Ct. 401 (1998) (in which the court said "[t]hat Congress ultimately enacted language similar to that employed by Smith v. Wade"); *supra* note 11.

136. *See* 42 U.S.C. § 1981a(b)(1) (1994).

137. In the alternative, the defendant could be required to articulate a defense which the plaintiff would then be required to disprove. "Punitive damages are damages, other than compensatory or nominal damages, awarded . . . to punish [a defendant] . . . and to deter him . . . from similar conduct in the future." RESTATEMENT (SECOND) OF TORTS § 908(1) (1977). If the defendant intentionally discriminated, he clearly deserves punishment in most cases because he has done a great social and moral wrong proscribed by federal law. If, however, he was acting in good faith based on reasonable grounds, he should not be assessed punitive damages.

138. *See generally* Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987).

139. *See* 42 U.S.C. § 2000e-2(e)(1) (1994).

140. *See infra* text accompanying notes 212-17, 311-13. For a discussion of the difference between recklessness and negligence, see *infra* note 298.

this path under the ADEA[141] and § 1981.[142] Similarly, Congress intended that the same standard that applies to § 1981 would apply to 1991 Civil Rights Act.[143] In addition, because Congress used virtually the same language as the Court used in the ADEA cases and in *Smith v. Wade,* it is impossible to argue rationally that Congress intended "reckless indifference" to mean something different.[144] Furthermore, the presence of "reckless indifference" as an alternative to "malice" in the statute is an indication that Congress intended the minimum standard to be something less than conduct more egregious than intentional discrimination.

After the 1991 Civil Rights Act made damages for race and national origin cases under Title VII contingent on not being able to recover under § 1981, § 1981 cases are generally consolidated with Title VII cases. The courts are still trying to distinguish the standard for liability for intentional discrimination under these two acts, as well as the ADA, from the now unified standard for punitive damages.[145] Under the ADEA, however, the Supreme Court has articulated a workable and sensible interpretation of "reckless indifference," and courts are generally following it.[146] The answer must, therefore, lie in that direction. Before discussing the ADEA standard for liquidated damages, which is my suggested solution, I will first discuss the recent cases on punitive damages decided under Title VII and § 1981, as well as the ADA, to illuminate the problem.

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141. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985).

142. *See* Smith v. Wade, 461 U.S. 30, 56 (1983).

143. There is some conflict in the legislative history, but it is clear that Congress intended that the standard for Title VII should be the same as the standard that governed § 1981. *See, e.g.,* Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927 (5th Cir. 1996).

144. *See, e.g.,* Kolstad v. American Dental Ass'n, 139 F.2d 958, 963 (D.C. Cir. 1998), *cert. granted,* 119 S. Ct. 401 (1998).

145. *See id.*

146. *See infra* Part IV.D.

B. *Recent Decisions Interpreting the Standard for Punitive Damages Under the 1991 Civil Rights Act and § 1981*

1. Generally

a. *Kolstad v. American Dental Ass'n*

I cited in my earlier article the few lower court cases that had interpreted the standard for punitive damages under Title VII at that time, as well as cases decided under § 1981.[147] These cases foreshadowed the nearly uniform difficulty courts are having in interpreting the standard for punitive damages under the 1991 Civil Rights Act, both in Title VII and ADA cases. The confusion in the lower courts has continued, has reached the courts of appeal, and has captured the attention of the Supreme Court. The Court recently granted certiorari in *Kolstad v. American Dental Ass'n,*[148] an en banc opinion of the United States Court of Appeals for the District of Columbia.

In the panel opinion of the *Kolstad* case,[149] the defendant argued that legislative history indicated that punitive damages under Title VII are available "only in 'extraordinarily egregious cases,'"[150] while the plaintiff argued that other contrary legislative history said that "'[p]unitive damages are available under [§ 1981a] to the same extent and under the same standards that they are available to plaintiffs under 42 U.S.C. § 1981.'"[151] The panel said that "[d]ecisive to us, however, is section 1981a's plain language, which tracks the standard that courts had previously established for the proof required to sustain awards of punitive damages under other federal civil rights

147. *See* Johnson, *Punitive Damages, supra* note 1, at Parts III.C.2., III.D. The article included cases decided through 1993. The courts that discussed the standard for punitive damages under Title VII by 1994 generally were predicting what the standard should be, were acting on motions for summary judgment, or were deciding that the Civil Rights Act of 1991 was not retroactive. *See id.* at Part III.D. The Supreme Court eventually decided that the damages provision of the Act was not retroactive. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 289 (1994).

148. 139 F.3d 958 (D.C. Cir. 1998), *cert. granted,* 119 S. Ct. 401 (1998).

149. 108 F.3d 1431 (D.C. Cir. 1997), *vacated in part,* 139 F.3d 958 (D.C. Cir. 1998), *cert. granted,* 119 S. Ct. 401 (1998).

150. *Id.* at 1437 (citing 137 CONG. REC. S15,473 (daily ed. Oct. 30, 1991)).

151. *Id.* (citing 137 CONG. REC. H9527 (daily ed. Nov. 7, 1991)).

statutes."[152] The court cited the rule in *Smith v. Wade,* recognizing that "'evidence that suffices to establish an *intentional* violation of protected civil rights also may suffice to permit the jury to award punitive damages, provided that the jury, in its "discretionary moral judgment," finds that the conduct merits a punitive award.'"[153] The court continued, "'no additional evidence is required,' because 'the state of mind necessary to trigger liability for the wrong is at least as culpable as that required to make punitive damages applicable.'"[154] The court further indicated that punitive damages are not appropriate in every Title VII case and cited as an example of such a situation one in which the defendant defends on the ground that the employer erroneously believed that bona fide occupational qualification or affirmative action justified the discrimination.[155]

Unfortunately, the court en banc vacated the panel opinion, required a showing of egregiousness for punitive damages under the 1991 Civil Rights Act, and decided that the defendant had not acted egregiously.[156] The court reached its decision in part by misinterpreting *Smith v. Wade* to require egregious conduct in addition to the conduct needed for liability to support punitive damages. The court also cited legislative history that indicated that "punitive damages [would] be available only in 'extraordinarily egregious cases.'"[157] A strong dissent decried the

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152. *Id.*

153. *Id.* at 1438 (emphasis in original) (quoting Barbour v. Merrill, 48 F.3d 1270, 1277 (D.C. Cir. 1995) (quoting Smith v. Wade, 461 U.S. 30, 52 (1983))); *see also* Greenwell v. Raytheon Aerospace, Inc., No. CIV.A.95-2138, 1996 WL 709422, at *3 (E.D. La. Dec. 6, 1996).

154. *Id.* (quoting Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 205 (1st Cir. 1987)). See *Adams v. Pinole Point Steel Co.*, Nos. C92-1962 MHP, C93-3708 MHP, 1995 WL 73088, at *4 (N.D. Cal. Feb. 10, 1995), in which the court cited the standard for punitive damages under both § 1981 and Title VII as follows: "'punitive damages are available under both section 1981 and section 1983 upon a showing of intentional violation of federal law.'" *Id.* at *4 (quoting Smith v. Wade, 461 U.S. 30, 56 (1983)).

155. *See Kolstad*, 108 F.3d at 1438.

156. *See* Kolstad v. American Dental Ass'n, 139 F.3d 958, 960 (D.C. Cir. 1998), *cert. granted,* 119 S. Ct. 401 (1998).

157. *Id.* at 962 (quoting 137 CONG. REC. S15,473 (daily ed. Oct. 30, 1991)). The case involved discriminatory failure to promote on the basis of sex. The evidence showed that a less qualified man was preselected and that the employer attempted to cover up the preselection. The person responsible for the preselection allegedly told sexually offensive jokes at staff meetings and made derogatory references to women. Evidence also indicated that the employer changed its explanation for failing to select

majority's misinterpretation of *Smith v. Wade,* which plainly does not require conduct more egregious than an intentional violation of the law. The dissent recommended the same solution proposed in this article. The dissent also noted that the problem with the majority's approach is that it offers no guidance for determining what conduct is sufficiently egregious to qualify for punitive damages.[158] For example, in the *Kolstad* case, the dissent said that the majority seemed to relate egregiousness to three different criteria. At one point, egregiousness seemed to be related to how severe the discriminatory conduct was,[159] which is particularly subjective. At another point, the majority seemed to relate egregiousness to the strength of the plaintiff's evidence of discrimination.[160] Finally, egregiousness was related to whether the plaintiff had shown more than mere pretext.[161] The dissent concluded that "[g]iven the clarity of section 1981a's text, we should follow the statue rather than the selective bits of its confused legislative history."[162] The Supreme Court has granted certiorari in *Kolstad* which should resolve whether there will be a consistent approach to a standard for exemplary damages under the four principal anti-discrimination acts and what that standard will be.

b. Other Courts

The Ninth Circuit's analysis of the problem is as instructive as the *Kolstad* majority opinion, but even more anomalous. In *Ngo v. Reno Hilton Resort Corp.,*[163] the court thoughtfully pe-

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the plaintiff. *See id.* at 978-79. The court decided that this conduct was not sufficiently egregious to warrant a remand. *See id.* at 970.

158. *See id.* at 976 (Latel, J., dissenting).

159. *See id.*

160. *See id.* at 977.

161. *See id.* at 977-78.

162. *Id.* at 975.

163. 140 F.3d 1299 (9th Cir. 1998), *amended on petition for reh'g,* 156 F.3d 988 (9th Cir. 1998). The court said that the defendant acted negligently or even recklessly in determining whether the plaintiff was eligible for leave, but did not "evince an evil motive or a conscious and deliberate disregard" for the plaintiff's rights. *Id.* at 1305. Rather, the discriminatory decision to treat the Asian-American plaintiff differently from a white person was based on miscommunication between managers. On petition for rehearing, the court amended the opinion to include a reference to the *Kolstad* en banc opinion. The court also changed its reference to the number of circuit courts that require more than intentional discrimination from four to five. *See Ngo,* 156 F.3d

rused the law to determine what standard it should apply for punitive damages. The court noted that "section 1981a tracks the standard for punitive damages established by the courts under other civil rights statutes, most notably 42 U.S.C. §§ 1981 and 1983"[164] and that the legislative history indicated that the language of the 1991 Act was directly derived from that law. It also acknowledged that *Smith v. Wade* was the authoritative interpretation of the standard, and that case rejected the argument that the standard for punitive damages must necessarily be higher than the standard for liability. The court noted, however, that many courts had, nevertheless, interpreted *Smith v. Wade* to require a heightened evidentiary showing for punitive damages. The court, then, decided that it was these lower court's "interpretation" of *Smith v. Wade* that Congress intended to adopt in § 1981a.[165] The court decided that to recover punitive damages, "the plaintiff must demonstrate that the defendant 'almost certainly knew that what he was doing was wrongful and subject to punishment.'"[166]

Many courts also rely on the legislative history of the 1991 Civil Rights Act to require a heightened standard of proof, but they are unable to articulate exactly what the additional proof should entail. For example, in *Harris v. L & L Wings, Inc.*,[167] the Fourth Circuit quoted legislative history to the effect that "'[p]laintiffs must first prove intentional discrimination, then must prove actual injury or loss arising therefrom to recover compensatory damages, *and must meet an even higher standard (establishing that the employer acted with malice or reckless or callous indifference to their rights) to recover punitive damages.*'"[168]

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at 988.

164. 140 F.3d at 1301.

165. *See id.* at 1301-03.

166. *Id.* at 1304 (quoting Soderbeck v. Burnett County, 752 F.2d 285, 291 (7th Cir. 1985)). In the *Ngo* case, the court unwittingly required that the defendant act "knowingly," a more culpable state of mind than mere recklessness. An actor acts recklessly if he "consciously disregards a substantial risk," that the prohibited result will occur. *See* Johnson, *Punitive Damages*, *supra* note 1, at 537. He acts knowingly when he is "aware that his conduct is practically certain to cause" the prohibited result. MODEL PENAL CODE § 2.02(2) (1985). For an explanation of the use of the criminal law model, see *supra* note 127.

167. 132 F.3d 978 (4th Cir. 1997).

168. *Id.* at 983 (emphasis added) (quoting H.R. REP. NO. 102-40(I), at 72 (1991)).

The legislative history of the Act ostensibly contradicts itself, however, by also providing that the standard for punitive damages should be the same for Title VII and for § 1981, the standard for which is controlled by *Smith v. Wade*,[169] which does not require more evidence or a heightened standard. As discussed above, the standard must be determined to be the same. It should be noted, however, that legislative comments that describe the standard for punitive damages as "higher" than the standard for liability are not necessarily inconsistent with requiring that the defendant acted with a good faith reasonable belief that it was not discriminating. Many courts, however, assume that there is a conflict in the legislative history in this regard.

The Second Circuit acknowledged this conflict in the legislative history and resolved it with reference to the language of the statute that does not reflect a heightened standard but rather follows the standard in other civil rights cases.[170] The court also refused to approve a heightened standard to award the maximum amount of punitive damages.[171]

Deciding that the standard should be same for § 1981 and for the 1991 Civil Rights Act is simply the first step in the analysis. The next step is to recognize what that standard is and how to apply it. Other than the cases discussed above, most of the courts, although holding that the standard is the same for § 1981 and the 1991 Civil Rights Act, have not interpreted the standard, but have simply decided whether the defendant's conduct was reckless or not.[172]

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169. *See supra* text accompanying notes 98-108.

170. *See* Luciano v. Olsten Corp., 110 F.3d 210, 220 (2d Cir. 1997).

171. *See id.* at 221.

172. For example, in *Anderson v. Martin Brower Co.*, No. 93-2333-SWL, 1994 WL 377115, at *1 (D. Kan. June 9, 1994), the court denied the defendant's motion for summary judgment on the issue of punitive damages because there was evidence that the defendant knew that it could not discharge the plaintiff for his alcoholism. *See id.* at *3, *6. The defendant was aware that the plaintiff was absent from work to try to solve his problem and "the close proximity in time between defendant's awareness of plaintiff's disability and his termination" was sufficient to indicate reckless indifference. *Id.* at *6.

In an ADA case, *EEOC v. AIC Sec. Investigations, Ltd.*, 823 F. Supp. 571 (N.D. Ill. 1993), *aff'd in part and rev'd in part,* 55 F.3d 1276 (7th Cir. 1995), the court said that the defendant's conduct was egregious and outrageous. *See id.* at 578. The president who fired the plaintiff because of his disability lacked remorse which made fu-

In *Merriweather v. Family Dollar Stores of Indiana, Inc.*,[173] for example, the court stated that "[p]unitive damages are proper only on a showing of 'evil motive or intent, or . . . reckless or callous indifference to the federally protected rights of others.'"[174] The defendant argued that this interpretation of the standard for punitive damages is tantamount to an automatic imposition of punitive damages whenever the court finds intentional discrimination. The court responded that "[p]unitive damages are never awarded as a matter of right; the finder of fact, after reviewing the entire record, is called upon to make a 'moral judgment' that the unlawful conduct warrants such an award to punish the wrongdoer and deter others."[175] In this case, it found that the defendant's "attempt to deceive the court, by presenting false reasons for its decision to discharge Merriweather [the plaintiff], was sufficiently serious that it warranted imposition of punitive damages."[176] Thus, the court required an after-the-fact aggravating circumstance to justify punitive damages; but whether the court would have affirmed the award of punitive damages in the absence of such evidence is not clear.[177]

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ture violations likely. Furthermore, firing a loyal employee who could perform the job because he has only a short time to live "reflected a reckless indifference to his rights and a callous insensitivity to his human condition." *Id.*

In another district court case, the court denied the defendant's motion for summary judgment on the issue of punitive damages because the plaintiff received positive evaluations prior to his request for accommodation. The court said that a reasonable jury could infer malice from the defendant's subsequent complaints about the plaintiff's performance. *See* Stone v. La Quinta Inns, Inc., 942 F. Supp. 261, 266 (E.D. La. 1996).

In pre-trial motions in another case, the court said that an award of punitive damages, though only remotely possible, could not be ruled out in a case in which the defendant allegedly refused to interview the plaintiff because he was on crutches. Koblosh v. Adelsick, No. 95C 5209, 1997 WL 311956, at *2 (N.D. Ill. June 5, 1997).

173. 103 F.3d 576 (7th Cir. 1996); *see* McKnight v. Circuit City Stores, Inc., No. 3:95CV964, 1997 WL 328638, at *1 (E.D. Va. Mar. 12, 1997). In *McKnight*, the court said that the standard required "malice or reckless indifference," not "reprehensible, wanton, malicious or bad faith conduct." *Id.* at *4. The jury was justified in finding this standard met by the employer's failure to remedy complaints of racial discrimination and its excessively subjective promotion practices. *See id.* at *5.

174. 103 F.3d at 581 (omissions in original) (quoting Smith v. Wade, 461 U.S. 30, 56 (1983)).

175. *Id.* at 582 (citing *Smith*, 461 U.S. at 52).

176. *Id.*

177. In another Seventh Circuit case, the court found that to establish liability, the plaintiff only has to show that the defendant intentionally discriminated; however, the

Some courts use state law standards to assess punitive damages under the 1991 Civil Rights Act, ignoring the federal statutory standard altogether. For example, in *Harper v. B.P. Exploration & Oil, Inc.*,[178] the court said that because

> racial discrimination, by definition, is willful and involves disregard for the victim's civil rights, it is difficult to imagine a case of racial discrimination that does not fit the district court's description [that the defendant showed reckless disregard for the plaintiff's rights because its discriminatory behavior was "willful and intentional"]. Therefore, the district court's analysis leads to the conclusion that punitive damages should always be awarded in discrimination cases, a conclusion that is contrary to the law. . . . Since a faulty conclusion implies a faulty premise, *wilfulness and reckless disregard provide insufficient grounds on which to base a punitive damage award.*[179]

The court, nevertheless, affirmed the award of punitive damages, based on a nine factor test borrowed from a state court case. Two of the factors served as the basis for the award: the duration of the defendant's misconduct, which had lasted sever-

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standard for punitive damages, "malice or reckless indifference to the plaintiff's rights," is a higher hurdle. *See* Emmel v. Coca-Cola Bottling Co. of Chicago, 95 F.3d 627, 636 (7th Cir. 1996). In the *Emmel* case, the court also found that the maximum amount of punitive damages was appropriate because the violation was egregious. Evidence established that the defendant had a policy of not promoting women into higher management positions. *See id.* at 636-37; *see also* Hennessy v. Penril Datacomm Networks, Inc., 69 F.3d 1344, 1354 (7th Cir. 1995).

In *Williams v. Pharmacia, Inc.*, 956 F. Supp. 1457 (N.D. Ind. 1996), the court said that the standard for punitive damages required more than proof of the underlying unlawful discrimination. *See id.* at 1475. In addition, the court said that the amount of punitive damages would be determined by the egregiousness of the defendant's conduct. *See id.* at 1477. Hounding the plaintiff out of the company by unreasonable work assignments was sufficiently egregious to support the maximum award. *See id.* at 1476-78.

In another case, the Seventh Circuit upheld the denial of punitive damages because the defendant terminated the plaintiff's employment in the sincere belief that the plaintiff had intentionally made false accusations against her supervisors. The court said this finding precluded a finding that the defendant was acting in reckless disregard of the plaintiff's rights. *See* Ortiz v. John O. Butler Co., 94 F.3d 1121, 1126-27 (7th Cir. 1996).

178. 134 F.3d 371 (6th Cir. 1998) (unpublished table decision) (text available on Westlaw, Nos. 96-5854, 96-5919, 1998 WL 45487, at *1).

179. *Harper*, 1998 WL 45487, at *5 (emphasis added).

al years, and the fact that the defendant had been assessed punitive damages in a prior discrimination case.[180]

The Eighth Circuit has also followed a test adopted from state law. In *Varner v. National Super Markets, Inc.*,[181] management ignored the plaintiff's complaints that an employee had sexually assaulted her.[182] Although the court decided that the company was on notice of the incidents and failed to remedy them, the defendant did not act with "reckless disregard" of the plaintiff's rights. The court said that the plaintiff must prove that the company acted with "malice or deliberate indifference or that its conduct was outrageous."[183]

Other courts cite no authority for their requirement of a heightened standard. In the Sixth Circuit, the court has refused to affirm an award of punitive damages, without discussion, upon a showing that the plaintiff was discharged because she contemplated having an abortion.[184] "[A]lthough the actions of [the defendant] were duplicitous and disclosed a lack of empathy, they did not rise to the level to support a punitive damages award under the Civil Rights Act of 1991."[185]

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180. *See id.* at *6 (citing Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901-02 (Tenn. 1992)).

181. 94 F.3d 1209 (8th Cir. 1996).

182. *See id.* at 1211 (stating that an employee had grabbed the plaintiff's breasts on two occasions).

183. *Id.* at 1214 (court mistakenly relied on an earlier case, *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051 (8th Cir. 1993), where the court affirmed an award of punitive damages under Missouri law in a case brought under both Title VII and Missouri law); *accord* Browning v. President Riverboat Casino-Mo., Inc., 139 F.3d 631, 636-37 (8th Cir. 1998); Karcher v. Emerson Elec. Co., 94 F.3d 502, 509 (8th Cir. 1996) (holding that, despite the defendant's retaliatory actions and its intentionally setting qualifications to eliminate women, such actions were insufficient for the award of punitive damages under Title VII or under state law and that punitive damages could only be awarded under state law for conduct that would "'shock the conscience and cause outrage'" (quoting Turic v. Holland Hospitality, Inc., 85 F.3d 1211, 1216 (6th Cir. 1996))); *see also* Howard v. Burns Bros., Inc., 149 F.3d 835 (8th Cir. 1998) (stating that punitive damages under the Civil Rights Act of 1991 require more than intentional discrimination, but finding the requisite reckless disregard in the supervisor's inappropriate conduct which continued for years and was ignored by the manager); Hogue v. MQS Inspection, Inc., 875 F. Supp. 714, 725 (D. Colo. 1995) (stating that, because reckless indifference is not defined in the ADA, it would be informed by the federal standard for violations of civil rights, and that the defendant's conduct was "not so egregious or shocking so as to allow assessment of punitive damages").

184. *See, e.g.*, Turic v. Holland Hospitality, Inc., 85 F.3d 1211 (6th Cir. 1996).

185. *Id.* at 1216 (6th Cir. 1996). The defendant had lied about the reason for the

Regardless of the source of authority, most courts that require additional proof demand some "egregious" conduct on the part of the defendant.[186] What "egregious" means other than intentionally discriminating against the plaintiff is left to imagination and becomes like obscenity: the court will know it when

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discharge and had "padded" the plaintiff's file to support a manufactured reason. *See id.* at 1214-15.

The Tenth Circuit said that the "defendant's acts need not have been 'extraordinarily egregious' to support a finding of punitive damages.'" Adakai v. Front Row Seat, Inc., 125 F.3d 862 (10th Cir. 1997) (unpublished table decision) (text available on Westlaw, No. 96-2249, 1997 WL 603458, at *2) (quoting Luciano v. Olsten Corp., 110 F.3d 210, 220 (2d Cir. 1997)). For a discussion of the case, see *infra* text accompanying notes 202-04.

In *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498 (1st Cir. 1996), the First Circuit determined that the lower court refused to award punitive damages based on the district court's decision that the defendants' sexual harassment was offensive, and the district court's statement that "[i]n fact, in many cases, this behavior might be strong evidence of malice or, at least, reckless indifference to Plaintiffs' rights. In this case, however, the Court believes that, the behavior of at least some Defendants was influenced by language, cultural, and educational barriers." *Id.* at 507-08. The court of appeals remanded the case to the district court to specify other evidence, if any, that made punitive damages inappropriate. *See id.* at 509. The First Circuit concluded that "heavy reliance on cultural and educational factors [was] inappropriate . . . . Ignorance of the law or of local custom is not a defense." *Id.* However, despite the fact that the defendants' conduct was patently offensive and repeated, punitive damages are never awarded as of right, but only "'to punish [the defendant] for his outrageous conduct and deter him and others like him from similar conduct in the future.'" *Id.* at 508 (quoting Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 205 (1st Cir. 1987) (alteration in original)).

186. For example, in *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742 (4th Cir. 1998), the court, addressing a § 1981 case, found that "'[a]lthough any form of discrimination constitutes reprehensible and abhorrent conduct, not every lawsuit under § 1981 calls for submission of this extraordinary remedy to a jury.' In our view, there is simply insufficient evidence in the record to conclude that [the defendant's] conduct toward [the plaintiffs] was so egregious that it was appropriate to submit the issue of punitive damages to the jury." *Id.* at 766 (quoting Stephens v. South Atlantic Canners, Inc., 848 F.2d 484, 489-90 (4th Cir. 1988)).

In *Coffman v. Tracker Marine, L.P.*, 141 F.3d 1241 (8th Cir. 1998), the court determined that the employer could not be assessed punitive damages because it "attempted to solve what it perceived to be the problem." *Id.* at 1248. In *EEOC v. Wal-Mart Stores, Inc.*, 11 F. Supp. 2d 1313 (D.N.M. 1998), the employer had a nationwide interview form that asked about medical conditions. The defendant did not change the form for some months after it became subject to the provisions of the ADA. The defendant's argument was that this was negligent on its part but not reckless. The jury was instructed that if it believed that the question was asked because the defendant was recklessly indifferent to the plaintiff's rights under the ADA, punitive damages were appropriate. *See id.* at 1325. The court held that there was enough evidence, in addition to neglecting to change the form, such as failing to train its interviewers about the ADA, to support the jury's verdict. *See id* at 1326.

it sees it.[187] The problem is that there is no way to describe egregious conduct to the jury so that the jury will know it when it sees it.

Some courts even index the amount of egregiousness to the amount of the award. For example, in *Cline v. Wal-Mart Stores, Inc.*,[188] the Fourth Circuit held that the award of punitive damages was appropriate because the defendant acted with callous indifference to the plaintiff's rights under the ADA by demoting him during his medical leave without making any effort to inquire into his condition.[189] The court, nevertheless, determined that the award of $182,000 in punitive damages was excessive and, therefore, reduced it to $50,000. The court noted that, although the defendant's actions were "sufficiently egregious" to justify a punitive damages award, when "[t]aking into consideration the harm suffered by [the plaintiff]; the degree of [the defendant's] indifference towards [the plaintiff's] rights under the ADA; and the policy judgments inherent in any" punitive damages award, $182,000 was superfluous.[190]

In another Fourth Circuit case, the court said that

> [p]unitive damages may be warranted in discrimination cases when the employer (or its agent) deliberately deceives the court by consciously misrepresenting its true motives for an employment decision. . . . [The supervisor's] systematic and continuous deceit, including his orchestrated cover-up of his racist motivations and the jury's obvious rejection of his testimony as false, revealed [the supervisor's] truly cavalier disregard for [the plaintiff's] federal right to be free from race discrimination.[191]

Finally, some courts base the decision of whether punitive damages are appropriate on the defendant's conduct toward the employee after the discriminatory act. For example, courts have

187. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J. concurring).

188. 144 F.3d 294 (4th Cir. 1998).

189. *See id.* at 306.

190. *Id.* at 306-07.

191. Cooper v. Paychex, Inc., Nos. 97-1645, 97-1543, 97-1720, 1998 WL 637274, at *12 (4th Cir. Aug. 31, 1998); *see also* EEOC v. Wal-Mart Stores, Inc., 156 F.3d 989, 993 (9th Cir. 1998) (stating that punitive damages were appropriate because the jury could have found that the defendant attempted to cover up the fact that it had failed to hire the plaintiff because she was pregnant).

considered the defendant's attempt "to solve what it perceived to be the problem,"[192] or the defendant's failure to remedy the problem in deciding whether or not punitive damages are appropriate.[193]

Courts are not in agreement on the standard for punitive damages under the 1991 Civil Rights Act and § 1981. Agreement regarding the standard is not the only problem, however. The question that arises is who has to be recklessly indifferent for the jury to award punitive damages against the company.

2. The Employer's Liability for Punitive Damages for Acts of Supervisors

The standard for punitive damages is further complicated by the fact that the act of discrimination is rarely carried out by the employer but rather by an agent of the employer, commonly a supervisor.[194] If the employer is liable for compensatory damages for the supervisor's intentional discrimination, there is no statutory basis for not attributing to the employer the supervisor's reckless indifference to the plaintiff's federally protected rights. Several courts, however, have refused to impute punitive damages to the employer for a supervisor's reckless indifference.

This additional confusion has been especially pronounced in sexual harassment cases in which courts may be willing to hold the company liable for the intentional discrimination of its supervisors, but not its supervisor's reckless disregard of the plaintiff's rights.[195] For example, in *Splunge v. Shoney's,*

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192. Coffman v. Tracker Marine, L.P., 141 F.3d 1241, 1248 (8th Cir. 1998).

193. *See* Feltner v. Title Search Co., Nos. 97-1087, 97-3413, 1998 WL 636773, at *1 (7th Cir. Sept. 2, 1998) (ruling that punitive damages are appropriate in a case in which the company did nothing to stop the sexual harassment).

194. Even the panel of the D.C. Circuit that decided the only case under the Civil Rights Act of 1991 and that adopted the view this article proposes, stated that punitive damages against an employer may not be appropriate in a case where the "discrimination occurs outside the scope of the agency relationship between employer and employee—in a hostile environment case." Kolstad v. American Dental Ass'n, 108 F.3d 1431, 1439 (D.C. Cir. 1997), *vacated en banc on other grounds,* 139 F.3d 958 (D.C. Cir. 1998), *cert. granted,* 119 S. Ct. 401 (1998).

195. Some courts require complicity by higher company officials. For example, in *Burrell v. Crown Central Petroleum, Inc.,* 177 F.R.D. 376 (E.D. Tex. 1997), the court

Inc.,[196] the court decided that punitive damages were inappropriate even though all of the supervisory personnel in the restaurant engaged in such blatant sexual harassment that the defendant did not even contest the existence of a hostile environment.[197] The court further decided that a reasonable jury could have found the company's sexual harassment policy was never communicated to the plaintiffs,[198] and that the hostile environment was so pervasive that higher management should have known about it. This was enough to establish the company's liability for compensatory damages.[199] With regard to punitive damages, however, the court reversed the award of punitive damages, saying that, although the plaintiffs had complained to the area supervisor, they had never complained to "higher management," so the company did not act with reckless indifference to the plaintiffs' rights.[200]

In several other cases, the courts have said that the "requisite level of recklessness or outrageousness can be inferred from management's participation in the discriminatory conduct."[201]

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held that to recover punitive damages, the plaintiffs would "have to show that the company itself engaged in discriminatory conduct reaching the level of maliciousness or discriminatory conduct, or at least that the company knew about such conduct and authorized, ratified, or approved it." *Id.* at 386. In another case of hostile environment sexual harassment, the court dismissed the punitive damages claim because senior officials responded to the plaintiff's complaint, albeit belatedly, by "talking" to the alleged harasser. *See* Ayers v. Wal-Mart Stores, Inc., 941 F. Supp. 1163, 1170 (M.D. Fla. 1996).

196. 97 F.3d 488 (11th Cir. 1996); *see also* Reynolds v. CSX Transp., Inc., 115 F.3d 860 (11th Cir. 1997), *vacated and remanded,* 118 S. Ct. 2364 (1998). In the *Reynolds* case, the only person who acted with malice or reckless disregard was the supervisor who harassed the plaintiff. Because he was not considered a member of upper management, the company was not liable for punitive damages. The company showed that it took the plaintiff's complaints seriously, posted its anti-harassment policy, reprimanded the supervisor, and remedied the discrimination against the plaintiff. *See id.* at 869. The Supreme Court vacated the judgment in *Reynolds* and remanded in light of *Faragher v. City of Boca Raton,* 118 S. Ct. 2275 (1998). *See* Reynolds v. CSX Transp., Inc., 118 S. Ct. 2364 (1998).

197. Supervisory employees "grabbed Plaintiffs, commented extensively on their physical attributes, showed them pornographic photos and videotapes, offered them money for sex, favored other employees who had affairs with them, speculated as to the plaintiffs' sexual prowess, and so on." *Splunge,* 97 F.3d at 489.

198. *See id.* at 490.

199. *See id.*

200. *See id.*

201. Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568, 575 (8th Cir. 1997); *see also* Kim v. Nash Finch Co., 123 F.3d 1046, 1066 (8th Cir. 1997).

For example, in *Adakai v. Front Row Seat, Inc.*,[202] the owner referred to the plaintiff several times as a "'long-haired, scuzzy Navajo guy,'" and told the plaintiff's supervisor to "'get rid of that goddamned Indian.'"[203] The court found this evidence was sufficient to show malice or reckless indifference of the plaintiff's federally protected rights.[204]

To require that the highest company officials must be involved in the discrimination or must be reckless in order to assess punitive damages creates a substantial loophole that Congress likely did not intend. At the time of the enactment of the 1991 Civil Rights Act, the courts were virtually unanimous in holding that an employer was strictly liable for the supervisor's actions in a case involving tangible employment actions, such as hiring and discharge.[205]

Courts that limit the employer's liability for punitive damages usually cite as their authority *Meritor Savings Bank, F.S.B. v. Vinson*,[206] in which the Supreme Court declined "to issue a definitive rule on employer liability," but directed the courts to general agency principles.[207] The Supreme Court's recent deci-

202. No. 96-2249, 1997 WL 603458, at *1 (10th Cir. Oct. 1, 1997).

203. *Id.* at *3.

204. *See id.* The Fourth Circuit requires a heightened showing for punitive damages, not only of the harasser, but also of the employer. *See* Harris v. L & L Wings, Inc., 132 F.3d 978, 983 (4th Cir. 1997). The *Harris* court articulated a three-part test to evaluate the "sufficiency of the evidence on the malice or reckless indifference of employers . . . (1) evidence of the employer's attitude towards sexual harassment [which may include the promulgation of an anti-harassment policy]; (2) direct statements by the employer about plaintiffs' rights or complaints; and (3) the egregiousness of the conduct at issue." *Id.* In this case, the employer had no anti-harassment policy and had disavowed his responsibility to rid his workforce of sexual harassment. Furthermore, the conduct complained of was daily and pervasive sexual harassment of both physical and verbal nature. *See id.* at 984.

In a Fifth Circuit case, the court rejected the plaintiff's cross-appeal challenging the judgment notwithstanding the verdict, which reversed the jury's punitive damages award. *See* Farpella-Crosby v. Horizon Health Care, 97 F.3d 803 (5th Cir. 1996). The Fifth Circuit ruled that a reasonable jury could have found that the defendant knew or should have known of the sexual harassment directed at the plaintiff by her supervisor, but that "no reasonable juror could conclude that Horizon [the defendant] itself acted with malice or with reckless indifference." *Id.* at 810. The plaintiff complained to the human resources director about her supervisor's comments regarding her personal life on several occasions. The director took no action. "Further, under the particular facts of this case, no applicable tool of agency law would justify imposing punitive damages on Horizon based on [the supervisor's] conduct." *Id.*

205. *See* Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2264-65 (1998).

206. 477 U.S. 57 (1986).

207. *Id.* at 72. The Court added the caveat that

sions refining *Meritor* should change rulings limiting employer liability for punitive damages and, in addition, may provide some guidance for a possible resolution of the interpretation of the standard for punitive damages.[208]

In *Burlington Industries, Inc. v. Ellerth*,[209] the Court clarified *Meritor* and held that Congress intended to reference supervisory liability to general agency law.[210] Using the Restatement (Second) of Agency, the Court decided that, because the supervisor is aided in the conduct by the agency relationship, the employer is vicariously liable in cases in which sexual harassment results in a tangible job consequence. In cases in which there is no tangible job consequence, termed hostile environment cases, the employer is similarly vicariously liable for sexual harassment under the same theory but has an affirmative defense. The employer can avoid liability by showing that "(a) [it] 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 the harm otherwise."[211]

> such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.

Id. The Court noted that the EEOC's view was

> where a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them. Thus, the courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions.

Id. at 70-71 (citations omitted). The Court then turned to the EEOC's suggestion that these principles should not apply in a hostile environment case. *See id.* at 71.

208. *See, e.g.*, Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581 (5th Cir. 1998). The Fifth Circuit in *Deffenbaugh-Williams* revised its earlier interpretation of employer liability for punitive damages to conform to the Supreme Court's decision in *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2264-65 (1998).

209. 118 S. Ct. 2257 (1998).

210. *See id.* at 2269-70. The Court decided a companion case and applied the same standard. *See* Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2292-93 (1998).

211. *Ellerth*, 118 Ct. at 2270.

There is no reason to apply a different rule to the imposition of punitive damages on the employer in general.[212] In addition, *Ellerth* provides guidance for an additional affirmative defense for employers to use in extenuating circumstances. As the dissent in *Kolstad* suggested, employers who are usually strictly liable for the acts of their supervisors for compensatory damages purposes could possibly have a defense to punitive damages if they made good faith efforts to train supervisors not to discriminate.[213]

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212. In one recent case that involved only a § 1981 claim, the Tenth Circuit adopted the Restatement (Second) of Torts test for whether an employer is liable for punitive damages for the acts of its supervisors:

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

Fitzgerald v. Mountain States Tel. & Tel. Co., 68 F.3d 1257, 1263 (10th Cir. 1995) (quoting RESTATEMENT (SECOND) OF TORTS § 909 (1977)). This cause of action arose prior to the passage of the Civil Rights Act of 1991.

At least one race discrimination case, decided before *Ellerth,* relied on *Meritor* to deny punitive damages. In *Patterson v. P.H.P Healthcare Corp.,* 90 F.3d 927 (5th Cir. 1996), the Fifth Circuit reversed the award of punitive damages based on *Meritor. See id.* at 943. The difference between this case and other cases citing *Meritor* as justification for denying punitive damages is that *Patterson* was not a hostile environment sexual harassment case but rather a race discrimination and retaliation case involving tangible employment consequences brought under § 1981 and Title VII. The court held the employer liable for compensatory damages for the intentional race discrimination committed by its project manager, Kennedy. The court found that punitive damages may only be assessed against a defendant who has been malicious or reckless. *See id.* at 944. The project manager, however, was not a corporate officer, and there was no other evidence that the company "had knowledge of Kennedy's malicious or reckless conduct, or authorized, ratified, or approved Kennedy's actions." *Id.* Furthermore, the company had a policy of non-discrimination and a procedure for filing complaints which the plaintiffs did not utilize. *See id.* The Fifth Circuit revised its view of employer liability after the Supreme Court's decision in *Ellerth. See supra* note 208.

213. *See* Kolstad v. American Dental Ass'n, 139 F.3d 958, 976 (D.C. Cir. 1998), *cert. granted,* 119 S. Ct. 401 (1998). It should be noted that in situations other than hostile environment discrimination, the defense would not work unless the plaintiff is in a better position than the employer to know that she is being discriminated against and fails to take advantage of appropriate procedures for notifying the employer.

For example, although the court did not specifically address company liability, in *Delph v. Dr. Pepper Bottling Co.*,[214] the court affirmed an award of punitive damages based on the company's failure to provide anti-discrimination training to its supervisors who used racial epithets when referring to the plaintiff.[215] The court said that this may not have been evidence of malice, but it was at least evidence that the employer was recklessly indifferent to the plaintiff's rights.[216] Presumably, if the company could have convinced the court that it had in fact trained the supervisors, it could have avoided liability in this case.

Courts, then, have further limited the availability of punitive damages by requiring not only reckless indifference on the part of supervisor involved but also some sort of direct complicity by high management officials.[217] This makes punitive damages

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214. 130 F.3d 349 (8th Cir. 1997).

215. *See id.* at 358.

216. *See id.* The court quoted the proper standard under federal law, "'malice or reckless indifference,'" but failed to analyze it separately. *Id.* (quoting 42 U.S.C. § 1981a(b)(1) (1994)).

217. In addition, some courts have created yet another obstacle to the recovery of punitive damages, applying *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996), to Title VII cases to require an even higher standard of disreputable behavior.

In *Patterson v. P.H.P Healthcare Corp.,* 90 F.3d 927 (5th Cir. 1996), the Fifth Circuit turned to *BMW of North America,* in which the Supreme Court dealt with the constitutional limits on punitive damages, to vacate and remand for reconsideration an award of punitive damages in a case of admittedly egregious racism. *See id.* at 945. The court also parsed the record to reverse the award of compensatory damages. "[T]he record is replete with Kennedy's [the managerial employee responsible for the discrimination] use of racial epithets and other actions demonstrating his reprehensible views on race relations." *Id.* at 942. With regard to one of the plaintiffs, Patterson, Kennedy told her that she was not to hire "another nigger." *Id.* When she did so, he terminated her and back-dated a document to support his story that she was discharged for misconduct. *See id.* The other plaintiff, Brown, was assigned the less desirable shift and menial tasks because of his race. *See id.* Although the lower court did not abuse its discretion in finding that Kennedy had acted with "malice and/or reckless indifference to the federally protected rights" of the plaintiffs, the award was not justified under *BMW of North America. Id.* at 942-43. The court enumerated three factors in its decision: "(1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm suffered and the damage award; and (3) the difference between the damages awarded in this case and comparable cases." *Id.* at 943. The court decided that an award of $150,000 did not meet any of the three factors. *See id.*

Because the plaintiff, Brown, was not subjected personally to Kennedy's racist comments, the only behavior that met the standard of malice and reckless indifference was the intentional falsification of documents, which was insufficient to support

the award in light of *BMW of North America*. *See id.* Furthermore, the award did not bear a "reasonable relationship" to the compensatory damage award of $22,648, which would be reduced on remand. *See id.* Finally, the largest punitive damage award for a similar case was $50,000. With regard to the award against Kennedy personally, the court reversed the award in favor of the plaintiff Patterson, who only had a Title VII claim under which no individual liability attached. *See id.* at 945. Because the Fifth Circuit has revised its view of employer liability, the decision, if made today, would be somewhat different based on the court's decision in *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581 (5th Cir. 1998). *See supra* notes 212-13.

In *Deffenbaugh* itself, however, the court reduced the amount of punitive damages based on *BMW of North America* because even though the employer's conduct was malicious, it was not sufficiently "reprehensible." *Deffenbaugh-Williams*, 156 F.3d at 598.

In *Guess v. Pfizer*, 971 F. Supp. 164 (E.D. Pa. 1996), the court cited *Smith v. Wade* for the proposition that "[p]unitive damages are awarded to punish the defendant for outrageous conduct and deter it and others like it from similar conduct in the future," and the court held that the defendant's conduct justified punitive damages. *Id.* at 176. The defendant complained that the air quality in the lab in which he worked exacerbated his asthma. *See id.* at 168. In order to show that the air quality was not a factor, the defendant commissioned an air quality study, assuring the defendant that nothing would be found to be wrong. Before the test, the defendant had the lab floor professionally cleaned and opened all the windows which were usually kept closed. *See id.* at 176. The court then proceeded to remit the jury's award based on *BMW of North America*, stating that the most important factor was how reprehensible the defendant's conduct was and found that it was not sufficiently reprehensible to justify the $150,000 award. *See id.* at 177. The court analyzed three factors extracted from *BMW of North America*: (1) degree of reprehensibility of defendant's conduct, (2) the disparity between the actual or potential harm suffered and the punitive award, and (3) the difference between the award and the civil or criminal penalties imposed in comparable cases. *See id.* at 177-79 (citing *BMW of North America*, 517 U.S. at 575). This case, then, put a further burden on the plaintiff to show that the defendant's conduct was reprehensible, despite the language of the Civil Rights Act of 1991 and *Smith v. Wade*. The court said that in cases of similar awards, the defendant's conduct was more reprehensible; here, there was no showing that the defendant had ever discriminated against disabled people in the past or would do so in the future. *See id.* at 178-79. Although there was little disparity between the amount of the punitive damages and the compensatory damages, and the court had insufficient information on whether other similar awards were comparable, the court, nevertheless, decided that the award "shocked the conscience" and reduced it to $17,500. *See id.* at 180.

In another case, the court pointed out with more clarity the difference between a case of intentional discrimination and *BMW of North America*, which involved the failure of the seller to inform the buyer that the car had been repainted. *See* McKnight v. Circuit City Stores, Inc., No. 3:95CV964, 1997 WL 328638, at *5-7 (E.D. Va. Mar. 12, 1997).

In *Hearn v. General Elec. Co.*, 927 F. Supp. 1486 (M.D. Ala. 1996), the court cited *BMW of North America* for the proposition that the court should consider the character and degree of the wrong. The court decided that the defendant acted with reckless indifference in laying off and demoting the plaintiffs. In addition, the court found that the defendant also acted with malice, defining it as intentionally doing "a wrongful act without just cause or excuse, with an intent to injure the person or

unlikely except in a very small business, the highest officials of which are involved in the day-to-day work. This cannot be what Congress intended as evidenced by the fact that at the time of the 1991 Civil Rights Act, there was no question but that employers were generally strictly liable for the acts of their supervisors.[218] The availability of punitive damages should not change this as a general rule, but there should be room for extenuating circumstances, as the Court recognized in *Burlington Industries, Inc. v. Ellerth.*[219] In addition, the damage caps of the 1991 Act are determined by the size of the company, which indicates a Congressional intent that the company itself would be liable.[220]

Also, at the time of the 1991 Civil Rights Act, Congress must have been informed by the law that existed at the time which used as a standard "reckless indifference to federal rights." The ADEA is one of those and should inform the standard for the 1991 Civil Rights Act.

IV. Historical Development of the Standard for Liquidated Damages under the ADEA

The ADEA provides that the "rights created by the Act are to

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property of another person." *Id.* at 1500. The evidence of malice was the contemptuous manner in which the supervisor told the plaintiffs of their respective demotion and lay off. *See id.*

BMW of North America is inappropriate in a Title VII case because discrimination is reprehensible per se and because it is not clear that punitive damages cannot be awarded in the absence of compensatory damages. *See* Shea v. Galaxie Lumber & Constr. Co., 152 F.3d 729, 736 (7th Cir. 1998); Timm v. Progressive Steel Treating, Inc., 137 F.3d 1008, 1010 (7th Cir. 1998); EEOC v. Wal-Mart Stores, Inc., 11 F. Supp. 2d 1313, 1326 (D.N.M. 1998) (awarding punitive damages for asking a question about an applicant's medical condition which is illegal under the ADA); Robertson v. Bryn Mawr Hosp., No. Civ.A.94-2489, 1995 WL 375837, at *2 (E.D. Pa. June 20, 1995) (stating that even in the absence of compensatory damages, punitive damages are awardable as a matter of federal common law). The court in *EEOC v. Wal-Mart Stores, Inc.*, decided that if compensatory damages were required to support punitive damages in this case, the ADA's prohibition against asking about medical problems would be rendered meaningless because there would rarely be a serious injury caused by asking an illegal question. *See Wal-Mart Stores, Inc.*, 11 F. Supp. 2d at 1326.

218. *See generally* Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257 (1998).

219. *See id.* at 2269-70; *see also supra* text accompanying notes 210-12.

220. *See* 42 U.S.C. § 1981a(b)(3) (1994). For the full text of this provision, see *supra* note 28.

be 'enforced in accordance with the powers, remedies, and procedures' of the Fair Labor Standards Act."[221] The standard for a willful violation was developed first under the Fair Labor Standards Act ("FLSA"), which may account for some of the confusion in determining liquidated damages under the ADEA. Under the FLSA, the defendant is strictly liable if he fails to pay the requisite amount.[222] The defendant does not need bad intent, unlike the ADEA, which may require that the defendant intend to discriminate in order to be liable.[223] Under the FLSA, if the defendant does act with bad intent, he may be guilty of a criminal violation if he acted willfully.[224] Originally, liquidated damages were automatically awarded upon a finding of liability.[225] The Portal-to-Portal Act amended the liquidated damages provision and allowed the employer to avoid such damages in the discretion of the court if the employer showed that the "act or omission giving rise to such action was in good faith and that [the employer] had reasonable grounds for believing that his act or omission was not a violation" of the Act.[226] The problem in applying the FLSA standard in a non-FLSA statute is that when the underlying violation also requires a bad intent, as in the case of an ADEA violation, ostensibly requiring a different and possibly less culpable intent for the imposition of liquidated damages is confusing. The Court first attempted to resolve the problem by articulating the standard for a willful violation of the ADEA in *Trans World Airlines, Inc. v. Thurston.*[227]

221. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 125 (1985) (citing Lorrilard v. Pons, 434 U.S. 575, 579 (1978)).

222. *See generally* MARK A ROTHSTEIN ET AL., EMPLOYMENT LAW 201-09 (1994).

223. *See supra* note 35.

224. *See* 29 U.S.C. § 216(a) (1994).

225. *See id.* § 216(b). Criminal penalties for the ADEA were rejected by the drafters of the ADEA because of the increased burden of proof for criminal violations and to avoid employers' frustrating the implementation of the ADEA by interposing their privilege against self incrimination. *See Thurston*, 469 U.S. at 125 (quoting 113 CONG. REC. 2199, 7076 (1967)).

226. 29 U.S.C. § 260 (1994).

227. 469 U.S. 111 (1985).

A. Trans World Airlines, Inc. v. Thurston

In *Thurston*, the Court reviewed the defendant's policy which allowed airline pilots who were mandatorily retiring due to age to transfer to flight engineer status. The transfer was possible only if a vacancy in flight engineering existed.[228] The policy was ultimately found to violate the ADEA because pilots who retired for reasons other than age were permitted to transfer to flight engineer even if no vacancy existed.[229] Once it concluded that the employer was liable, the Court examined whether the defendant had committed a willful violation of the ADEA.

The Court began by analyzing the relationship between the FLSA and the ADEA. The Court observed that, although the enforcement provisions of the FLSA were incorporated into the ADEA, the provisions are not identical.[230] The Court noted that the FLSA has criminal penalties for a willful violation. For a willful violation of the ADEA, the Act prescribes only liquidated damages which Congress intended to be punitive.[231]

> [A]n employer is subject to criminal penalties under the FLSA when he "wholly disregards the law . . . without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law." This standard is substantially in accord with the interpretation of 'willful' adopted by the Court of Appeals in interpreting the liquidated damages provision of the ADEA. The court below stated a violation of the Act was "willful" if "the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA."[232]

The Court rejected the plaintiff's proposal of guilt for a willful violation if the defendant knew that the ADEA was "in the picture." The Court said that

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228. *See id.* at 116.
229. *See id.* at 121-22.
230. *See id.* at 125.
231. *See id.* (citing Fair Labor Standards Act of 1938 § 16(b), 29 U.S.C. § 216(b) (1994)). Congress rejected a proposal to add criminal penalties to the ADEA. *See id.* (citing 113 CONG. REC. 2199, 7076 (1967)).
232. *Id.* at 126 (citations omitted).

> [t]he "in the picture" standard would allow the recovery of liquidated damages even if the employer acted reasonably and in complete "good faith." Congress hardly intended such a result. The Court interpreted the FLSA, as originally enacted, as allowing the recovery of liquidated damages any time that there was a violation of the Act. In response to its dissatisfaction with that harsh interpretation of the provision, Congress enacted the Portal-to-Portal Act of 1947. [It] provides the employer with a defense to a mandatory award of liquidated damages when it can show good faith and reasonable grounds for believing it was not in violation of the FLSA. Section 7(b) of the ADEA does not incorporate § 11 of the PPA [Portal-to-Portal Act]. Nevertheless, we think that the same concerns are reflected in the proviso to § 7(b) of the ADEA.[233]

The Court further found that adopting the "in the picture" standard would result in punitive damages in every case. Because covered employers are required by law to post ADEA notices, they are universally aware of the ADEA. Consequently, the ADEA is "in the picture" for all covered employers.[234]

The Court adopted the standard articulated by the court of appeals that a "violation is 'willful' if 'the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA,'"[235] which would preserve the two-tier standard intended by Congress.[236] The Court found that the defendant in *Thurston* had acted reasonably and in good faith because it consulted with legal counsel on the matter and negotiated with the union before changing its policy, consequently the violation was not willful.[237]

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233. *Id.* at 128 n.22 (citations omitted).

234. *See id.* at 127-28.

235. *Id.* at 128 (quoting Airline Pilots Ass'n, Int'l v. Trans World Airlines, Inc., 713 F.2d 940, 956 (1983)). The Court said that this standard also comported with how the Court had interpreted the term "willful" in other criminal and civil cases. *See id.* at 127.

236. *See id.* at 127-28. The Court also rejected the employer's argument that willful should mean that the employer intentionally violated the Act. *See id.* at 127.

237. *See id.* at 129.

B. McLaughlin v. Richland Shoe Co.

Before the 1991 Civil Rights Act changed the statute of limitations for the ADEA,[238] a willful violation under the ADEA had an additional implication. Under both the ADEA and the FLSA, if the defendant engaged in a willful violation, the statute of limitations was extended from two to three years. The lower courts were not sure whether the standard for measuring willfulness for purposes of the statute of limitations should be the same as the standard announced in *Thurston.*

In *McLaughlin v. Richland Shoe Co.*,[239] which arose under the FLSA, the Court decided that the standard for a willful violation should be the same as that announced in *Thurston,* whether the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute."[240]

The Court said that the two-tiered statute of limitations indicated Congress's intent to make a "significant distinction between ordinary violations and willful violations."[241] The Court again rejected the "in the picture" standard because it would "obliterate [the] distinction."[242]

C. Hazen Paper Co. v. Biggins

In *Hazen Paper Co. v. Biggins*,[243] the Court reiterated again that liquidated damages can be assessed only if "'the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [ADEA].'"[244] The Court noted that even after *Thurston* and *McLaughlin*, the lower courts continued to be confused about the term "will-

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238. *See* Age Discrimination in Employment Act § 7(e), 29 U.S.C. § 626(e) (1994).
239. 486 U.S. 128 (1988).
240. *Id.* at 133. The Court also noted that the same statute of limitations applied to the ADEA. *See id.* at 131.
241. *Id.* at 132.
242. *Id.* at 132-33. For a further discussion of the *Thurston* case, see *infra* text accompanying notes 285-87.
243. 507 U.S. 604, 615 (1993).
244. *Id.* at 615 (quoting *McLaughlin*, 486 U.S. at 133).

ful."[245] In cases which did not involve a discriminatory policy, courts generally declined to apply the "reckless disregard" standard. Some courts required direct evidence; others required that age be the "predominate" reason for the action; one court required that the employer's conduct be outrageous.[246]

The Court in the *Hazen Paper* case identified the problem accurately. "The chief concern of these Circuits has been that the application of *Thurston* would defeat the two-tiered system of liability intended by Congress, because every employer that engages in informal age discrimination knows or recklessly disregards the illegality of its conduct."[247] The Court said that this concern was misplaced. The ADEA requires a willful violation for the assessment of liquidated damages, and the two-tiered liability principle was only one interpretive tool to use in deciding the meaning of the term "willful." The Court said "across the range of ADEA cases," the "knowledge or reckless disregard" standard will still produce a two-tier liability scheme.[248]

> It is not true that an employer who knowingly relies on age in reaching its decision invariably commits a knowing or reckless violation of the ADEA. The ADEA is not an unqualified prohibition on the use of age in employment decisions, but affords the employer a "bona fide occupational qualification" defense, and exempts certain subject matters and persons. If an employer incorrectly but in good faith and nonrecklessly believes that the statute permits a particular age-based decision, then liquidated damages should not be imposed.[249]

In clarifying that the employer is not guilty of a willful violation if it shows that it acted in good faith on the reasonable belief that it was not in violation of the Act, *Hazen Paper* has provided the guidance the courts needed to distinguish between willful and non-willful violations in ADEA cases.[250]

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245. *See id.*; Henkel, *supra* note 95, at 1210-15 (discussing lower court opinions after *Thurston*).

246. *See Hazen Paper,* 507 U.S. at 615 (citations omitted).

247. *Id.* at 615-16.

248. *Id.* at 616.

249. *Id.* (citations omitted).

250. *See infra* Part IV.D.

D. *Recent Lower Court Decisions Under the ADEA*

Before *Hazen Paper*, the lower courts were unable to apply the "reckless indifference" standard announced in *Thurston.*[251] As the Court in *Hazen Paper* noted, some courts required direct evidence; others required that age be the "predominate" reason, and one court required that the employer's conduct be outrageous.[252] These inconsistencies are not unlike those that are occurring now in Title VII cases.[253]

After *Hazen Paper*, lower courts have been virtually unanimous in finding that the employer acted with "reckless indifference," absent presentation of evidence of good faith reasonable belief that the ADEA permitted the action. When the standard is expressed in such terms, the courts have been able to apply it. In *Woodhouse v. Magnolia Hospital,*[254] for example, the Fifth Circuit noted *Hazen Paper's* clarification of the standard. The court said that "liquidated damages are not recoverable only if there is evidence that the intentional violation of the ADEA was based on the employer's good faith, albeit mistaken, belief that the statute allowed an age-based decision."[255]

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251. *See supra* text accompanying notes 245-47.

252. *See Hazen Paper*, 507 U.S. at 615 (citations omitted); Henkel, *supra* note 95, at 1210-15 (discussing these lower court cases).

253. *See* discussion *supra* Part III.B.

254. 92 F.3d 248 (5th Cir. 1996).

255. *Id.* at 256 (citing Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 129-30 (1985)); *accord* Shattuck v. Kinetic Concepts, Inc., 49 F.3d 1106 (5th Cir. 1995) (where the evidence established that the defendant knew that age discrimination was illegal but discharged someone for it anyway, without any colorable reason to believe that the ADEA did not apply); Ray v. Iuka Special Mun. Separate Sch. Dist., 51 F.3d 1246 (5th Cir. 1995) (holding that, even if the defendant did not know that retaliation violated the ADEA, the defendant's conduct was at least reckless; furthermore, there was no showing that the defendant had a good faith belief that the ADEA permitted the retaliation against the plaintiff for filing a charge); *see also* Sanchez v. Puerto Rico Oil Co., 37 F.3d 712, 722 (1st Cir. 1994) (noting that under any standard the defendant's actions "clearly fall outside the safe haven for good faith but incorrect conduct"). The jury in *Sanchez* could have found that the failure to reinstate the plaintiff was based on a deliberate strategy reflecting age discrimination. *See id.*; *see also* Mulqueen v. Daka, Inc., 909 F. Supp. 86, 96 n.13 (N.D.N.Y. 1995) ("The more appropriate inquiry might be whether a finding of intentional violation by the jury required a finding of willfulness as a matter of law. However, the plaintiff failed to make a request or objection to the court's charge despite the defendant's now admitted failure to raise a defense of good faith."); Curtis v. Robern, Inc., 819 F. Supp. 451, 457 (E.D. Pa. 1993) (finding that the defendant did not act in good faith and

In *Woodhouse*, an official admitted that he had been informed "that age would be used as one factor in determining which positions would be eliminated."[256] There was also evidence that the reduction in force ("RIF") policy could be manipulated so that older employees would be eliminated and that the policy was not followed at all when the plaintiff was discharged.[257] Thus, the court decided that the jury could have concluded that the defendant acted willfully. Furthermore, the defendant "offered no evidence that it reasonably believed in good faith that the ADEA permitted an age-based decision on the selection of positions for elimination."[258]

In *Stewart v. City of Chicago*,[259] the city attempted to interpose such a defense. The city broadened the class of firefighters in order to retire more people mandatorily under the limited exemption to the ADEA's prohibition against mandatory retirement.[260] The court granted summary judgment, determining that the defendant had discriminated based on age by applying the broader exemption which violated the ADEA.[261] The court also granted summary judgment for the plaintiff on the issue of liquidated damages, citing *Hazen Paper* and ruling that the defendant can avoid liquidated damages only if it believed in good faith and non-recklessly that the statute permitted the age-based decision.[262] In this case, the defendant was attempting to avoid the prohibition against mandatory retirement by broadening the policy. The court stated that "[t]he exemption protects only those retirement plans which are 'not a subterfuge to evade the purposes of [the ADEA].'"[263] The court said the city could make no argument that it acted in good faith and nonrecklessly.[264]

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nonrecklessly, and thereby acted willfully, by not following its own procedures; furthermore, the defendant's actions had shown affirmative bad faith, but the court noted that it did not have to go that far to find the defendant guilty of a willful violation).

256. *Woodhouse*, 92 F.3d at 256.

257. *See id.*

258. *Id.* at 257 (citations omitted).

259. No. 92C4919, 1994 WL 46672, at *1 (N.D. Ill. Feb. 14, 1994).

260. *See id.* at *3.

261. *See id.* at *4.

262. *See id.*

263. *Id.* (quoting 29 U.S.C. § 623(j)(2) (1994)).

264. *See id.*

In a district court case, *Dittman v. Ireco, Inc.*,[265] the court, having earlier granted summary judgment in favor of the plaintiff on liability, questioned whether as a matter of law the plaintiff was also entitled to liquidated damages. The court said that

> once an employer is found to have intentionally discriminated against an employee in violation of the ADEA, it may avoid a finding of willfulness if it shows that it acted in good faith and nonrecklessly. However, under such circumstances, this defense is not broad and all encompassing. The Supreme Court recognizes only three acts of "good faith and nonrecklessness" which may save the employer from liquidated damages. Specifically: (1) the employer was ignorant of the correlation between the selection mechanism and age; (2) the employer believed that age was a bona fide occupational qualification ("BFOQ"); and (3) the employer believed the employee was not covered by the ADEA.[266]

The court said that the first good faith defense would generally apply only in a disparate impact case. Because this was a disparate treatment case, the defendant had to show a BFOQ or another exemption and had not done so. The court found insufficient the fact that the defendant had "consulted with its attorneys before implementing the reorganization plan and discharging the plaintiff."[267] The failure to interpose one of the two possible defenses was fatal to the defendant's opposition to liquidated damages.

The argument could be made that consultation with counsel should provide the "good faith" part of the test, as *Thurston* seemed to indicate. The remaining question, then, would be whether the client was reasonable in relying on counsel's advice. If, for example, the client provided inaccurate or insufficient information to its counsel, the client could not reasonably rely on advice of counsel. As will be discussed later, if the

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265. 903 F. Supp. 347 (N.D.N.Y. 1995).

266. *Id.* at 349 (citations omitted).

267. *Id.* In another district court case, *Hysell v. Mercantile Stores Co.*, 736 F. Supp. 457 (S.D.N.Y. 1989), the court found that the defendant had not committed a willful violation when it acted on the advice of counsel that the plaintiff was a bona fide executive who could be mandatorily retired. This case predated *Hazen Paper*.

defendant's action in relying on counsel's advice was merely negligent, liquidated damages should not be awarded.

For example, in *Padilla v. Metro-North Commuter R.R.*,[268] the court said that, although the defendant consulted lawyers with regard to whether the demotion of the plaintiff violated the ADEA, he did not testify that he reasonably relied in good faith on their advice.[269] Presumably had the defendant testified that he relied in good faith, he might have been able to claim the defense if his reliance was reasonable. In that vein, in *Fink v. Kitzman*,[270] the district court, following the good faith standard, refused to immunize the defendant from punitive damages simply because she consulted an attorney. The court said that the evidence showed that the defendant targeted the plaintiff for discharge because of her age and recklessly discharged her in violation of the ADEA.[271]

Other courts, while not specifically adopting the good faith standard, have looked at evidence which would indicate the existence vel non of good faith. For example, in *Parrish v. Immanuel Medical Center*,[272] the court reviewed a jury verdict in favor of the plaintiff in which she was awarded liquidated damages. The court affirmed the judgment, finding sufficient evidence to support the liquidated damages. Among other things, the court noted, the defendant had implemented a mandatory retirement plan several years after the ADEA eliminated the upper age limit and, further, had asked another employee to retire with the approval of the human resources director who was presumably responsible for complying with anti-discrimination laws.[273]

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268. 92 F.3d 117 (2d Cir. 1996).

269. *See id.* at 124.

270. 881 F. Supp. 1347 (N.D. Iowa 1995).

271. *See id.* at 1389-90.

272. 92 F.3d 727 (8th Cir. 1996); *see also* Futrell v. J.I. Case Co., 38 F.3d 342, 349 (7th Cir. 1994) (holding that the defendant's "'innocuous evidence of age awareness' becomes significant when combined with other evidence of potential discrimination such as failure to follow procedures in discharging him and discriminatory remarks"). *But see* EEOC v. Massey Yardley Chrysler Plymouth, Inc., 117 F.3d 1244, 1250 (11th Cir. 1997) (holding that the jury was warranted in not awarding liquidated damages because, although the plaintiff's harassers knew it was wrong to treat someone differently based on age, they did not know that they were violating the ADEA when they did so).

273. *See Parrish*, 92 F.3d at 736. In later cases, the Eighth Circuit recognized the

Similarly, in *Nelson v. Boatmen's Bancshares, Inc.*,[274] the court affirmed the jury's verdict awarding the plaintiff punitive damages based, among other things, on the evidence that the plaintiff was promoted six months before he was fired but was never informed of his promotion by his immediate supervisors, that management officials had discussed offering him early retirement before they fired him, and that the human resources director had lacked both training and experience in the ADEA.[275]

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standard as good faith reasonable belief. *See* Newhouse v. McCormick & Co., 110 F.3d 635, 640 (8th Cir. 1997) (stating that proof of a willful violation did not require additional evidence but whether the "person making the hiring decision incorrectly but in good faith believed that the statute permitted an age-based decision"). Here the jury could have concluded that the interviewer had a younger person picked for the job and only interviewed the plaintiff to give the appearance of complying with the ADEA. *See id.* at 640; *see also* Maschka v. Genuine Parts Co., 122 F.3d 566, 572 (8th Cir. 1997) (finding that the defendant had policies against age discrimination and presented no evidence that it acted in the erroneous belief that the action was permitted by the ADEA); Curtis v. Electronics & Space Corp., 113 F.3d 1498, 1502-03 (8th Cir. 1997) (finding that the supervisor had attended company seminars discussing the company policy that age discrimination was illegal; while this was insufficient alone to provide the basis for liquidated damages, the company did not present evidence that it mistakenly believed that the decision was legitimate under the ADEA). *But see* Jarvis v. Sauer Sundstrand Co., 116 F.3d 321, 324 (8th Cir. 1997) (finding "[a] violation of the ADEA does not require any particular mental state, but the award of liquidated damages under the ADEA does"). Because the plaintiff did not submit additional evidence in *Jarvis*, liquidated damages were not appropriate. *See id.*

The Eighth Circuit sitting en banc had earlier recognized the error of its ways in requiring direct evidence in previous cases. In *Brown v. Stites Concrete Co.*, 994 F.2d 553 (8th Cir. 1993), the court rejected the instruction proferred by the defendant that would have required some additional evidence of outrageous conduct to support the award of liquidated damages. *See id.* at 559. Instead, it approved the instruction given in the case which resulted in an award of liquidated damages for the plaintiff: "[a] violation is willful if it's done voluntarily and deliberately and intentionally and not by accident or inadvertence or ordinary negligence." *Id.* at 560. The court found that voluntariness is insufficient to establish willfulness, but the error was not reversible: "[t]he question is not whether the evidence used to establish willfulness is different from and additional to the evidence used to establish a violation of the ADEA, but whether the evidence—additional or otherwise—satisfies the distinct standard used for establishing willfulness." *Id.* The dissent disagreed that the jury instruction stated the law correctly and thought that the defendant had proved that it acted in good faith reasonable belief that considering the plaintiff's age was legitimate. *See id.* at 561-62 (Loken, C.J., dissenting).

274. 26 F.3d 796 (8th Cir. 1994).

275. *See id.* at 802-03; *see also* Ryther v. KARE 11, 864 F. Supp. 1510, 1520 (D. Minn. 1994), *aff'd en banc*, 109 F.3d 832 (8th Cir. 1997) (finding evidence to support a willful violation in the defendant's policies prohibiting such discrimination and in the fact that the defendant built a record against the plaintiff to justify his dis-

Other courts have found, but not required, the equivalent of bad faith in order to assess liquidated damages. For example, in one case, the employer's lying about the reason for the employment action supported liquidated damages.[276] In another case, the discrepant responses by defendant's witnesses were evidence of a willful violation.[277] While there may be some argument that the courts are interpreting the *Hazen Paper-Thurston* standard for "reckless indifference" too strictly,[278] they are virtually in harmony in doing so, as compared to the varying interpretations of "reckless disregard" under Title VII.

V. ANALYSIS

When Congress used the term "reckless indifference" in the Civil Rights Act of 1991, it was not writing on a clean slate. The Supreme Court interpreted the term in *Thurston* to mean that exemplary damages are awardable in the absence of evidence that the defendant believed in good faith based on reasonable grounds that it was not violating the plaintiff's statutory rights.[279] The Court affirmed this interpretation again before 1991,[280] and has since rejected a contrary reading in

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charge); Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089 (3d Cir. 1995) (noting that the Supreme Court rejected its requirement of outrageous conduct, requiring instead that the defendant's conduct show reckless disregard of the plaintiff's statutory rights). The fact that the jury in *Starceski* could have found that the defendant specifically targeted the plaintiff and the older engineers in his department for layoff satisfied the requirement of reckless disregard. *See id.* at 1099-1100.

276. *See* EEOC v. Watergate at Landmark Condominium, 24 F.3d 635, 641 (4th Cir. 1994) (holding that if the defendant lies about the reason for its action and the jury finds age discrimination, this would support a finding that the violation was willful).

277. *See* EEOC v. Pape Lift, Inc., 115 F.3d 676, 680 (9th Cir. 1997).

278. By limiting the good faith defense to claims of an enumerated defense to the ADEA, it could be argued that the courts are interpreting good faith more strictly than *Thurston* intended. *See infra* text accompanying notes 285-87.

279. *See* 469 U.S. 111, 129 (1985).

280. *See generally* McLaughlin v. Richland Shoe Co. 486 U.S. 128 (1988). Again, the 1991 Civil Rights Act uses the term "reckless indifference" as opposed to *Thurston's* "reckless disregard." The difference in terminology is irrelevant. The Court in *Smith v. Wade* used the term "reckless disregard," and there is no doubt that the intention is that the standard under both § 1981 and the 1991 Civil Rights Act should be the same. *See Smith v. Wade,* 461 U.S. 30, 56 (1983). The Court further stated that punitive damages may be inferred from the same evidence from which liability is found and that "reckless disregard" did not require a heightened showing. *See id.*; *see also supra* note 20.

Hazen Paper. To re-interpret the meaning of "reckless indifference" for a statute as closely related to the ADEA as is Title VII would be problematic at best, and judicial activism at worst.

The courts are encountering problems under the Civil Rights Act of 1991 and § 1981 because they have failed to recognize that the standard for punitive damages does not require more evidence of the defendant's intent regarding the discriminatory *act.* Rather, it requires evidence regarding the defendant's *state of mind with regard to the law,* as the Court recognized in its ADEA decisions and in *Smith v. Wade.*

The confusion comes from the fact that liability for these discrimination claims ostensibly requires a more culpable state of mind or intent to discriminate than the standard for punitive damages, which requires that the employer act recklessly. The distinction should be made between the defendant's intent with regard to the act of intentionally discriminating and his state of mind (reckless indifference) with regard to the plaintiff's protected rights. Intentional discrimination requires only that the defendant treat the plaintiff differently from another person because of a prohibited characteristic such as race, sex, religion, national origin, color, or disability. Reckless indifference to whether this violates the law is another question. Arguably, the plaintiff should have to prove that the defendant knew about the law and was reckless in violating it. Ignorance of the law, however, has never been a defense under any of the anti-discrimination provisions.[281] As the court said in *Thurston,* everyone knows discriminating based on age violates the law, and it would not be enough for liquidated damages to show that the defendant knew that age discrimination was wrong or "in the picture."[282] Certainly, if most employers know that age discrimination is wrong, it is even more likely that employers know that race, sex, religion, or national origin discrimination is wrong.[283]

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281. *See supra* text accompanying notes 130-32. *See generally* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985).

282. *See Thurston,* 469 U.S. at 127-28.

283. Because discrimination against the disabled is a newer proscription, one could argue that if knowledge of the law was intended to be part of the proof for punitive damages, disability discrimination would be the most likely candidate. Congress, how-

The Supreme Court's interpretation of "reckless indifference" under the ADEA was to allow the defendant to avoid punitive damages by showing that its violation of the law was in good faith based on reasonable belief. This is the only interpretation of the 1991 Civil Rights Act that makes sense. "Reckless indifference" cannot mean that the defendant's conduct was worse than simply discriminating. *Smith v. Wade* held that punitive damages punish egregious behavior, but the intentional conduct that violated the Civil Rights Act in that case was considered egregious enough without requiring more.[284] Similarly, simple discrimination is sufficiently egregious behavior. The clear language of the standard for punitive damages relates to the defendant's intention regarding the law, as does the standard for liquidated damages under the ADEA. Because no employer today can or should be able to profess ignorance of the law that discrimination is illegal, the absence of a good faith reasonable belief is the only logical meaning of "reckless indifference" to statutory rights.

Reading between the lines of the *Thurston* case,[285] the argument can be made, however, that the Supreme Court intended to allow ignorance of the *nuances* of the law to be a defense to exemplary damages. In *Thurston*, the defendant tried to bring its retirement policy into compliance with the new amendment to the ADEA that forbids mandatory retirement. In amending

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ever, did not make this distinction, applying the same standard for punitive damages to the ADA and Title VII. *See supra* note 19; *infra* text accompanying notes 297-301.

284. *See* Smith v. Wade, 461 U.S. 30, 56 (1983). The actual question in *Smith v. Wade* was whether an award of punitive damages requires the defendant to act maliciously or intentionally (in fact, the plaintiff had already proven an intentional violation which is required under § 1983, as under § 1981) or whether an award of punitive damages requires only "reckless disregard" to federal rights. The Court opted for the latter, without clearly defining what that would mean, except that it did not require additional evidence, as courts today are requiring. The Court in *Smith v. Wade* quoted the Restatement (Second) of Torts: "'Punitive damages may be awarded for conduct that is outrageous, *because* of the defendant's evil motive or his reckless indifference to the rights of others.'" *Id.* at 46-47 (emphasis added) (quoting RESTATEMENT (SECOND) OF TORTS § 908(2) (1977)).

285. In *Thurston*, the Court reviewed the defendant's policy that allowed airline pilots who were mandatorily retiring due to age to transfer to flight engineer status. The transfer was possible only if a vacancy in flight engineering existed. *See Thurston*, 469 U.S. at 116. The policy was ultimately found to violate the ADEA because pilots who retired for reasons other than age could transfer to flight engineer even if no vacancy existed. *See id.* at 121-22.

its policy to remedy the obvious violation, the defendant unintentionally incorporated a new violation in its transfer policy.[286] While the policy violated the ADEA, the Supreme Court said that the violation was not reckless because the defendant believed in good faith that its new policy conformed to the law and that the belief was reasonable because the defendant consulted with its legal counsel. The Court's solution to allow the defendant to show that it thought the discrimination was justified makes as much sense under Title VII as it does under the ADEA and more under the ADA.[287]

The D.C. Circuit's panel and en banc opinions in *Kolstad*[288] are the only opinions that discuss the applicability of the good faith reasonable belief standard to the 1991 Civil Rights Act.[289] The en banc court's reason for rejecting the good faith standard is based, in part, on a misapprehension that the ADEA is easier to violate than Title VII.[290] The court said that because of the ADEA's defenses, it would be more likely for employers to believe that the discrimination is allowed by the ADEA.[291] Most of the important defenses to the ADEA,

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286. In this case, the defendant may have been negligent, but recklessness requires a more culpable state of mind. *See* Johnson, *Punitive Damages*, *supra* note 1, at 525 n.21. For a discussion of the meaning of "reckless," see *supra* text accompanying note 129.

287. *See infra* text accompanying notes 298-304.

288. Kolstad v. American Dental Ass'n, 108 F.3d 1431 (D.C. Cir. 1997), *rev'd en banc*, 139 F.3d 958 (D.C. Cir. 1998), *cert. granted,* 119 S. Ct. 401 (1998).

289. "[T]he ADEA requires 'willful' conduct, not 'malice' or 'reckless indifference.'" *Id.* at 967. The en banc court in *Kolstad* said that liquidated damages were different and neglected to mention that the standard is interpreted to be basically the same. *See Thurston*, 469 U.S. at 124-28.

290. *See Kolstad*, 139 F.3d at 967.

291. For example, the court said that many people think retiring people early is not a violation of the law. *See id.* As the Court in *Thurston* said, absent good faith reasonable belief, this would require imposition of liquidated damages. *See Thurston*, 469 U.S. at 127-28.

The same argument, that the Act is easier to violate unintentionally, could be made for violations of the Equal Pay Act, for example, which has several defenses and depends on a fact-bound assessment of whether the parties in question are doing equal work. The Equal Pay Act requires that the employer pay the same wages to men and women who are performing equal work. Equal work is defined as work requiring equal skill, effort, and responsibility, performed under the same working conditions. The defenses are (1) any other factor other than sex; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; and (4) a seniority system. *See* Equal Pay Act of 1963 § 3, 29 U.S.C. § 206(d) (1994). The Supreme Court, nevertheless, applied the same standard to the Equal Pay Act and the

however, are also defenses to Title VII. Both have a BFOQ and bona fide seniority system defenses.[292] While it is true that Congress added other defenses to the ADEA that were not found in Title VII specifically, "reasonable factors other than age," "bona fide benefit plan," as well as discipline or discharge for good cause,[293] these defenses rarely arise.[294] The most

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ADEA. *See, e.g.*, McLaughlin v. Richland Shoe, 486 U.S. 128 (1988). The ADEA and Title VII have more of the same concepts and defenses in common than do the Equal Pay Act and the ADEA. *See generally supra* note 50.

292. *See* 42 U.S.C. § 2000e-2(e), (h) (1994). The BFOQ defense is not absolute under Title VII but applies only to sex, religious, and national origin discrimination. *See id.* § 2000e-2(e). The court in *Kolstad* assumed that BFOQ would apply more often under the ADEA than under Title VII. It can be argued that sex as a BFOQ has been raised as often as age. *Compare* UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991), *with* Western Airlines, Inc. v. Criswell, 472 U.S. 400 (1985).

293. 29 U.S.C. § 623(f) (1994). Section 623(f) states that:

> It shall not be unlawful for an employer, employment agency, or labor organization—
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> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;
>
> (2) to take any action otherwise prohibited under subsection (a), (b), (c) or (e) of this section—
>
> (A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this Act, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual; or
>
> (B) to observe the terms of a bona fide employee benefit plan—
>
> (i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, Title 29, Code of Federal Regulations (as in effect on June 22, 1989); or
>
> (ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this Act.
>
> Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement

common defense to an ADEA claim is the "legitimate, non-discriminatory reason" that was developed by the courts as a defense to Title VII and applies as well to the ADEA.[295] Furthermore, the Supreme Court has equated legitimate, non-discriminatory reason with a "factor other than age."[296] Finally, the standard for punitive damages under the Civil Rights Act of 1991 also applies to the ADA which has defenses of its own.[297] Because the ADA is more recent, employers are less familiar with its provisions.

The D.C. Circuit's supposition that the ADEA is easier to violate accidentally than Title VII would apply with more force to the ADA, which has even more traps for the unwary than the ADEA or Title VII.[298] For example, in *Bartlett v. New York Board of Law Examiners*,[299] the court decided that the

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proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

Id. See Howard Eglit, *The Age Discrimination in Employment Act's Forgotten Defense: The Reasonable Factors Other Than Age Exception*, 66 B.U. L. REV. 155, 176-77 (1986).

294. *See generally* Eglit, *supra* note 293.

295. *See id.*

296. Johnson, *Semantic Cover*, *supra* note 29, at 24. The Court held that "[a]lthough some language in our prior decisions might be read to mean that an employer violates the ADEA whenever its reason for firing an employee is improper in any respect, this reading is obviously incorrect." Hazen Paper Co. v. Biggins, 507 U.S. 604, 612 (1993) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (a Title VII case)). There are, in addition, defenses under Title VII which are not contained in the ADEA, such as action taken pursuant to a merit system or a system which measures quantity or quality of production or a professionally developed test. These are as rarely used as some of the ADEA defenses. *See* 42 U.S.C. § 2000e-2(h) (1994). The defenses of merit system and quantity or quality of production are also included in the Equal Pay Act of 1963 § 3, 29 U.S.C. § 206(d) (1994), which share the same standard for liquidated damages as the ADEA. *See supra* note 291.

297. *See* 42 U.S.C. § 12,117(a) (1994 & Supp. II 1996).

298. For example, it is illegal under the ADA for the defendant to ask an applicant about medical problems before she is hired. *See id.*; *see also* EEOC v. Wal-Mart Stores, Inc., 11 F. Supp. 2d 1313 (D.N.M. 1998) (holding that punitive damages were appropriate where, after the ADA became applicable to it, the defendant neglected to change its nationwide interview form, which asked an illegal question about applicants' medical condition).

An actor acts recklessly if he "consciously disregards a substantial risk," that the prohibited result will occur. *See* Johnson, *Punitive Damages*, *supra* note 1, at 537. He acts negligently if he "should have been aware of an unreasonable" risk that the prohibited result would occur. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, 164-65 (5th ed. 1984).

299. 970 F. Supp. 1094 (S.D.N.Y. 1997).

plaintiff had been discriminated against because the defendant failed to reasonably accommodate her learning disability in administering the bar exam to her.[300] Nevertheless, the court held that even if punitive damages were available, because of the "'chaos' in the learning disability field"[301] and the "ambiguity in the law," the defendant did not act with reckless indifference to the plaintiff's rights.[302]

Even the court in *Kolstad* acknowledged that *Smith v. Wade* rejected the requirement of "'actual malicious intent—"ill will, spite, or intent to injure,"'"[303] but then required egregiousness as a threshold requirement. The court declined to define the term, but found that there was no evidence of egregiousness in the *Kolstad* case because the plaintiff contended only that the defendant had preselected a male for the position and had made offensive references to women. The court said examples of egregiousness include where a defendant (1) "engaged in a pervasive pattern of discriminatory acts," (2) "manifested genuine spite and malevolence," or (3) "otherwise evinced a 'criminal indifference to civil obligations.'"[304]

It is difficult to reconcile the requirement of egregiousness, and the *Kolstad* court's explanation of the term, with *Smith v. Wade's* rejection of a requirement of malice or ill will. The

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300. This case was decided under another Title of the ADA, not the Title that applies to employment discrimination.

301. *Id.* at 1135.

302. *Id.* at 1134. The ADA also has a good faith defense for the employer who offers a reasonable accommodation. At least one court has equated lack of good faith under the ADA with reckless indifference. In *Oswald v. LaRoche Chemicals,* 894 F. Supp. 988 (E.D. La. 1995), the court denied the defendant's motion for summary judgment on the issue of good faith efforts to find a reasonable accommodation. The court found that the defendant may have acted recklessly with regard to the plaintiff's rights. The company consulted a physician who determined that the plaintiff could not perform other jobs. Testimony indicated that the physician reviewed the plaintiff's medical file once, never visited the plant to view any of the possible positions, relied on the defendant's representatives to tell him the job duties, and did not remember being consulted on the job plaintiff applied for and was denied. *See id.* at 997.

In *Mason v. Salvation Army,* 112 F.3d 516 (9th Cir. 1997), without citing the statutory authorization, the court decided that an award of punitive damages was not supported by the evidence because the defendant had made a number of accommodations to the plaintiff. *See id.*

303. Kolstad v. American Dental Ass'n, 139 F.3d 958, 964 (D.C. Cir. 1998), *cert. granted,* 119 S. Ct. 401 (1998) (quoting Smith v. Wade, 461 U.S. 30, 37 (1983)).

304. *Id.* at 965 (footnotes and citations omitted).

courts that require egregious violations are simply requiring some type of malice or ill will.[305] As the dissent in *Kolstad* pointed out, the courts are usurping the jury's function of deciding when to make the moral judgment of when the employer should be punished. Under the standard of egregiousness, judges cannot instruct juries on when to assess punitive damages but can only apply a hindsight view of the evidence and arbitrarily decide whether they think the defendant's conduct was egregious or not.[306] Furthermore, the standard is "malice *or* reckless indifference" and requiring egregious behavior is the equivalent of reading "reckless indifference" out of the statute.

The absurdity of the situation is best illustrated by the Ninth Circuit's decision in *Ngo*. The court acknowledged that *Smith v. Wade* was the authoritative interpretation of the standard and that it rejected the argument that the standard for punitive damages must necessarily be higher than the standard for liability.[307] The court said, however, that many other courts had, nevertheless, misinterpreted *Smith v. Wade* to require a heightened evidentiary showing for punitive damages. The court in *Ngo* then adopted the misinterpretation on the assumption that Congress had also adopted the misinterpretation. While admitting that the defendant may have been reckless, the court further required "evil motive or a conscious and deliberate disregard," a clearly higher standard than that required by the statute in order to impose punitive damages.[308]

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305. *See, e.g.,* Ngo v. Reno Hilton Resort Corp., 140 F.3d 1299, 1302 (9th Cir. 1998), *amended on pet. for reh'g,* 156 F.3d 988 (9th Cir. 1998) (requiring an evil motive, presumably racial hatred).

It should be noted that courts that find malice are correct but those that require it are not. Malice is sufficient for punitive damages, but the minimum standard is reckless indifference. For a discussion of malice, see *supra* note 98.

306. *See Kolstad,* 139 F.3d at 976-77 (Latel, J., dissenting). *Compare* Merriweather v. Family Dollar Stores of Ind., Inc., 103 F.3d 576, 582 (7th Cir. 1996) (determining that the defendant's "attempt to deceive the court, by presenting false reasons for its decision to discharge [the plaintiff], was sufficiently serious that it warranted imposition of punitive damages"), *with* Varner v. National Super Markets, Inc., 94 F.3d 1209, 1214 (8th Cir. 1996) (holding that the company was on notice of the incidents and failed to remedy them, but defendant's conduct was not sufficiently outrageous to justify an award of punitive damages where the plaintiff's complaints to management that an employee had sexually assaulted her were ignored).

307. *See id.* 1302-03.

308. *Id.* at 1305. The jury found that the defendant intentionally discriminated. The only remaining question addresses what the defendant's belief was with regard to

VI. CONCLUSION

The Supreme Court has two choices in the *Kolstad* case. If it chooses to interpret the standard to require more evidence of bad conduct on the part of the defendant in order to impose punitive damages, it will perpetuate the chaos in the lower courts. As evidenced by lower court cases, courts do not agree on what bad conduct is sufficiently bad for punitive damages.[309] Furthermore, if the Court chooses this solution, it would also either have to overrule or "clarify" *Smith v. Wade* to require more evidence or apply a different standard to § 1981 cases.

The second choice, recommended by this article, is to interpret "reckless indifference" consistently and apply *Thurston* to the 1991 Civil Rights Act. In order to avoid an award of punitive damages, there must be some evidence that the defendant believed that he was acting in good faith based on reasonable grounds that he was not discriminating.[310] The jury must then make a moral judgment of whether the employer should be punished to deter such conduct in the future.[311] The Court need not limit the defendant to proof that it mistakenly be-

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whether it was violating the plaintiff's rights in refusing her a medical leave, but granting a white employee leave to go on her honeymoon. The court admitted that the defendant may have been reckless, which is all that is required by the statute, but would require that the defendant have an evil motive, i.e., racial hatred, or an intentional disregard for the plaintiff's rights. *See id.*

309. *See* cases cited *supra* Part III.B.

310. Again, under Title VII, to recover punitive damages, the plaintiff must demonstrate that the defendant acted with malice or reckless indifference. *See* 42 U.S.C. § 1981a(b)(1) (1994). It is the position of this article that once the plaintiff has shown that the defendant intentionally discriminated, the plaintiff has met this burden. It should be incumbent on the defendant to prove that he acted in good faith based on reasonable grounds.

In the alternative, the defendant could be required to articulate a defense which the plaintiff would then be required to disprove. "Punitive damages should be awarded when the defendant deserves to be punished, and the award would deter him and others from such conduct in the future." RESTATEMENT (SECOND) OF TORTS § 908(1) (1977). If the defendant intentionally discriminated, he clearly deserves punishment in most cases because he has done a great social and moral wrong proscribed by federal law. If, however, he was acting in good faith based on reasonable grounds, he should not be assessed punitive damages.

311. It must be remembered that damages under the Civil Rights Act of 1991 are not unlimited but capped at $300,000 (punitive and compensatory) for the largest employer. *See* 42 U.S.C. § 1981a(b)(3)(D) (1994).

lieved that it had a statutory defense. The defendant could be allowed to present other evidence that it was acting in good faith based on reasonable grounds that it was not discriminating. For example, the recent decision in *Ellerth* could provide guidance in cases such as hostile environment harassment cases where the defendant has an anti-discrimination policy, has trained its supervisors not to discriminate, and has no reason to believe that discriminatory decisions were being made at the supervisory level.[312] In *Thurston* itself, the defendant was clearly trying to comply with the law. With regard to the discriminatory transfer policy, the defendant could not contend that it believed that the policy was non-discriminatory; however, in the context of the defendant's overall conduct, it was clear that the defendant was trying to remedy a mandatory retirement policy when it *negligently* created the discriminatory transfer policy. In addition, there may be other instances of good faith reasonable belief that would show that the defendant should not be punished with punitive damages.[313] Requiring further evidence that the defendant was intentionally discriminating does not speak to whether the defendant was reckless with regard to the law.

Whether the present Court agrees with *Smith v. Wade* at this point in time or with the earlier interpretation of "reckless disregard" in *Thurston,* these were the relevant decisions when Congress passed the 1991 Civil Rights Act. Requiring an egregious or malicious[314] violation simply reads "reckless indifference" out of the statute, and any such requirement must be the subject of legislative, not judicial action.

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312. *See supra* text accompanying notes 210-13; *supra* note 213.

313. *See, e.g.,* Bartlett v. New York Bd. of Law Exam'rs, 970 F. Supp. 1094 (S.D.N.Y. 1997).

314. *See supra* notes 98, 102; Johnson, *Punitive Damages, supra* note 1, at 534-38 (discussing the meaning of the term malice).