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Minimizing Punitive Damages Exposure in Employment Cases: Post-*Kolstad* Case Law Lessons

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In 1999, the US Supreme Court adopted into law an affirmative defense for employers which, if proven, can eliminate liability for punitive damages in an employment discrimination lawsuit, even where a violation is found. The lower federal courts have provided substantial and meaningful guidance on the type of "good faith efforts to comply" with the law that are required to establish this affirmative defense. In other words, the roadmap to establishing the defense is there. Still, many employers do not fully appreciate the opportunity this case law has created, and are not taking full advantage. This article provides background information on punitive damages standards in employment cases, and then sets forth ten detailed steps employers can take to eliminate, or at least minimize, the risk of a punitive damages award. The author notes that, by following many or all of these ten steps, an employer will create a better workplace atmosphere, enhance productivity and morale, and drastically reduce the risk of being sued in the first place. And, when faced with lawsuits, an employer that has followed these suggestions will be empowered to take principled stands and fight tough cases.

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In defending employment cases, employers often want to take a principled stand because they truly believe no discrimination or harassment occurred, and are convinced the plaintiff's claims are without merit. Yet, employers routinely find themselves agonizing over frustrating decisions about setting challenging employment cases they would have preferred to try—even where the back pay or front pay damages at issue are not substantial. One common thread in these difficult decisions is the specter of a jury awarding punitive damages. Since the Civil Rights Act of 1991, this has been a very real concern. As one commentator recently stated, "ironically, at a time when the [US Supreme Court's] *BMW v. Gore* decision allows courts to invalidate excessive punitive damage awards, jurors are increasingly adopting the attitude that punitive damages" are appropriate against corporations in employment cases.[1]

But employers need not settle cases they would rather try for fear of a large punitive damages award. Instead, employers can empower themselves to take principled stands in difficult cases by understanding the teachings of the lower courts that have applied the Supreme Court's 1999 holding in *Kolstad v. American Dental Association*.[2] In *Kolstad*, the Supreme Court ruled in part that employers can avoid punitive damages liability in Title VII and ADA cases by engaging in certain "good faith efforts" to comply with the law. That is exactly what occurred in *Bryant v. Aiken Regional Medical Centers Inc.*, in which the US Court of Appeals for the Fourth Circuit in June 2003 reversed a $210,000 punitive damages award because the employer had engaged in "widespread anti-discrimination efforts."[3]

Kolstad indicates that, to avoid punitive damages via an affirmative defense, employers must at a minimum (1) implement policies prohibiting violations of federal anti-discrimination laws, and (2) educate employees on such policies. But what does this mean, and what else (if anything) should employers do to ensure they can defeat a claim for punitive damages? Lower courts applying *Kolstad* have provided substantial guidance on this issue. At the same time, these court decisions provide guidance on how employers should structure their policies and procedures so as to avail themselves successfully of the affirmative defense to claims of supervisory harassment adopted by the Supreme Court in the 1998 cases *Faragher v. City of Boca Raton*,[4] and *Burlington Industries, Inc. v. Ellerth*.[5]

Taking the necessary steps to design, implement, document, and enforce effective Equal Employment Opportunity (EEO) policies will enable an employer to defeat claims for punitive damages in employment cases by proving "good faith efforts to comply" with the law. These efforts can provide concrete evidence of an essential trial theme: the company is a "good citizen" when it comes to EEO matters. These efforts can empower a company to fight a tough case. Even where settlement is the

best option for the employer, most cases unquestionably can be resolved more favorably if the employer can demonstrate to the plaintiff that the odds of a punitive damages award are low because the employer can prove the *Kolstad* affirmative defense. Perhaps most importantly, employers that adhere to the post-*Kolstad* case law lessons discussed herein are much more likely to foster a positive workplace atmosphere in which productivity and morale are enhanced, complaints (and lawsuits) are decreased, and potential litigation often is avoided.

PUNITIVE DAMAGES—FEDERAL LAW

Prior to 1991, prevailing plaintiffs in employment discrimination cases were not entitled to recover punitive damages. The Civil Rights Act of 1991, however, made punitive damages available to prevailing plaintiffs in lawsuits filed under Title VII of the Civil Rights Act of 1964[6] (Title VII), and the Americans with Disabilities Act of 1990[7] (the ADA). The statute limits recovery of punitive damages, however, to cases in which the plaintiff-employee can prove that the employer (a) engaged in intentional discrimination (*i.e.*, not in a "disparate impact" case), and (b) acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[8] Federal law caps the amount of punitive and compensatory damages recoverable under Title VII and the ADA on an ascending scale (depending on the size of the employer) up to $300,000 for "each complaining party."[9]

After passage of the Civil Rights Act of 1991, a circuit split developed regarding whether the "malice or reckless indifference" punitive damages standard required heightened proof that the employer committed or was responsible for some form of unusually "egregious" or "outrageous" conduct, or whether proof of an intent to discriminate could suffice.[10] On June 22, 1999, the US Supreme Court resolved the split in *Kolstad v. American Dental Association*,[11] holding that the "malice or reckless indifference" standard for recovery of punitive damages does *not* require proof that the employer engaged in or condoned "egregious" or "outrageous" conduct. Rather, the Court held, punitive damages are available in cases where the employer "discriminate[d] in the face of a perceived risk that its actions will violate federal law."[12] This part of the *Kolstad* decision was hailed by plaintiffs' advocates as lowering the evidentiary bar (at least in many jurisdictions) with respect to the level of proof required for an employee to recover punitive damages.[13]

But the *Kolstad* Court also provided employers with specific and valuable guidance on how to *avoid* punitive damages liability. The

Court held that agency principles limit vicarious liability for punitive damages. In this regard, the Court explained that where an employer undertakes "good faith efforts to comply" with Title VII, it often can demonstrate that it "never acted in reckless disregard of federally protected rights."[14] Accordingly, the Court provided an affirmative defense to punitive damages liability: "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 [or the ADA].'"[15]

Kolstad thus empowers employers to insulate themselves from punitive damages exposure in employment cases by taking certain steps to prevent and/or remedy discrimination and harassment. To invoke the "*Kolstad* defense" to punitive damages claims employers must, at a minimum, implement and disseminate policies prohibiting all forms of conduct that violate Title VII and the ADA, and educate employees on such policies.[16] Although the *Kolstad* Court provided little specific guidance on exactly what a "good faith effort" entails, subsequent lower court decisions have provided detailed guidance. These cases indicate that additional efforts at prevention and/or correction can bolster, and often are necessary to prove, the defense. For the most part, these are common sense rulings. The more an employer does to ensure compliance, the more likely it is that the company's workplace will have an atmosphere in which employees are treated with respect, courtesy, and concern. This can go a long way toward avoiding litigation entirely.

PUNITIVE DAMAGES—STATE LAW

Some of the largest punitive damages awards in employment cases arise from state law claims to which the federal punitive damages "caps" do not apply. Two basic sources of large punitive damages awards can be found under state laws. First, many states have nondiscrimination statutory schemes (mirroring Title VII's prohibitions), and some state statutes do not cap recovery of compensatory or punitive damages. These statutes greatly increase punitive damages exposure for employers.[17] Second, "uncapped" punitive damages are often available to prevailing plaintiffs via traditional state law tort theories of liability, such as intentional infliction of emotional distress; negligent supervision, retention or hiring; defamation; and assault or battery.

The *Kolstad* defense to punitive damages does not directly apply to state law tort claims and, in many instances, does not apply to discrimination and harassment claims brought pursuant to state statute. However, the same facts and evidence that would support an employer's assertion of "good

faith" efforts to comply with Title VII under *Kolstad* often will help employers defend punitive damages claims brought with state law causes of action. Such evidence should help employers show that they did not act with the requisite level of conduct necessary for an award of punitive damages under state law. Accordingly, taking precautions necessary to ensure availability of the *Kolstad* defense in a federal civil rights lawsuit should also help an employer in defending against punitive damages claims in state law cases.

AFFIRMATIVE DEFENSES TO HARASSMENT CLAIMS

Before discussing the lower courts' implementation of *Kolstad* and how employers can create procedures to bolster their defenses to punitive damages claims, it is important to discuss the closely connected issue of the affirmative defense to claims of supervisory harassment established by the Supreme Court one year prior to *Kolstad* in *Faragher v. City of Boca Raton*,[18] and *Burlington Industries, Inc. v. Ellerth*.[19] The US Court of Appeals for the Eleventh Circuit recently summarized the impact of the *Faragher* and *Ellerth* decisions:

> In *Ellerth* and *Faragher*, the Supreme Court indicated that courts should no longer use the labels "quid pro quo" and "hostile environment" to analyze whether an employer should be held liable on an employee's Title VII claim concerning a supervisor's sex-based harassment. Instead, when analyzing whether an employer should be held liable for a supervisor's harassment, courts should separate these cases into two groups: (1) harassment which culminates in a "tangible employment action," such as discharge, demotion or undesirable reassignment, and (2) harassment in which no adverse "tangible employment action" is taken but which is sufficient to constructively alter an employee's working conditions. Under this analysis, when a supervisor engages in harassment which results in an adverse "tangible employment action" against the employee, the employer is automatically held vicariously liable for the harassment. In contrast, when the supervisor's harassment involves no adverse "tangible employment action," an employer can avoid vicarious liability for the supervisor's conduct by raising and proving the affirmative defense described in the *Faragher* and *Ellerth* cases.[20]

Under the *Faragher/Ellerth* standard, an employer can prove a defense to harassment claims and avoid liability for alleged hostile work environment harassment committed by a supervisor by showing: (1) that it exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) that the plaintiff unreasonably failed to take advantage of the corrective opportunities provided by the employer.[21]

Taking steps to prevent harassing conduct in the first place, and taking corrective action if harassment occurs, is part and parcel of engaging in the type of "good faith efforts" to comply with Title VII that support a *Kolstad* punitive damages defense. Accordingly, in addressing the steps necessary to ensure availability of the *Kolstad* defense, this article will also comment on actions employers can take to ensure availability of the *Faragher/Ellerth* defense.[21.1]

STEPS TO AVOID OR LIMIT PUNITIVE DAMAGES EXPOSURE

Outlined below are ten detailed steps that employers can take to limit the risk of facing punitive damages claims.

Step 1. Develop, Implement, and/or Update Effective Policies Prohibiting Discrimination and Harassment

As noted above, the Supreme Court in *Kolstad* indicated that encouraging employers to adopt anti-discrimination policies is a key policy reason supporting the "good faith efforts to comply" defense to punitive damages. Additionally, the Supreme Court's holding in the *Faragher* case made clear that dissemination of an anti-harassment policy with an effective complaint procedure that encourages victims to come forward is necessary to prove an affirmative defense in supervisor harassment cases. Accordingly, implementation of strong and comprehensive EEO policies is the starting point for establishing the *Kolstad* and the *Faragher/Ellerth* defenses.

There has been some litigation concerning whether a particular policy constituted or was part of a successful "good faith effort to comply" with Title VII for purposes of the *Kolstad* defense, and even more litigation on the closely-related issue of whether anti-harassment policies were sufficient to support the *Faragher/Ellerth* affirmative defense to harassment claims (*i.e.*, whether an employer's EEO policy constituted, or was part of, the employer's having taken "reasonable care to prevent and correct" any harassing behavior). The cases provide substantial guidance as to the content needed for a policy to demonstrate a *bona fide* "good faith effort" to comply with the federal employment laws:

- The policy must clearly and unequivocally prohibits unlawful discrimination and harassment.

The company's EEO policies should very clearly state that unlawful discrimination or harassment is against company policy and will not be tolerated under any circumstances. The policies should convey this

commitment in simple terms designed to be easily understood by employees of average or even below average education or reading levels. Clarity and simplicity are important. If the policy is overly complicated, hypertechnical and/or contains too much "legalese," then the policy might be attacked by a plaintiff's attorney as being an "ineffective" or "unreasonable" method of attempting to prevent or correct unlawful conduct. On the other hand, a clearly worded policy can be very helpful in the event of litigation.[22]

At trial, the company's EEO policy will be an important exhibit. It is vital that the company's bedrock commitment to non-discrimination is set forth at the outset, on page one of the policy, and on all other appropriate human resources documents. These policies must be easily understood by the average juror.

- The policy must prohibit *all forms* of unlawful discrimination and harassment.

It is essential that the policy prohibit *all forms* of unlawful discrimination and harassment. The company's policy should very clearly state that the company will not tolerate or condone, under any circumstances, discrimination or harassment based on race, sex, pregnancy, national origin, ancestry, religion, disability, age, or any other factor prohibited by law. It may not be enough for policies to simply say that "all unlawful forms of discrimination are against company policy." For example, even though "pregnancy discrimination" is generally considered a subset of "sex discrimination," policies should specifically address the issue of pregnancy non-discrimination. These policies must be carefully worded in light of case law developments.[23] In states such as California, in which state statutes set forth additional protected characteristics, the policy should also specify that discrimination and harassment based on the additional protected factors (such as sexual orientation, medical condition or marital status, depending on state law) will not be tolerated.

- The policy must explain what forms of conduct are prohibited.

To be effective, the company's policy needs to explain what types of conduct are prohibited and unacceptable. With respect to sexual harassment, the policy should explain, for example, that the company prohibits not only unwanted and overt sexual advances or requests for sexual favors, but also *any other* inappropriate sex-related behavior such as unwelcome physical contact, improper gestures, sexually charged epithets and similar conduct or remarks that make co-workers feel uncomfortable. The policy should state that the examples provided are

only that—examples—and that *any* sex-related form of conduct which makes another person feel uncomfortable in the workplace violates company policy. The policy also should contain a very clear statement that "same-sex" harassment is prohibited.[24]

Hostile work environment harassment claims based on protected characteristics other than sex—such as age, disability, and racial harassment claims—generally have been recognized by the courts.[25] Thus, employer policies must also explain that harassing conduct based on race, religion, age, disability, national origin, etc., is also prohibited. Policies should explain that prohibited conduct includes, but is not limited to, inappropriate jokes, banter, emails, cartoons, pictures, gestures, epithets, or any other conduct that could make someone feel uncomfortable to due these issues.

Finally, it is becoming more common for plaintiffs to attack, under Title VII, conduct that is abusive or offensive but does not relate to any particular "protected characteristic." This is an effort to expand the law so as to make generically abusive conduct actionable under Title VII. In light of this, policy explanations of "harassing" conduct should make clear that intimidating, hostile, or offensive conduct even *without* sexual or racial content, can violate company policy and will not be tolerated (for example, if such conduct is directed at someone "because of" a protected characteristic, a policy violation would occur).

- The policy must explain that employees have a duty to report immediately conduct which may violate the policy.

Every non-harassment and non-discrimination policy should *require* that employees report to the company any perceived harassing or discriminatory conduct (or discriminatory decisions) they believe they have experienced. It is also important, but often overlooked, for the policy to require employees to report any perceived harassment or discrimination they believe they have *witnessed*, or *heard about*. In other words, the reporting duty should be independent of whether the employee believes he or she is a "victim" of the conduct at issue.

The policy should also require that any reports be made *immediately*. Otherwise, the policy might leave the employer vulnerable to the argument the plaintiff "did not know" she should have reported the conduct when it occurred, or that she thought the policy language allowed her to "try to deal with the situation herself" before reporting the alleged offensive conduct to the company.

- The policy must provide multiple avenues by which an employee can report a concern or complaint.

Employer policies must clearly explain *how* an employee should raise a complaint or concern about perceived discrimination, harassment or other inappropriate behavior. Many employer policies identify specific person(s) within the company to whom complaints or reports should be made. Most employer policies start by indicating that employees can make such reports to their immediate supervisors. It is vital, however, that employer policies provide additional means of raising a complaint or concern. Failure to do so can place employees in uncomfortable positions, especially where their supervisors are the perpetrators of inappropriate conduct. In litigation, the failure to provide multiple reporting avenues can be very problematic.[26]

It is preferable for non-harassment policies to set forth *several* alternative avenues through which an employee can raise a concern or complaint. Policies have been challenged as ineffective for failing to name *specific employees* (in addition to an employee's immediate supervisor) to whom complaints should be addressed. Two federal Circuit Courts of Appeals have held, however, that policies were not defective in the context of the *Faragher/Ellerth* defense where the policies stated that complaints could be raised with the immediate supervisor or "the human resources department."[27] Thus, it might not be necessary for policies to designate complaint recipient's job titles, names, telephone numbers and email addresses, but this is often desirable and preferable. Each company should analyze its own situation and make sure its policies are practical and make it as easy as possible for employees to raise concerns about possible discriminatory or harassing conduct.

Employer policies commonly provide that employees can (or must) report any harassment or discrimination issues to their immediate supervisors. For many organizations, this is a practical approach that makes sense. There are, however, risks associated with having the policy provide that complaints can (or must) be raised with an employee's immediate supervisor, particularly where lower-level and mid-level managers may be relatively unsophisticated and/or untrained with respect to recognizing and dealing with these issues. If that is the case, the employer's policy can actually create a liability *risk* that the immediate supervisor will do nothing in response to a complaint. The *Kolstad* defense can then be rendered inapplicable because the employer's policy will likely be ruled "ineffective." For this reason, employers should carefully consider whether it would be most effective for their policies to state that employees can (or must) raise their concerns with their immediate supervisors. If a company decides that its policy should direct employees to make reports or complaints to their direct supervisors, then it is *vital* that the company provide adequate training to all

supervisors on EEO issues. (A more detailed discussion of training issues is below.)

Some employer policies require employees to report any perceived harassing conduct *both* to their immediate supervisor (or someone successively higher in management) *and* to the human resources department. Such "double" reporting requirements might be attacked by a plaintiff as being an unreasonable burden on an aggrieved employee. Both in resolving a situation and in litigation, however, requiring that employees let both operations and human resources know about the issue can help protect the employer from a "rogue" supervisor failing to act on a complaint.[28]

- The policy should stress that complaints or reports will be handled in a confidential manner, although the policy should not "guarantee" confidentiality of identity or information.

An employer's anti-harassment policies and complaint procedures should state that complaints or reports of harassment or discrimination will be taken seriously, and will be treated as confidentially as possible. This helps encourage employees to come forward with concerns, which is the ultimate goal of the policies. This also is necessary to insulate the policies from attack on the grounds that, for example, it was reasonable for an employee to ignore the employer's reporting mechanisms due to fear of intimidation, retaliation, ridicule, embarrassment, etc.

It is equally important, however, that employer policies avoid making absolute "guarantees" of confidentiality that cannot be kept in some instances. For example, sometimes it is necessary to inform or confront the alleged offender with the specifics of the complaint, including the identity of the complainant. Therefore, the better approach is for the policy to stress that confidentiality will be maintained to the maximum extent possible. In practice, reports or complaints (including the identity of the complaining party and other witnesses) should be treated as confidentially as possible and should only be disclosed on a true "need to know" basis.[29]

- The policy should explain that violations will result in disciplinary action, up to and including discharge.

It is important that EEO policies clearly explain that conduct or decisions which violate the policies will result in disciplinary action, up to and including termination of employment, depending on the circumstances. The policy should not simply provide for disciplinary action in the event "of a finding of sexual [or other] harassment," or in the event the company concludes a legal violation has occurred. The policies must also provide for disciplinary action—up to and including discharge—in cases of *policy violations* that do not rise to the level of legal

violations. (Additional information on taking disciplinary action in response to policy violations is set forth below.)

- The policy should be updated regularly.

Finally, it is critical that employer EEO policies be updated as regularly as practicable. Policies must be updated or modified promptly to ensure compliance with recent Supreme Court decisions or relevant statutory developments. If it is not feasible to revise or update EEO policies on an annual basis, then companies should consider at least sending an annual letter, memo, or email to employees reminding them of the policy, the company's serious commitment to maintaining a discrimination and harassment free workplace, each employee's reporting responsibilities, etc.

Step 2. Develop and Implement a Policy on "Reasonable Accommodation" of Disabilities

Failure to provide "qualified individuals with disabilities" with "reasonable accommodations" is a form of unlawful "discrimination" as defined by the ADA.[30] In terms of taking steps to avoid punitive damages liability, one issue employers sometimes overlook is adoption of a policy on "reasonable accommodation" of disabilities under the ADA (and/or state statutes). Yet, in an ADA case, such a policy will be considered by a court to be an important, and perhaps necessary, element in the employer's "good faith efforts" to comply with the ADA.[31]

The elements of a good reasonable accommodation policy include, but are not limited to, the following: (1) an explanation of who is considered a qualified individual with a disability; (2) a definition of reasonable accommodation; (3) procedures for requesting accommodations (making clear that the process is interactive and that the employee bears the responsibility of notifying the employer of the need for accommodation); and (4) a very brief explanation or indication of how the employer will decide whether an accommodation is appropriate.

A reasonable accommodation policy can be included with a nonharassment policy in a comprehensive "EEO policy," or can be adopted as a stand-alone policy. If a separate policy is used, the employer should take the same steps with respect to this policy regarding dissemination, documentation, prohibition of retaliation, etc., as outlined above regarding policies against harassment and discrimination.

Step 3. Include in EEO Policies a Clear Prohibition of Retaliation

It is also vital that an employer's EEO policies contain a clear statement prohibiting retaliation for making a good faith report or complaint about alleged policy violations. This is essential to ensuring that the company's policies will be considered true "good faith efforts to comply" with Title VII and the ADA. In *Reed v. Cracker Barrel Old Country Store, Inc.*,[32] the jury returned a verdict for the plaintiff on her retaliation claim but for the defendant-employer on the plaintiff's sexual harassment claim. On the harassment claim, the jury found that the plaintiff had proven her case but that the employer had proven its affirmative defense. On the retaliation claim, the jury awarded back pay and punitive damages. Moving for judgment as a matter of law on the retaliation claim, the employer argued that it was inconsistent for the jury to have found that the employer proved its affirmative defense on the harassment claim and, at the same time, awarded punitive damages on the retaliation claim.[33] The district court, however, denied the employer's motion and upheld the punitive damages award on the retaliation claim. That the employer's sexual harassment policy made no mention of retaliation, and the evidence showed that the company's management training did not include the issue of retaliation, were key to this ruling.[34] This case underscores how important it is to address the issue of retaliation within existing EEO policies, in a separate anti-retaliation policy and/or in complaint procedures, and in training programs.[35]

Many policies state that the employer prohibits any form of retaliation against an employee who makes a complaint or report concerning harassment or discrimination issues. In light of the Supreme Court's 2001 opinion in *Clark County v. Breeden*, however, an alternative, and possibly better, approach may be to prohibit retaliation taken against "good faith" reports or complaints.[36] This removes any doubt as to whether dishonest or bad faith reports are "protected"—they are not.

Step 4. Disseminate the Company's EEO Policies in an Effective Manner—And Document the Company's Efforts

Even the best-crafted policies against discrimination and harassment will not have their intended effect of prohibiting inappropriate conduct if the policies are not distributed to all employees in a manner designed to draw attention to policy language and importance. Many circuit courts have stated quite clearly that "good faith efforts" for purposes of invoking the *Kolstad* defense must include more than simple adoption of a written anti-discrimination policy.[37] A starting point for additional, good faith efforts to comply is disseminating the policy to all employees. EEO policies often have been ruled ineffective because they were

a very effective approach, especially if the company's computer system has a verifiable way to "track" that employees actually "received" the electronic copies. If re-distribution of paper policies seems too expensive or time-consuming, use of email for this purpose provides an attractive alternative.

The consequences of failing to use the email system to re-distribute policies can be adverse. In litigation, a plaintiff's attorney will easily be able to establish that the company regularly and repeatedly used email and email reminders with regard to topics such as billings, collections, sales, etc. An effective attorney can make it appear that an employer's failure to use its email system to remind employees of the company's EEO policies shows that the company did not really prioritize discrimination or harassment prevention. Use of email reminders can insulate against this increasingly common tactic.

- Post the policy throughout the workplace.

Another way to make sure employees have regular and easy access to the company's EEO policies is to post copies of the policies on employee bulletin boards in cafeterias, rest areas, human resources offices, and even in less "traditional" posting locations such as smoking areas and restrooms. Failure to post the relevant policies can have negative consequence in litigation.[41]

- Consider other alternatives that might be appropriate.

There are a variety of other, creative ways to distribute EEO policies and complaint reporting procedures. For example, some employers have included policy reminders in payroll check envelopes, or have placed the toll-free complaint line telephone number directly on the payroll stubs. This type of creativity can increase the likelihood that problems (and litigation) will be avoided. In the event of litigation, employers will find that every additional, creative effort to educate or remind employees of the company's EEO policies will help the company argue that it has "gone the extra mile" in a good faith effort to comply with applicable law, thereby decreasing the potential for punitive damages exposure.

Step 5. Provide Meaningful Training on the Company's Policies Against Discrimination and Harassment, and on the Company's Reasonable Accommodation Policy

The Supreme Court's opinion in *Kolstad* specifically notes that "edu-

cating employees" regarding anti-discrimination policies is a step that should be taken in an employer's "good faith efforts" to comply with the law. Failure to provide training on how to comply can result in loss of the "*Kolstad* defense" to punitive damages claims.[42] The amount and extent of training required to establish a "good faith attempt to comply" will be judged on a case-by-case basis, and will probably depend on several factors, including the employer's size, financial resources, structure, and history. Accordingly, each employer must make a decision that is right for the company's circumstances about which employees to train and what content to cover. In all cases, the training provided should consist of more than a mere cursory review of the company's policies prohibiting harassment and discrimination. Employees should be informed of the types of conduct to avoid, how to recognize prohibited conduct, and how to fulfill various responsibilities under the policies.

- At a minimum, provide and update training for those within the organization who are designated to receive, and to those who may be responsible for investigating, complaints, or concerns.

It is imperative that training on discrimination and harassment prevention be provided to human resources personnel *and* to any operations personnel who are designated in the company's complaint reporting procedure as individuals to whom complaints or reports should be made. There is no bright-line test for how much training needs to be provided to ensure effectiveness or to establish a "good faith effort" to comply with the law. At a minimum, training generally should cover (a) the types of conduct that violate the company's policies, (b) how to respond and react to concerns brought to one's attention, and (c) how to respond and follow up on concerns or events of which one becomes aware (even if not directly reported to the individual). Managers should be provided enough information so that they know what *not* to say or do when presented with various circumstances. Managers also must be able to recognize when an issue is presented on which they need guidance from human resources personnel or counsel.

- Consider providing training to all executives, supervisors and managers.

Ideally, all management personnel who are likely to receive a complaint—whether or not they are designated in the policy—should receive training. At a bare minimum, all supervisors should be instructed to bring any complaints to the attention of the human resources department and/or a higher-level supervisor. Otherwise, the employer

risks losing the *Kolstad* defense, and setting the stage for a punitive damages award. It is much better to provide more comprehensive training to all managers. The US Court of Appeals for the Tenth Circuit has held that the *Kolstad* defense to punitive damages may not be available where "a sufficiently highly ranked managerial or policy-making employee" has knowledge of harassment but fails to act.[43] In such cases, courts may deem the employer directly liable for discriminatory conduct because the manager's inaction can be "imputed as a matter of law" to the employer.[44] The cost of providing training to all managerial employees is a good investment.

- Consider training all staff or production employees as well.

Employers should consider seriously providing training on harassment and discrimination prevention to all employees, not just to management and human resources personnel. The conventional wisdom in some organizations is that providing "staff" training on this subject serves little purpose other than to educate employees with respect to how to bring claims against the company. This line of thinking, however, is risky. Certainly, the content and approach in training staff employees must be much different than for management employees. If staff training is done well, it can increase morale and help reduce the frequency of litigation. In-house human resources staff often can provide this type of training at a relatively low "expense" to the organization. In these circumstances, outside counsel or consultants can assist with the materials and the strategy to ensure legal compliance.

- Document attendance at all training courses and keep copies of the training materials.

As with distribution of company policies, it is vital that employers obtain signed acknowledgment or attendance forms from all EEO training courses, and that these records be maintained by the human resources department. Additionally, the employer should retain at least one set of the written materials provided to training session participants, as well as a copy of the instructor's manual or materials (if any), any videotapes or overheads used in the training, etc. These records could become vital evidence in defending against a punitive damages claim in court.[45]

- Periodically update and reinforce the training.

Ideally, discrimination and harassment training programs (or refresher courses) should be held annually or bi-annually to reinforce the com-

pany's commitment to a harassment- and discrimination-free workplace. Failure to reinforce prior training can prove fatal to the *Kolstad* defense and lead to a punitive damages award. In *Romano v. U-Haul International*,[46] the US Court of Appeals for the First Circuit affirmed a $285,000 punitive damages award against U-Haul for gender discrimination. The court held that the *Kolstad* defense was unavailable even though U-Haul had taken steps to disseminate its policy and educate employees in the past, because the company had failed to maintain awareness of its non-discrimination policies. Specifically, the court held that punitive damages were appropriate because U-Haul failed to show "an active mechanism for renewing employees' awareness of the policies through either specific education programs or periodic re-dissemination or revision of their written materials."[47] Accordingly, employers must be vigilant when it comes to educating employees and providing training in this area. Otherwise, the consequences could be substantial.

Step 6. Investigate *All* Reports or Complaints of Alleged Harassing or Discriminatory Conduct

To ensure availability of the *Kolstad* defense to punitive damages (and the *Faragher/Ellerth* defense to harassment claims), it is essential that employers take each complaint seriously and develop an overall record of investigating reports and concerns, regardless of how meritless a particular report or complaint might appear at first blush. As the US Court of Appeals for the Eighth Circuit has noted, "half-hearted responses" to employee complaints will not satisfy the employer's obligation.[48]

Ideally, investigations will be conducted by experienced and specifically trained human resources or upper management personnel, in-house counsel or, in certain cases, outside counsel. These investigations are extremely important. Courts generally will "excuse" a harassment plaintiff from following company reporting procedures, or will find that the employer did not really engage in "good faith efforts" to comply with the law, if the plaintiff can show that her complaint and/or complaints raised by others were not investigated, or were not investigated promptly enough or well enough.[49]

In the case of harassment complaints, the employer must take steps during the investigation, if necessary, to make sure the complaining party is not in a position to experience further adverse conduct while the investigation is ongoing. Often, this will necessitate separating the complaining party from the alleged harasser during the investigation. This can be accomplished by a variety of means. Recent case law teach-

es that failure to take *immediate* steps designed to end any alleged harassing behavior can be a costly mistake.[50] On the other hand, an employer's prompt and appropriate response to a harassment or discrimination claim can result in dismissal. For example, in *Walton v. Johnson & Johnson Services, Inc.*, the employer after receiving the employee's first complaint of harassment immediately put the alleged harassing supervisor on administrative leave, insured that the employee had no more work contact with the supervisor, and immediately began an investigation, which resulted in the supervisor's termination. In that case, the district court granted summary judgment, noting that the employer had acted reasonably by doing all it could to insure from that point forward that the plaintiff was no longer subjected to harassment, and the court of appeals affirmed.[51]

Step 7. Take Appropriate Disciplinary Action Whenever Policy Violations Are Established

It is important not only for policies to make clear that violations will result in disciplinary action, but also for employers actually to take disciplinary action when violations occur. If the company fails to take disciplinary action in response to policy violations, employees likely will be aware of this and, consequently, may be much less likely to report any perceived harassing or discriminatory conduct they experience or witness. Additionally, a record of failing to take disciplinary action can render the company vulnerable to an argument that the employer's policies and corrective mechanisms were not really "good faith attempts" to comply with the law, so punitive damages are appropriate. In a harassment case, a plaintiff might also argue that the employer's record of failing to act in the past rendered the plaintiff's failure to report harassment "not unreasonable," which might defeat the employer's *Faragher/Ellerth* defense.

Appropriate disciplinary action should be taken in response to conduct that the employer believes violates the employer's policies even if it likely does *not* rise to a legal violation. The punishment should be designed to correct the problem(s) and should be in proportion to the gravity of the violation. Most policy violations do not need to result in discharge. A variety of disciplinary actions might be appropriate depending on all the circumstances (such as the severity of the conduct, its effect on co-workers or the complaining party, the accused employee's employment record and behavioral history and other factors). Appropriate disciplinary action can include verbal or written counseling, suspension, transfer, demotion, individual training, training with a

group, or some combination thereof.[52]

Step 8. Audit and/or Update Other Policies and Documents That Might Implicate EEO Concerns

Another step employers can take to ensure compliance with Title VII and thereby bolster the *Kolstad* and *Faragher/Ellerth* defenses is to audit and, if necessary, update other policies that might implicate EEO concerns. Just by way of example, some employers have written or unwritten personal appearance, grooming and hygiene standards. These types of policies are sometimes challenged in lawsuits under Title VII (or state statutes) alleging that the policies discriminate against one or more employees on the basis of sex, race, religion, national origin, etc. Such policies are more likely to be upheld where the employer can articulate a clear, non-discriminatory rationale for the policies and where the rationale is supported by specific facts (addressing safety concerns, maintaining the company's public image, reducing distractions and conflicts, etc.).

Additionally, it is wise to include in every supervisory job description, as a featured item, an expectation that supervisors will comply with and show commitment to the company's EEO policies. In litigation, this can be powerful evidence of the company's commitment to fair employment practices. Companies might also review in this regard their internal computer "intranet" and/or their Web sites, particularly if remote employees regularly sign on to the company Web site to perform work. Noting and emphasizing the company's EEO policies on intranets and Web sites can reinforce the policies to employees and managers and, in the event of litigation, can provide additional, concrete evidence of the company's creativity and commitment to a compliant workplace.

Step 9. Consider Designating Corporate "EEO Officers"

Some companies have taken the additional step of designating one or more officials as "EEO Officers" of the company. These individuals typically receive special, intensive training on how to evaluate, respond to and investigate reports or complaints of harassment, discrimination and/or other forms of inappropriate workplace conduct. These individuals are typically charged with monitoring compliance, ensuring follow-through on training efforts, participating in efforts to improve diversity and, importantly, receiving complaints or reports of harassment or discrimination. Designation of EEO Officers can emphasize the importance

of maintaining a harassment- and discrimination-free work environment, help minimize the risks associated with the possibility that supervisors will fail to act in response to a particular situation, and provide additional evidence of "good faith efforts to comply" in support of the employer's "*Kolstad* defense" to punitive damages claims.

Step 10. Take Steps Designed to Improve and Enhance Diversity

Every effort that an employer takes to improve and enhance the diversity of its workforce can have the added benefit of providing additional evidence of "good faith efforts to comply" to bolster the *Kolstad* defense. In *Bryant v. Aiken Regional Medical Centers*, the US Court of Appeals for the Fourth Circuit cited the employer's "carefully developed diversity training program" and voluntary monitoring of demographic information as factors in the Court's decision to overturn the jury's punitive damages award.[53] Recruiting outreach efforts to minority schools and institutions, community outreach efforts to minority communities and a host of other activities can constitute effective parts of a "diversity enhancement" program. The right mix of components of such an effort is highly dependent on a variety of factors affecting the organization.

CONCLUSION

Fortunately for employers, the power to avoid punitive damages awards—or even having the issue of punitive damages submitted to the jury—is largely in each employer's own hands. The Supreme Court in *Kolstad* and the lower courts applying *Kolstad* have provided substantial guidance on how employers should go about engaging in "good faith efforts" to avoid discrimination and harassment in the workplace. By following this guidance, employers should decrease substantially the risk of workplace problems and litigation in the first place and, in the end, can drastically reduce exposure for punitive damages. This is an area in which an ounce of prevention clearly is worth at least a pound of cure. The benefits of investing in appropriate policies, training and enforcement are far-reaching. They can include improved morale and productivity, as well as probable reduction in claims and distractions. Extensive good faith efforts at EEO compliance also will enable an employer to prove at trial via clear evidence that the company is a "good actor" that takes issues of employee respect and non-discrimination seriously. This can shift the focus at trial from the plaintiff's allega-

tions to the employer's excellent track record. This also can empower an employer to take a principled stand in litigation, and aggressively defend challenging cases.

NOTES

1. J. Johnston, "The Psychology of Punitive Damage Decisions During Employment Litigation," 45 Orange County Lawyer 30 (August 2003).

2. 527 U.S. 526 (1999).

3. 333 F.3d 536, 548–549 (4th Cir. 2003). In Bryant, the plaintiff alleged that she repeatedly had been denied a promotion because of her race and in retaliation for complaining about the employer's allegedly discriminatory hiring policies. The jury found in favor of the plaintiff and awarded $40,000 in lost wages, $50,000 for emotional distress and $210,000 in punitive damages. The court of appeals affirmed the lost wages and emotional damages awards, but reversed the punitive damages award on the grounds that the employer proved the Kolstad defense to punitive damages by, among other things, (a) "extensively implement[ing an] organization-wide Equal Employment Opportunity Policy"; (b) creating an effective complaint procedure; (c) instructing employees that retaliation would not be tolerated; (d) engaging in diversity efforts; and (e) conducting certain diversity monitoring activities.

4. 524 U.S. 775 (1998).

5. 524 U.S. 742 (1998).

6. 42 U.S.C. §§ 2000e to 2000e-17 (2000).

7. 42 U.S.C. §§ 12101 to 12213 (2000).

8. 42 U.S.C. § 1981a(b)(1) (2000).

9. 42 U.S.C. § 1981a(b)(3) (2000).

10. J. Hancock & J. Starnes, "Revisiting Kolstad v. American Dental Ass'n: Reform of Punitive Damages Awards in Employment Discrimination Cases Since the Supreme Court Adopted the Standard of Malice or Reckless Indifference," 31 *U. Mem. L. Rev.* 641, 645–646 (Spring 2001).

11. 527 U.S. at 526, 535 (1999).

12. *Id.* at 536.

13. This article focuses on practical approaches to avoiding punitive damages exposure by developing evidence to support the Kolstad defense. Other articles and numerous cases address the types or degree of conduct upon which a punitive damages award can be sustained. *See, e.g.*, S. Hickox, "Reduction of Punitive Damages for Employment Discrimination: Are Courts Ignoring Our Juries," 54 *Mercer L. Rev.* 1081 (Spring 2003).

14. 527 U.S. at 544 (quoting Kolstad v. Am. Dental Ass'n, 139 F.3d 958, 974 (D.C. Cir. 1998) (Tatel, J., dissenting), vacated by 527 U.S. at 526)).

15. *Id.* at 545.

16. *Id.* ("The purposes underlying Title VII are similarly advanced where employers are encouraged to adopt antidiscrimination policies and to educate their personnel on Title VII's prohibitions").

17. *See, e.g.*, Gagliardo v. Connaught Labs., 311 F.3d 565, 570 (3d Cir. 2002) (jury awarded plaintiff $2.5 million in compensatory and punitive damages; court of appeals applied federal $300,000 damages cap, but plaintiff still recovered $2.3 million because $2 million of award was attributable to damages awarded under Pennsylvania Human Relations Act).

18. 524 U.S. 775 (1998).

19. 524 U.S. 742 (1998).

20. Walton v. Johnson & Johnson Servs., Inc., 347 F.3d 1272, 1280–1281 (11th Cir. 2003) (quoting Frederick v. Sprint/United Mgmt. Co., 246 F.3d 1305, 1311 (11th Cir. 2003) (citations omitted)).

21. In cases involving harassment by a co-worker, employer liability generally attaches where "the employer knew (actual notice) or should have known (constructive notice) of the harassment and failed to take remedial action." Breda v. Wolf Camera & Video, 222 F.3d 886, 889 (11th Cir. 2000).

21.1. Some states with state fair employment practices statutes provide for affirmative defenses to harassment claims similar to the *Faragher/Ellerth* defense. For example, in Dept. of Health Servs. v. Superior Court, 6 Cal. Rptr. 3d 441, 31 Cal. 4th 1026, 79 P.3d 556 (Nov. 23, 2003), the California Supreme Court adopted an "avoidable consequences" affirmative defense to supervisory harassment claims. To establish this defense, an employer must show: "(1) the employer took reasonable steps to prevent and correct workplace sexual harassment; (2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided; and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered. 31 Cal. 4th at 1044, 6 Cal. Rptr. 3d at 452, 79. P.3d at 565.

22. *See also* Coates v. Sundor Brands, Inc., 164 F.3d 1361, 1364 (11th Cir. 1999) (affirming summary judgment for employer after finding plaintiff's failure to report harassment unreasonable where employer's sexual harassment policy "clearly specified the steps a victimized employee should take").

23. *See* Golson v. Green Tree Financial Servicing Corp., 26 Fed. Appx. 209, 214 (4th Cir. 2002) (court of appeals affirmed punitive damages award in favor of a pregnancy discrimination plaintiff notwithstanding employer's adoption and dissemination of EEO policies because company's EEO policies did not mention pregnancy discrimination).

24. Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998) (recognizing that "same-sex" hostile work environment harassment may be actionable under Title VII where harassment by male co-workers was allegedly directed at male plaintiff "because of [the plaintiff's] sex").

25. *See, e.g.*, Aramburu v. Boeing Co., 112 F.3d 1398, 1410 (10th Cir. 1997) (plaintiff may demonstrate hostile work environment based on disability); Crawford v. Medina Gen. Hosp., 96 F.3d 830, 834 (6th Cir. 1996) (noting that it is "a relatively uncontroversial proposition that [hostile work environment claims are] . . . viable under the ADEA); Watkins v. Bowden, 105 F.3d 1344, 1355 (11th Cir. 1997) (indicating plaintiff must prove essentially same elements to establish either racial or sexual harassment hostile work environment claim).

26. For example, in Swinton v. Potomac Corp., 270 F.3d 794, 820 (9th Cir. 2001), *cert. denied*, 535 U.S. 1018 (2002), the court of appeals affirmed a punitive damages award even though the plaintiff did not report the alleged incidents of racial harassment he suf-

fered to management. In this case, the employer's anti-discrimination policy only directed the employee to report any perceived harassment to his direct supervisor. *Id.* at 805. There was, however, evidence that the plaintiff's direct supervisor—who was not accused of harassing the plaintiff—had actually witnessed the harassment, laughed at racial jokes, and failed to take any action to stop the discriminatory conduct. Based on this evidence, the court found that the insensitivity of the person designated in the company's policy to receive harassment complaints precluded the employer from proving the Kolstad punitive damages defense. *Id.* at 818.

27. Walton, 347 F.3d at 1286–1288 (no question of fact whether employer acted reasonably to prevent harassment where policy stated complaints would be handled by human resources department); Montero v. Agco Corp., 192 F.3d 856, 862 (9th Cir. 1999) (employer exercised reasonable care where policy identified only employee's supervisor and human resources department as proper recipients of sexual harassment complaints).

28. *See, e.g.*, Breda v. Wolf Camera & Video, 222 F.3d 886, 890 (11th Cir. 2000) (distinguishing aspects of policy which required employees to report incidents to direct supervisors, but merely suggested that employees also or alternatively report incidents to personnel department).

29. Some employer policies provide that a complaining or reporting employee has the "option" of having the information he or she provides (and his or her identity) kept confidential, upon request, until such time as the company's investigation might support the allegations. The theory behind this approach is apparently that it will encourage "victims" to feel more comfortable making complaints or reports, and will make "witnesses" more likely to inform management of what they have seen or heard. This approach may not be advisable. It could, in some circumstances, unnecessarily hamper the employer's efforts to conduct a thorough investigation. It also might create an unrealistic expectation of "absolute confidentiality" in some employees. It may be better to stress the company's commitment to keeping information confidential to the extent possible, without providing employees the "option" to insist upon absolute confidentiality up to a certain stage in the process.

30. 42 U.S.C. § § 12111(9) & 12112(b)(5).

31. *See* Kolstad, 527 U.S. at 545.

32. 171 F. Supp. 2d 741 (M.D. Tenn. 2001).

33. *Id.* at 747.

34. *Id.* at 748–750.

35. *See also* Miller v. Woodharbor Molding & Millworks, Inc., 80 F. Supp. 2d 1026, 1030–1033 (N.D. Iowa 2000) (finding employer's policy "woefully inadequate, because it fail[ed] to include any language that the employee will not encounter retaliation, or punishment," which undermined the employer's ability to prove the *Faragher/Ellerth* affirmative defense and allowed the plaintiff to recover for hostile work environment sexual harassment), *aff'd*, 248 F.3d 1165 (8th Cir. 2001) (table decision); Thomas v. BET Soundstage Rest., 104 F. Supp. 2d 558, 566 (D. Md. 2000) (finding anti-harassment policy inadequate because, in part, it contained no anti-retaliation clause).

36. Clark County Sch. Dist. v. Breeden, 532 U.S. 268 (2001) (finding no actionable retaliation claim because incident complained of could not have been reasonably viewed by plaintiff as violating Title VII, so plaintiff's complaints did not constitute "protected

activity"); *but see* EEOC v. White & Son Enters., 881 F.2d 1006, 1012 (11th Cir. 1989) (finding employer's retaliation actionable because plaintiff had "a reasonable belief that the employer was engaged in unlawful employment practices").

37. *E.g.*, Zimmermann v. Assocs. First Capital Corp., 251 F.3d 376, 385–386 (2d Cir. 2001) (holding that mere adoption of anti-discrimination policy would permit finding that employer was aware of federal law requirements, but did not establish in and of itself "good faith enforcement of such a policy"); Lowery v. Circuit City Stores, Inc., 206 F.3d 431, 446 (4th Cir. 2000) (written antidiscrimination policy standing alone will not establish good faith efforts to comply with statutory requirements).

38. Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1279 (11th Cir. 2002).

39. *E.g.*, Frederick, 246 F.3d at 1310, 1315–1316 (court of appeals reversed entry of summary judgment in employer's favor on sexual harassment claim where anti-discrimination policy was not provided to employees individually, finding that fact issues existed as to whether company's policy was "effectively published").

40. *See, e.g.*, Miller v. Kenworth of Dothan, Inc., 277 F.3d at 1279.

41. *See, e.g., id.* (one factor in finding policy ineffective was that "it was not posted in the workplace"); Frederick, 246 F.3d at 1315 (finding that one "defect" in employer's "publication of the policy" was "that it was not posted in [the plaintiff's] section of [the employer's] offices").

42. *See* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545 (1999).

43. Deters v. Equifax Credit Info. Servs., Inc., 202 F.3d 1262, 1270 (10th Cir. 2000) (upholding $295,000 award of punitive damages and finding Kolstad inapplicable to direct liability situation where higher-level manager or designated complaint recipient knew of harassing conduct but failed to act appropriately).

44. Examples of punitive damages liability created by the failure adequately to train managers are becoming legion. In a leading case on the issue, EEOC v. Wal-Mart Stores, Inc., 187 F.3d 1241, 1243 (10th Cir. 1999), a hearing-impaired employee was not provided with an interpreter during a company training session. After the employee declined to stay at the training session, his manager transferred him to a janitorial position. *Id.* at 1244. The employee later brought a lawsuit under the ADA and the court of appeals ultimately affirmed a $75,000 punitive damages award, despite the fact that Wal-Mart had adopted a concrete anti-discrimination policy and an ADA handbook, on the grounds that the plaintiff's direct manager and personnel manager had not received discrimination training. *Id.* at 1249. The court of appeals held that Wal-Mart's failure to provide training to these managers precluded it from showing "good faith efforts to comply" with the ADA. *Id.* at 1248–1249. *See also* Anderson v. G.D.C., Inc., 281 F.3d 452, 456, 462 (4th Cir. 2002) (granting employee new trial on punitive damages issue and finding that placement of EEOC sexual harassment poster in dispatch trailer did not constitute "good faith" attempt to comply with Title VII where employer had no anti-discrimination policy and provided no training); Breda, 222 F.3d at 889–890 (finding that, in co-worker harassment case, employer was deemed to have actual knowledge of the harassment where supervisor who had authority to receive complaints under company policy failed to act on report).

45. *See, e.g.*, Thompson v. Altheimer & Gray, No. 96 C 4319, 2001 U.S. Dist. LEXIS 20993, at **15–22 (N.D. Ill. Dec. 18, 2001) (denying employer's motion for summary

judgment on availability of punitive damages because, in part, employer produced "no evidence indicating that [it] conducted training or otherwise monitored enforcement of its anti-discrimination policy").

46. 233 F.3d 655, 672 (1st Cir. 2000).

47. *Id.* at 670.

48. Blackmon v. Pinkerton Sec. & Investigative Servs., 182 F.3d 629, 637 (8th Cir. 1999) (reversing judgment as a matter of law in favor of employer and reinstating jury's $100,000 punitive damages award in sexual harassment and retaliation case where employer did not engage in appropriate responsive actions to plaintiff's internal complaints).

49. *See, e.g.*, EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498, 513 (6th Cir. 2001) (affirming punitive damages award because, *inter alia*, internal investigator failed to seek potential witnesses who might have corroborated plaintiff's allegations; company failed to "exact any discipline for the offending conduct"; and employees and supervisors were unaware of anti-discrimination policy's contents). *See also* Watson v. Blue Circle, Inc., 324 F.3d 1252, 1259–1263 (11th Cir. 2003) (in case of alleged harassment by non-supervisors, where *Faragher/Ellerth* defense does not apply and employee must prove that employer either knew or should have known of harassment but failed to take immediate and appropriate corrective action, court of appeals reversed summary judgment for employer because, *inter alia*, there was evidence that employer's policy, although "well-disseminated," was ineffective because employee's concerns may not have been investigated and addressed promptly and effectively).

50. In Hatley v. Hilton Hotels Corp., 308 F.3d 473, 475 (5th Cir. 2002), the US Court of Appeals for the Fifth Circuit reinstated the harassment claims of two cocktail waitresses based in part on the employer's failure to separate the waitresses from their supervisor, who allegedly committed the harassment, during the investigation. The plaintiffs successfully argued on appeal that the *Faragher/Ellerth* affirmative defense was not available because the harassment continued well past the point where a reasonable employer would have ended it. However, the court of appeals held the employer had successfully established a "good faith" defense to punitive damages because it had a well-publicized anti-harassment policy, provided training, established an effective grievance procedure, and regularly investigated complaints. *Id.* at 477. *See also* Baty v. Willamette Indus., Inc., 172 F.3d 1232, 1244–1245 (10th Cir. 1999) (affirming $300,000 compensatory and punitive damages award where evidence showed employer conducted a sham investigation and managers actually condoned the harassment).

51. 347 F.3d at 1288–1293.

52. And it is never too late to do the right thing. In Swinton v. Potomac Corp., 270 F.3d 794, 815 (9th Cir. 2001), the US Court of Appeals for the Ninth Circuit ruled that the employer's remedial measures should be considered as a factor that might mitigate punitive damages exposure, even though the remedial measures occurred after the plaintiff filed suit. The court explained that policy considerations support this approach because "employers should be encouraged to institute anti-harassment measures, and must be

Minimizing Punitive Damages Exposure

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