# Judicial Legislation Run Amok

## New Limits On Punitive Damages Imposed

**BY DEBRA S. KATZ**

Ignoring the clear constitutional mandate to avoid judicial legislation, the Supreme Court ended this term by essentially amending statutes that attack discrimination. The Court acted to protect employers from punitive damages liability in *Kolstad v. American Dental Association*, 67 U.S.L.W. 4552 (June 22, 1999), and public schools from liability in all but the most extreme cases in *Davis v. Monroe County Board of Education*, 119 S. Ct. 1661 (May 24, 1999). (*See accompanying article.*) While paying lip service to expanding the rights of the aggrieved, the Court dredged safe harbors found nowhere in either of the laws at issue. In *Kolstad*, the creation of a "good faith" standard is particularly galling given that neither party addressed the question during the litigation, the American Dental Association expressly disavowed that the question was before the Court, and the facts of the case did not present a basis on which to create such a defense.

Why then is the Court's majority so willing to forget the words of Justice Louis Brandeis that "to supply omissions transcends the judicial function"? The answer is apparent: The majority is unwilling to accept Congress' considered judgment that punitive damages are necessary to strengthen employee rights and aggressively deter employer violations.

In passing the Civil Rights Act of 1991, Congress was clearly frustrated that discrimination continued even though "[v]irtually everyone in America now understands that it is both 'wrong' and 'illegal' to discriminate intentionally." In providing for punitive damages under Title VII of the Civil Rights Act of 1964, Congress sent a clear signal it was serious about ending job discrimination and that one way to do this was to impose financial penalties that would make employers think twice.

But now, instead of reading the express language of §1981a to permit punitive damages when a nongovernmental employer discriminates "with malice or with reckless indifference to the federally protected rights of an aggrieved individual," the Court has supplanted its own policy-making judgment. It has adopted extra-statutory standards to make punitive damages unavailable where an employer can demonstrate that discrimination by managerial agents was "contrary to the employer's 'good-faith efforts to comply with Title VII.'"

After hearing seven days of testimony in *Kolstad*, the jury concluded that the American Dental Association (ADA) had intentionally discriminated against Carole Kolstad on the basis of her gender by denying her a promotion. The judge refused to instruct the jury on punitive damages, even though the evidence demonstrated that the ADA's violation of Title VII was willful. Specifically, the evidence indicated that Kolstad was the more qualified of two job candidates, and that the decision-makers, who were senior executives, exhibited animus toward women by telling sexually offensive jokes in staff meetings and in one-on-one sessions with Kolstad and by referring to professional women in such derogatory terms as "bitch" and "battle-axe."

The evidence further supported an inference that the executives not only deliberately refused to consider Kolstad fairly for the promotion, but also manipulated the job requirements and conducted a "sham" selection procedure to conceal their misconduct. For example, the evidence demonstrated that the ADA groomed the preselected male candidate and that the decision-makers interviewed only that man for the position. Kolstad also adduced evidence showing that women were seriously underrepresented in the ADA's upper ranks.

Finally, the court prevented Kolstad from offering evidence concerning the ADA's prior litigation of a gender-discrimination class action. The resulting consent decree in that case expressly forbade the preselection of a candidate in a promotion setting.

The ADA put on no evidence that its two decision-makers were ignorant of Title VII's requirements, that they had violated an internal equal employment policy instituted in good faith, or that they had any good-faith reason for believing that being a man was a legitimate requirement for the job. Rather, as Justice John Paul Stevens noted in his separate opinion, the ADA resorted to false, pretextual explanations for its refusal to promote Kolstad.

### STANDARDS DEVIATION

A panel of the U.S. Court of Appeals for the D.C. Circuit reversed the lower court's decision denying a punitive damages instruction and rejected the ADA's assertion that punitive damages are available under Title VII only in "extraordinarily egregious" cases. But on rehearing *en banc*, a narrowly divided D.C. Circuit turned around and sustained the rejection of the punitive damages claim, holding that "before the question of punitive damages can go to the jury, the evidence of the defendant's culpability must exceed what is needed to show intentional discrimination." The court said that a defendant must be shown to have engaged in "egregious misconduct" before a jury would be permitted to consider punitive damages.

The Supreme Court granted certiorari to resolve a conflict among the circuit courts concerning the standard of conduct needed to permit a request for punitive damages to go to the jury.

In a 7-2 decision, the Court rejected the "egregious misconduct" standard and held that the "malice or reckless indifference" standard focuses on the defendant's state of mind—not the degree of its misconduct. To be liable in punitive damages, a defendant must be shown to have discriminated "in the face of a perceived risk that its actions will violate federal law." The Court noted that while egregious or outrageous acts support an inference of the requisite "evil motive," the act in question need not have some independently egregious quality to justify punitive damages.

The Court noted that "there will be circumstances where intentional discrimination does not give rise to punitive damages liability." Where an employer is "simply unaware of the relevant prohibition" because the underlying theory of discrimination is "novel or otherwise poorly recognized," or where an employer "discriminates with the distinct belief that its discrimination is lawful" because it satisfies a statutory exception to liability, an employer will escape punitive damages.

Not satisfied with giving employers this escape hatch, the Court by a 5-4 majority created out of whole cloth yet another limitation on punitive damages. While the statute has no such requirement, *Kolstad* calls for an aggrieved plaintiff not only to demonstrate that the employer acted with malice or reckless indifference to her federally protected rights, but also to offer evidence to "impute liability for punitive damages" to the employer.

After acknowledging that, "[i]n express terms, Congress has directed federal courts to interpret Title VII based on agency principles," the Court refused to adopt common law principles or the Restatement (Second) of Agency or the Restatement (Second) of Torts. These provide that punitive damages are properly awarded against a principal because of an agent's act if: (1) the principal authorized the doing and manner of the act; (2) the agent was unfit, and the principal was reckless in employing him; (3) the agent was employed in a managerial capacity and was acting in the scope of employment; or (4) the principal or his managerial agent ratified or approved the act.

Noting that the Restatement of Agency provides that even intentional torts are within the scope of employment if the conduct "is the kind [the agent] is employed to perform," "occurs substantially within the authorized time and space limits," and "is actuated, at least in part, by a purpose to serve" the employer, the Court—on strictly

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CORBIS/JULIE HOUCK

*Kolstad v. American Dental Association*
*Davis v. Monroe County Board of Education*

## Court Adopts Strict Test For Harassment Liability

**BY LYNNE BERNABEI**

*Davis v. Monroe County Board of Education*, 119 S. Ct. 1661 (1999), saw a Supreme Court engaged in high-handed policy making and legislative efforts once again. In defining when sexual harassment of students by other students violates Title IX of the Education Amendments of 1972, the Court created a new and onerous standard of liability.

Last term, in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), the Court had held that a student sexually harassed by a teacher could recover damages against a school district only if a school official with authority to take corrective action was notified of the harassment and if the official's response amounted to "deliberate indifference." Building on *Gebser*'s deliberate indifference standard, the 5-4 majority in *Davis* set an exceedingly high standard for students sexually harassed by other students to state an actionable claim against a school district under Title IX.

The standard is so high that it is puzzling why the dissent decries the majority opinion as threatening schools "beset with litigation from every side." It is much more likely that *Davis* will have the opposite effect—reducing the number of federal suits brought by sexually harassed or abused students. Indeed, Julie Underwood, general counsel for the National School Board, echoed the sentiments expressed by many school lawyers that it would be "the rare occasion when a school board is found liable in the future."

Title IX prohibits students from being excluded from participation in, being denied the benefits of, or being subjected to discrimination under programs or activities receiving federal funds. Aurelia Davis alleged that the school's deliberate indifference to a male student's persistent sexual advances toward her fifth-grade daughter LaShonda created an intimidating, hostile, offensive, and abusive school environment that violated Title IX. According to the complaint, a male classmate attempted to touch her daughter's breasts and genital area, made vulgar comments, and continuously acted in an offensive and sexually suggestive manner toward LaShonda and other female students. The school officials to whom these incidents were reported allegedly did nothing to stop them. It was only after the boy was charged with and pleaded guilty to sexual battery that the harassment ended. Both the U.S. District Court and the U.S. Court of Appeals for the 11th Circuit, sitting *en banc*, found that such student-on-student harassment could not provide

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policy grounds—rejected application of such a standard. It stated: "On this view, even an employer who makes every effort to comply with Title VII would be held liable for the discriminatory acts of agents acting in a 'managerial capacity.' " This, the Court concluded, "would reduce the incentive for employers to implement antidiscrimination programs."

Endorsing the amicus argument of the business-sponsored Equal Employment Advisory Council, the Court reasoned that "such a rule would likely exacerbate concerns among employers that §1981a's 'malice' and 'reckless indifference' standard penalizes those employers who educate themselves and their employees on Title VII's prohibitions." The majority observed that "[d]issuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII."

After condemning the "perverse incentives that the Restatement's 'scope of employment' rules create," the Court said it was "compelled to modify these principles to avoid undermining the objectives underlying Title VII." It held: "In a punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good-faith efforts to comply with Title VII.' " Thus, regardless of the intentional discrimination perpetuated, the egregious nature of the offense, or the harm caused, an employer that has undertaken "good faith" efforts at Title VII compliance thereby "demonstrat[es] that it never acted in reckless disregard of federally protected rights."

## IN GOOD FAITH

The Court cited D.C. Circuit Judge David Tatel's *en banc* dissent in support of its good-faith defense. Notably, Tatel referenced objective standards for an employer to meet in order to avoid punitive damages liability. He stated that an employer could properly argue that:

> it should not have to pay punitive damages because it had undertaken good faith efforts to comply with Title VII—for example, by hiring staff and managers sensitive to Title VII responsibilities, by requiring effective EEO training, or by developing and using objective hiring and promotion standards.

The *Kolstad* decision thus seems to indicate that the good-faith exemption is an affirmative defense for which the employer bears the burden of proof, akin to that established in *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. Boca Raton*, 524 U.S. 775 (1998). Given that it is a defense to punitive damages liability, courts should certainly place the burden on employers to prove their entitlement to this defense—not place yet another burden on plaintiffs by requiring them to prove the lack of good faith.

Although *Kolstad* states that an employer may avoid punitive damages liability only if it can show that it "had been making good faith efforts to enforce an antidiscrimination policy," the majority opinion fails to provide guidance as to how much an employer must actually do to avail itself of this defense. Judge Tatel's cited opinion makes clear that promulgation of a written policy will *not* be enough. The approach adopted by many lower courts in sending to the jury factual issues concerning the "reasonableness" of the employer's and employee's actions as elements of the *Ellerth/Faragher* affirmative defense is obviously the preferred course. Like that of reasonableness, the standard of good faith is quintessentially a fact-based, value-laden determination that should be decided by juries, not judges.

*Kolstad* will necessarily expand the discovery needs of plaintiffs trying to defeat an employer's good-faith defense to punitive damages. Plaintiffs will need to take comprehensive discovery about the employer's reasons for promulgating EEO policies and its bona fides in implementing and enforcing them. For example, in *Cadena v. The Pacesetter Corp.*, 30 F. Supp. 2d 1333 (D. Kan. 1998), the court found that while the employer's sexual harassment policy *looked* reasonable, related memorandums revealed a disdain for the 1991 Civil Rights Act and "mock[ed] the right of female employees to be free from sexual harassment."

An employer's recklessness may certainly be proven by expressions of hostility to or resentment of civil rights laws. So too may it be proven by evidence of a pervasive or lengthy pattern of discriminatory behavior, and by improper or nonresponsive reactions to complaints of discrimination. If the employer invokes a good-faith defense, it should not be able to prevent the admission of prior bad acts evidence related to Title VII compliance. Indeed, an employer's entire EEO record should become admissible. In *Kolstad*, the ADA's record, including the consent decree, should presumably be admissible during the punitive damages trial.

However appropriately courts may handle this new good faith defense, fundamentally *Kolstad* flies in the face of the clear language of §1981a and congressional intent in enacting a punitive damages provision. The legislative history demonstrates that Congress chose to protect the interest of businesses by capping damages, not by narrowing the standard for punitive damages liability or providing safe harbors for employers. Because *Kolstad* was a case of statutory construction, Congress' judgment should have controlled—not the Supreme Court's view of the best way to "incentivize" employers to comply with the law. ■

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the basis for damages under Title IX.

The Supreme Court reversed, holding that a damages action for student-on-student harassment may lie under Title IX provided that certain conditions are met. The first condition is that the school must be found to be "deliberately indifferent" to the harassment. The Court held that the school had to be on actual notice of the harassment, exercise substantial control over both the harasser and the context in which the known harassment occurred, and respond to the harassment in a clearly unreasonable manner given the known circumstances. The second requirement is that the plaintiff must show that the harassment is "so severe, pervasive, *and* objectively offensive, and that [it] so undermines and detracts from the victims' educational experience, that the victims are effectively denied equal access to an institution's resources and opportunities."

## RAISING THE BAR

This standard for demonstrating that misconduct in the school context under Title IX rises to the level of actionable sexual harassment is much higher than the standard in the employment context under Title VII. In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), and *Harris v. Forklift Systems Inc.*, 510 U.S. 17 (1993), the Court held that an employer violates Title VII by creating or tolerating a sexually hostile work environment, defined as an environment that is intimidating, hostile, *or* offensive on the basis of sex, and that is sufficiently severe *or* pervasive to alter an employee's working conditions. But under *Davis*, the misconduct must be severe *and* pervasive *and* offensive, *and* it must rise to a high enough level that it effectively denies a student equal access to educational opportunities. While *Meritor* and *Harris* read these terms in the disjunctive, *Davis* reads them in the conjunctive.

The *Davis* Court expressly held that it was not "necessary to show physical exclusion to demonstrate that students have been deprived by the action of another student . . . of an educational opportunity on the basis of sex." Taken to its logical conclusion, however, the decision does force a plaintiff to endure a significant amount of harassment to show that she was denied equal access to the school's resources. Courts could easily dismiss cases of highly disturbing harassment on the ground that the conduct was directed against one student only and thus was not pervasive, or on the ground that the harassment was not sufficiently severe because the student persevered under the pressure, attending class every day.

It is hard to understand why the protections afforded to the most vulnerable of our citizens—children in school, who cannot simply opt to go elsewhere—should be so much weaker than for adults, who in many cases can choose to leave a hostile and dangerous work environment.

As noted, the *Davis* Court borrowed from *Gebser* by holding that the school must have actual notice of the harassment and be "deliberately indifferent" to it. In the process of justifying this deliberate indifference standard for teacher-on-student harassment, the *Gebser* Court analogized the standard to the one used by the Department of Education in administratively enforcing Title IX's requirements. Under that standard, an administrative agency may not initiate enforcement proceedings against a recipient of federal funds until it has advised the appropriate person of the failure to comply with the requirement and determined that compliance could not be secured voluntarily.

The *Gebser* Court concluded that the implied damages remedy for Title IX should be judicially developed along the same lines. The most closely analogous standard would be deliberate indifference, which the Court reasoned was the judicial equivalent of "an official decision by the recipient not to remedy the violation."

The Court ostensibly supported this high standard by reference to the deliberate indifference standard for §1983 claims that allege that municipalities failed to prevent a deprivation of federal rights. Of course, that standard was itself judicially developed, without reference to the statutory language of §1983, for the express purpose of limiting municipal liability.

In addition, it is likely that the *Gebser* Court actually derived the deliberate indifference standard from an opinion by Chief Judge Richard Posner of the 7th Circuit, dissenting from a denial of rehearing *en banc* in *Doe v. University of Illinois*, 138 F.3d 653 (7th Cir. 1998). In an opinion issued just three months before *Gebser*, the 7th Circuit found that student-on-student sexual harassment violated Title IX under certain circumstances. Posner recommended the adoption of a deliberate indifference standard of liability because it "would give schools substantial protection against being sued for failing to guess right about the proper management of sexual and related nastiness among their charges."

Posner admitted that Title IX does not contain this or any other standard of liability. All the cases cited by the judge to support his importation of the deliberate indifference standard into Title IX concerned §1983 claims, including those against public school districts, not Title IX claims.

One threshold question left unanswered is whether this deliberate indifference standard differs from "reckless indifference." The 3rd Circuit considers deliberate indifference to be synonymous with reckless indifference, reckless disregard, and gross negligence, *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996), while the 9th Circuit rates deliberate indifference as a higher standard of liability than reckless indifference and gross negligence, *L.W. v. Grubbs*, 92 F.3d 894 (9th Cir. 1996). The Supreme Court, in a more recent §1983 case, did not resolve the proliferation or differentiation of these standards, simply stating that deliberate indifference "is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Board of County Commissioners v. Brown*, 520 U.S. 397 (1997).

It is difficult to reconcile *Gebser* and *Davis* with *Kolstad v. American Dental Association*, 67 U.S.L.W. 4552 (June 22, 1999), decided by the Court only a month after *Davis*. *Kolstad* says that punitive damages under Title VII require a showing of "malice or reckless indifference"—not the "deliberate indifference" now required under Title IX to simply prove liability. Yet there is little in Title IX to justify this more onerous standard.

Stripped of its dicta, the Supreme Court's adoption of the deliberate indifference standard in *Gebser* and *Davis* seems nothing short of judicial legislation of an extremely high hurdle for students trying to invoke federal civil rights protection for sexual harassment. The Court has provided less protection than that recommended by the Department of Education's Office of Civil Rights in its 1997 "Sexual Harassment Guidance," which said that student-on-student harassment falls within the scope of Title IX. The Court has also provided less protection than did the three circuits that previously held student-on-student sexual harassment actionable under Title IX. Ironically, in cutting back the protection afforded students in public schools, the Court has engaged in the very judicial activism it has long criticized in lower courts that vigorously enforce the civil rights laws. ■