SUPREME COURT OF THE UNITED STATES

No. 98–208

CAROLE KOLSTAD, PETITIONER *v.* AMERICAN DENTAL ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 22, 1999]

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, concurring in part and dissenting in part.

The Court properly rejects the Court of Appeals' holding that defendants in Title VII actions must engage in "egregious" misconduct before a jury may be permitted to consider a request for punitive damages. Accordingly, I join Parts I and II–A of its opinion. I write separately, however, because I strongly disagree with the Court's decision to volunteer commentary on an issue that the parties have not briefed and that the facts of this case do not present. I would simply remand for a trial on punitive damages.

I

In enacting the Civil Rights Act of 1991 (1991 Act), Congress established a three-tiered system of remedies for a broad range of discriminatory conduct, including violations of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e *et seq*., as well as some violations of the Americans with Disabilities Act of 1990 (ADA), 42 U. S. C. §12101 *et seq*. (1994 ed. and Supp II). Equitable remedies are available for disparate impact violations; compensatory damages for intentional disparate treatment; and punitive damages for intentional discrimination "with

malice or with reckless indifference to the federally protected rights of an aggrieved individual." §1981a(b)(1).

The 1991 Act's punitive damages standard, as the Court recognizes, *ante,* at 7, is quite obviously drawn from our holding in *Smith* v. *Wade,* 461 U. S. 30 (1983). There, we held that punitive damages may be awarded under 42 U. S. C. §1983 (1976 ed., Supp. V) "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." 461 U. S., at 56.* The 1991 Act's standard is also the same intent-based standard used in the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. §621 *et seq.* (1994 ed. and Supp. II). The ADEA provides for an award of liquidated damages– damages that are "punitive in nature," *Trans World Airlines, Inc.* v. *Thurston,* 469 U. S. 111, 125 (1985)– when the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *Hazen Paper Co.* v. *Biggins,* 507 U. S. 604, 617 (1993); accord, *Thurston,* 469 U. S., at 126.

In *Smith,* we carefully noted that our punitive damages standard separated the "quite distinct concepts of *intent to*

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*Lest there be any doubt that Congress looked to *Smith* in crafting the statute, the Report of the House Judiciary Committee explains that the "standard for punitive damages is taken directly from civil rights case law," H. R. Rep. No. 102–40, pt. 2, p. 29, (1991) and proceeds to quote and cite with approval the very page in *Smith* that announced the punitive damages standard requiring "evil motive or intent, or . . . reckless or callous indifference to the federally protected rights of others," 461 U. S., at 56, quoted in H. R. Rep. No. 102–40, at 29. The Report of the House Education and Labor Committee echoed this sentiment. See H. R. Rep. No. 102–40, p. 74 (1991) (citing *Smith* with approval). Congress' substitution in the 1991 Act of the word "malice" for *Smith* v. *Wade*'s phrase "evil motive or intent" is inconsequential; in *Smith,* we noted that "malice . . . may be an appropriate" term to denote ill will or an intent to injure. See 461 U. S., at 37, n. 6.

cause injury, on one hand, and *subjective consciousness* of risk of injury (or of unlawfulness) on the other," 461 U. S., at 38, n. 6, and held that punitive damages are permissible only when the latter component is satisfied by a deliberate or recklessly indifferent violation of federal law. In *Thurston*, we interpreted the ADEA's standard the same way and explained that the relevant mental distinction between intentional discrimination and "reckless disregard" for federally protected rights is essentially the same as the well-known difference between a "knowing" and a "willful" violation of a criminal law. See 469 U. S., at 126–127. While a criminal defendant, like an employer, need not have knowledge of the law to act "knowingly" or intentionally, he must know that his acts violate the law or must "careless[ly] disregard whether or not one has the right so to act" in order to act "willfully." *United States* v. *Murdock*, 290 U. S. 389, 395 (1933), quoted in *Thurston*, 469 U. S., at 127. We have interpreted the word "willfully" the same way in the civil context. See *McLaughlin* v. *Richland Shoe Co.*, 486 U. S. 128, 133 (1988) (holding that the "plain language" of the Fair Labor Standards Act's "willful" liquidated damages standard requires that "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute," without regard to the outrageousness of the conduct at issue).

Construing §1981a(b)(1) to impose a purely mental standard is perfectly consistent with the structure and purpose of the 1991 Act. As with the ADEA, the 1991 Act's "willful" or "reckless disregard" standard respects the Act's "two-tiered" damages scheme while deterring future intentionally unlawful discrimination. See *Hazen Paper*, 507 U. S., at 614–615. There are, for reasons the Court explains, see *ante*, at 8–9, numerous instances in which an employer might intentionally treat an individual differently because of her race, gender, religion, or disability

without knowing that it is violating Title VII or the ADA. In order to recover compensatory damages under the 1991 Act, victims of unlawful disparate treatment must prove that the defendants' *conduct* was intentional, but they need not prove that the defendants either knew or should have known that they were *violating the law*. It is the additional element of willful or reckless disregard of the law that justifies a penalty of double damages in age discrimination cases and punitive damages in the broad range of cases covered by the 1991 Act.

It is of course true that as our society moves closer to the goal of eliminating intentional, invidious discrimination, the core mandates of Title VII and the ADA are becoming increasingly ingrained in employers' minds. As more employers come to appreciate the importance and the proportions of those statutes' mandates, the number of federal violations will continue to decrease accordingly. But at the same time, one could reasonably believe, as Congress did, that as our national resolve against employment discrimination hardens, deliberate violations of Title VII and the ADA become increasingly blameworthy and more properly the subject of "societal condemnation," *McKennon* v. *Nashville Banner Publishing Co.*, 513 U. S. 352, 357 (1995), in the form of punitive damages. Indeed, it would have been rather perverse for Congress to conclude that the increasing acceptance of antidiscrimination laws in the workplace somehow mitigates willful violations of those laws such that only those violations that are accompanied by particularly outlandish acts warrant special deterrence.

Given the clarity of our cases and the precision of Congress' words, the common-law tradition of punitive damages and any relationship it has to "egregious conduct" is quite irrelevant. It is enough to say that Congress provided in the 1991 Act its own punitive damages standard that focuses solely on willful mental state, and it did not

suggest that there is any class of willful violations that are exempt from exposure to punitive damages. Nor did it indicate that there is a point on the spectrum of deliberate or recklessly indifferent conduct that qualifies as "egregious." Thus, while behavior that merits that opprobrious label may provide probative evidence of wrongful motive, it is not a necessary prerequisite to proving such a motive under the 1991 Act. To the extent that any treatise or federal, state, or "common-law" case might suggest otherwise, it is wrong.

There are other means of proving that an employer willfully violated the law. An employer, may, for example, express hostility toward employment discrimination laws or conceal evidence regarding its "true" selection procedures because it knows they violate federal law. Whatever the case, so long as a Title VII plaintiff proffers sufficient evidence from which a jury could conclude that an employer acted willfully, judges have no place making their own value judgments regarding whether the conduct was "egregious" or otherwise presents an inappropriate candidate for punitive damages; the issue must go to the jury.

If we accept the jury's appraisal of the evidence in this case and draw, as we must when reviewing the denial of a jury instruction, all reasonable inferences in petitioner's favor, there is ample evidence from which the jury could have concluded that respondent willfully violated Title VII. Petitioner emphasized, at trial and in her briefs to this Court, that respondent took "a tangible employment action" against her in the form of denying a promotion. Brief for Petitioner 47. Evidence indicated that petitioner was the more qualified of the two candidates for the job. Respondent's decisionmakers, who were senior executives of the Association, were known occasionally to tell sexually offensive jokes and referred to professional women in derogatory terms. The record further supports an inference that these executives not only deliberately refused to

consider petitioner fairly and to promote her because she is a woman, but they manipulated the job requirements and conducted a "sham" selection procedure in an attempt to conceal their misconduct.

There is no claim that respondent's decisionmakers violated any company policy; that they were not acting within the scope of their employment; or that respondent has ever disavowed their conduct. Neither the respondent nor its two decisionmakers claimed at trial any ignorance of Title VII's requirements, nor did either offer any "good-faith" reason for believing that being a man was a legitimate requirement for the job. Rather, at trial respondent resorted to false, pretextual explanations for its refusal to promote petitioner.

The record, in sum, contains evidence from which a jury might find that respondent acted with reckless indifference to petitioner's federally protected rights. It follows, in my judgment, that the three-judge panel of the Court of Appeals correctly decided to remand the case to the district court for a trial on punitive damages. See 108 F. 3d 1431, 1440 (CADC 1997). To the extent that the Court's opinion fails to direct that disposition, I respectfully dissent.

II

In Part II–B of its opinion, the Court discusses the question "whether liability for punitive damages may be imputed to respondent" under "agency principles." *Ante*, at 12. That is a question that neither of the parties has ever addressed in this litigation and that respondent, at least, has expressly disavowed. When prodded at oral argument, counsel for respondent twice stood firm on this point. "[W]e all agree," he twice repeated, "that that precise issue is not before the Court" Tr. of Oral Arg. 49. Nor did any of the 11 judges in the Court of Appeals believe that it was applicable to the dispute at hand– presumably because promotion decisions are quintessential

"company acts," see 139 F. 3d 958, 968 (CADC 1998), and because the two executives who made this promotion decision were the executive director of the Association and the acting head of its Washington office. *Id.*, at 974, 979 (Tatel, J., dissenting). See also 108 F. 3d, at 1434, 1439. Judge Tatel, who the Court implies raised the agency issue, in fact explicitly (and correctly) concluded that "[t]his case does not present these or analogous circumstances." 108 F. 3d, at 1439.

The absence of briefing or meaningful argument by the parties makes this Court's gratuitous decision to volunteer an opinion on this nonissue particularly ill advised. It is not this Court's practice to consider arguments– specifically, alternative defenses of the judgment under review– that were not presented in the brief in opposition to the petition for certiorari. See this Court's Rule 15.2. Indeed, on two occasions in this very Term, we refused to do so despite the fact that the issues were briefed and argued by the parties. See *South Central Bell Telephone Co.* v. *Alabama*, 526 U. S. ___, ___ (1999) (slip op., at 10); *Roberts* v. *Galen of Virginia, Inc.*, 525 U. S. ___, ___ (1999) *(per curiam)* (slip op., at 4-5). If we declined to reach alternate defenses under those circumstances, surely we should do so here.

Nor is it accurate for the Court to imply that the Solicitor General as *amicus* advocates a course similar to that which the Court takes regarding the agency question. Cf. *ante*, at 12. The Solicitor General, like the parties, did not brief any agency issue. At oral argument, he correspondingly stated that the issue "is not really presented here." Tr. of Oral Arg. 19. He then responded to the Court's questions by stating that the Federal Government believes that whenever a tangible employment consequence is involved §1981a incorporates the "managerial capacity" principles espoused by §217C of the Restatement (Second) of Agency. See Tr. of Oral Arg. 23. But to the extent that

the Court tinkers with the Restatement's standard, it is rejecting the Government's view of its own statute without giving it an opportunity to be heard on the issue.

Accordingly, while I agree with the Court's rejection of the en banc majority's holding on the only issue that it confronted, I respectfully dissent from the Court's failure to order a remand for trial on the punitive damages issue.