No. 18-533

In the Supreme Court of the United States

CONTRICE TRAVIS,

Petitioner,

v.

EXEL INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent Exel Inc. d/b/a DHL Supply Chain (USA) is wholly owned by DPWN Holdings (USA), Inc., which is wholly owned by Deutsche Post Beteiligungen Holding GmbH, which is wholly owned by Deutsche Post AG and is publically traded on the German stock exchange: FWB:DPW, DPW: Xetra; and DPW:GR.

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STATEMENT OF THE CASE

I. NATURE OF THE CASE AND COURSE OF PROCEEDINGS BELOW

This is an employment discrimination case involving only one liability issue - - whether Petitioner Travis was denied a promotion in June 2008 because of her sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"). The Equal Employment Opportunity Commission ("EEOC") filed the case in the district court and Travis intervened as a party-plaintiff.

The parties stipulated that Travis' back pay claim was limited to $1,184.37. (R. 120, p. 2.)[1] The jury returned a verdict awarding Travis the stipulated back pay amount, and compensatory and punitive damages. (R. 120, 124, 125.) Exel filed a motion for judgment as a matter of law as to both liability and punitive damages under Rule 50(b), Fed. R. Civ. P. (R. 133.) The district court denied Exel's motion as to liability, but dismissed the punitive damages claim. (App., pp., 50-82; R. 147.)

Exel's liability claim appeal was denied in a 2-1 Eleventh Circuit panel decision which contains a vigorous dissent arguing that there was insufficient evidence to support the jury's sex discrimination liability finding. (App., pp. 15-49.) The panel also unanimously dismissed the EEOC's and Travis'

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[1] "App" refers to the Appendix filed by Petitioner Travis. "R" refers to the district court docket entry and R. 165-168 contains the trial transcript filed in the district court. "PX" refers to trial exhibits introduced by Petitioner Travis and the EEOC.

punitive damages claim appeals, holding that there was insufficient evidence to impute punitive damages liability to Exel under long-standing Eleventh Circuit precedent.

Travis and the EEOC sought *en banc* review of the panel decision. *En banc* review was denied. (App., pp. 85-86.) Travis filed a petition for writ of certiorari challenging the Eleventh Circuit's punitive damages imputation standard. After obtaining two (2) deadline extensions in this Court (Case 18A205), the Solicitor General decided to not file a petition for writ of certiorari.

SUMMARY OF ARGUMENT

Punitive damages are a disfavored and extraordinary remedy. Exel made these separate arguments in the Eleventh Circuit for affirmance of the district court's order granting judgment as a matter of law on the punitive damages claim - - (1) there was insufficient evidence of malice or reckless indifference, (2) there was insufficient evidence to impute punitive damages liability to Exel based on a low level manager's lone decision to not promote Travis to the open supervisor position and (3) Exel maintains, disseminates and enforces equal opportunity policies and otherwise established the good faith defense to punitive damages claims established by the Supreme Court in *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999). The Eleventh Circuit affirmed judgment in favor of Exel on the punitive damages claim based on its long-standing imputation standard which is challenged now by Travis, and did not address Exel's other arguments.

The Eleventh Circuit's imputation standard set forth in *Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317 (11th Cir. 1999) does not conflict with *Kolstad.* In fact, the opposite is true. *Dudley's* imputation standard was cited with approval in the *Kolstad* decision. *Kolstad*, 527 U.S. at 1322-23. "Kolstad cited Dudley with approval for its use of the common law rule that agency principles limit vicarious liability for punitive damages . . ." *Howell v. Compass Group*, 448 Fed. Appx. 30, 38 n.5 (11th Cir. 2011). Travis' Petition should be denied on this ground alone.

The Supreme Court in *Kolstad* gave courts of appeals wide latitude when considering whether the disfavored punitive damages remedy can be imputed to corporate employers. The Eleventh Circuit's imputation standard is fully consistent with *Kolstad* and Travis' "circuit split" claim is vastly exaggerated. In fact, Travis cites only a single, 17 year old Court of Appeals decision that considers and criticizes the Eleventh Circuit's imputation standard. All of the appeals courts, including the Eleventh Circuit, apply similar legal standards to make the imputation analysis. The Supreme Court in *Kolstad* noted that there is no "good definition" relating to this standard. *Kolstad*, 527 U.S. at 543. Linguistic discrepancies and application of similar yet not identical legal standards and tests by appeals courts do not establish a "circuit split" sufficient to warrant Supreme Court review.

Furthermore, the imputation standard challenged here by Travis is rarely invoked to dismiss a punitive damages claim, and is not of sufficient import to warrant review. Research reveals that in the almost 20 years since the *Dudley* case was decided, only a small

handful of district courts cases have dismissed punitive damages claims based solely on the application of the Eleventh Circuit's imputation standard. The instant case is one of those rare cases, but even here the punitive damages claim is also subject to dismissal on other grounds - - no malice or reckless indifference and establishment of the *Kolstad* good faith defense.

REASONS FOR DENYING THE PETITION

I. THE ELEVENTH CIRCUIT'S PUNITIVE DAMAGES IMPUTATION STANDARD DOES NOT CONFLICT WITH THE SUPREME COURT'S *KOLSTAD* DECISION

Punitive damages are "an extraordinary remedy" in employment cases and "[n]ot every unlawful discriminatory act will support an award of punitive damages against an employer." *Dudley*, 166 F.3d at 1322. A "plaintiff seeking punitive damages against an employer for job discrimination faces daunting obstacles under the law established by decisions of the Supreme Court . . . 'Punitive damages are disfavored by the law and are awarded solely to punish defendants and deter future wrongdoing.'" *Ash v. Tyson Foods, Inc.*, 664 F.3d 883, 900 (11th Cir. 2011) (internal citations omitted).

The 1999 *Kolstad* case considered the circumstances under which punitive damages may be awarded in an action under Title VII. The Supreme Court reviewed Title VII's damages provisions and noted the Congressional intent to authorize punitive damages only in a subset of cases involving intentional discrimination. "Congress plainly sought to impose two standards of liability – one for establishing a right to

compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive award." *Kolstad*, 527 U.S. at 534.

The Supreme Court first held that punitive damages are available upon proof that the employer engaged in intentional discrimination and did so with "malice" or with "reckless indifference" to federally protected rights of an aggrieved individual. *Id.* at 534-540. The Supreme Court then said the "inquiry does not end with a showing of the requisite 'malice or . . . reckless indifference' on the part of certain individuals, however." *Id.* at 539. The inquiry continues because a plaintiff must "impute liability for punitive damages" to the employer. *Id*.

The Supreme Court began its imputation analysis by stating that the "common law has long recognized that agency principles limit vicarious liability for punitive awards." *Id.* at 541. (Citing Treatises.) "This is a principle, moreover, that this Court historically has endorsed." *Id*. (Citing Supreme Court cases.) "Courts of Appeals, too, have relied on these liability limits in interpreting 42 U.S.C. § 1981a." *Id*. **The very first case the Supreme Court cited to support the proposition that Courts of Appeals rely on agency principles to limit vicarious liability for punitive damages is the Eleventh Circuit's decision in *Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1322-1323 (11th Cir. 1999).** The Supreme Court's pin point page citation to *Dudley* - -pages 1322-1323 - - is the precise location in the case where the "high up the corporate hierarchy" punitive damages imputation standard is set forth and applied.

Rather than conflicting with the Supreme Court's *Kolstad* decision, the Eleventh Circuit's imputation standard was cited with approval by it. The Supreme Court cited *Dudley* for the specific proposition that courts of appeals rely on agency principles "to limit vicarious liability for punitive awards" under the statute. *Kolstad*, 527 U.S. at 541. This interpretation of *Kolstad* is not only Exel's reading of the case. The Eleventh Circuit noted that "*Kolstad* cited *Dudley* with approval for its use of the common law rule that agency principles limit vicarious liability for punitive damages . . ." *Howell*, 448 Fed. Appx. at 38 n.5.

The instant case has been hotly contested for many years and Exel has argued at every turn that *Kolstad* cited *Dudley* with approval. Yet, Travis' Petition does not acknowledge that *Kolstad* even cites *Dudley*, nor does it attempt to argue that the Supreme Court did not cite *Dudley's* imputation standard with approval. Rather, Travis states the chronologically correct fact that "*Dudley* was decided on February 9, 1999 - - over four months before this Court's *Kolstad* decision, which came down on June 22, 1999." (Travis Petition, p. 9.) Travis then summarily concludes that this "timing" evidence and the alleged "inharmonious relationship between *Dudley* and *Kolstad*" demonstrates that "*Dudley* has been undermined to the point of abrogation." *Id.*

It is true that the Supreme Court cites the Restatement (Second) of Agency in its further discussion of punitive damages limitations. *Kolstad*, 527 U.S. at 542-543. One limitation on punitive damages in the Restatement is that "the agent was employed in a managerial capacity. . ." *Id.* This does

not mean, however, that this is the only proper limitation the Supreme Court endorsed. The Supreme Court also recognized that "no good definition of what constitutes a 'managerial capacity' has been found" and that "the examples provided in the Restatement of Torts suggest that an employee must be 'important,' but perhaps need not be the employer's 'top management, officers, or directors,' to be acting 'in a managerial capacity.'" *Id.* at 543 (internal citations omitted). That limiting language - - the employee must be "important" - - is consistent with and supports the Eleventh Circuit's long-standing imputation standard.

II. THE ELEVENTH CIRCUIT'S IMPUTATION STANDARD DOES NOT CREATE A CIRCUIT SPLIT WARRANTING SUPREME COURT REVIEW

Travis attempts to paint the dire picture that all other Circuit Courts of Appeals have lined up against and criticized the Eleventh Circuit's imputation standard. A review of the cases Travis cites reveals only a single, 17 year old Court of Appeals decision that considers and criticizes the Eleventh Circuit's standard. *Jeffries v. Wal-Mart Stores, Inc.*, 15 Fed. Appx. 252 (6th Cir. 2001). *Jeffries* is factually inapposite. The offending managers in *Jeffries* included a district manager located at Wal-Mart headquarters and that court discussed whether the offending managers were "important," as noted in *Kolstad*. Not a single other Court of Appeals decision cited by Travis even discusses, much less criticizes, the long-standing Eleventh Circuit punitive damages standard.

Kolstad gave wide latitude to lower courts to limit imputation of punitive damages to employers. The Supreme Court stated that (1) no good definition of managerial agent exists and (2) the agent, while "perhaps" need not be an officer, director or top management, must nevertheless be "important." *Kolstad*, 527 U.S. at 543. The Eleventh Circuit's imputation standard is well within the parameters established by the Supreme Court and, as noted, it is cited with approval in *Kolstad*. Because some other circuits might apply a narrower or a more expansive imputation standard to cases involving different fact patterns and levels of managers, is no reason to overturn long-standing precedent in the Eleventh Circuit. Linguistic discrepancies and application of similar yet not identical legal standards and tests by appeals courts do not establish a "circuit split" sufficient to warrant Supreme Court review.

III. THE ELEVENTH CIRCUIT'S IMPUTATION STANDARD IS RARELY APPLIED TO DISMISS A PUNITIVE DAMAGES CLAIM

Research uncovered only 29 cases, excluding the instant case, in which a district court within the Eleventh Circuit applied the imputation standard.[2] In 14 of those 29 cases, the district court **refused to**

[2] Exel's research included shepardizing Westlaw's headnote 13 from *Dudley*, which is where the imputation standard is found, and all cases within the Eleventh Circuit citing headnote 13 from *Dudley*. Further, Exel performed a general Westlaw search using terms including "hierarchy," "corporate hierarchy", "higher management", "corporate ladder," and "punitive damages."

dismiss the punitive damages claim.[3] In 15 of those 29 cases, the punitive damages claim was dismissed. However, in only three (3)[4] of those 15 cases was the application of the Eleventh Circuit's imputation

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[3] *Wonders v. United Tax Group, LLC*, No. 13-80148-CIV, 2013 WL 5817589, at *7 (S.D. Fla. Oct. 29, 2013) (motion for summary judgment denied); *Jefferson v. Casual Restaurant Concepts, Inc.*, No. 8:05CV809 T30MSS, 2006 WL 2244733, at * 8 (M.D. Fla. Aug. 4, 2006) (same); *E.E.O.C. v. SDI Athens East, LLC*, 690 F. Supp. 2d 1370, 1383 (M.D. Ga. 2010) (same); *E.E.O.C. v. Stock Bldg. Supply, Inc.*, No. 205CV306FTM29DNF, 2007 WL 433461 (M.D. Fla. Feb. 6, 2007) (same); *Nealey v. Univ. Health Servs., Inc.*, 114 F. Supp. 2d 1358 (S.D. Ga. 2000) (same); *Johnson v. Stone Container*, 88 F. Supp. 2d 1295, 1297 (N.D. Ala. 2000) (motion for new trial on punitive damages denied); *Jones v. Capital Transportation Inc.*, No. 4:14CV15-RH/CAS, 2015 WL 6126832, at *3 (N.D. Fla. Oct. 16, 2015) (motion for judgment as a matter of law denied); *Adams v. Austal, USA, L.LC.*, No. CV 08-0155-KD-N, 2011 WL 13248979 (S.D. Ala. Dec. 20, 2011) (same); *Miller v. Kenworth of Dothan, Inc.*, 82 F. Supp. 2d 1299 (M.D. Ala. 2000), *judgment vacated in part, appeal denied in part*, 277 F.3d 1269 (11th Cir. 2002) (same); *Fodor v. E. Shipbuilding Grp.*, No. 5:12CV28/RS/CJK, 2013 WL 12178574, at *2 (N.D. Fla. July 9, 2013) (motion to amend complaint to add punitive damages claim granted); *Alger v. Prime Rest. Mgmt., LLC*, No. 1:15-CV-567-WSD, 2016 WL 3741984, at *9 (N.D. Ga. July 13, 2016) (default judgment granted); *Dawson v. Cairo IGA LLC*, No. 1:12-CV-41 WLS, 2013 WL 3816618, at *5 (M.D. Ga. July 19, 2013) (same); *McPherson v. Kids N Play, LLC*, No. 1:15-CV-340-WSD, 2015 WL 8179769, at *3 (N.D. Ga. Dec. 7, 2015) (same); *Dismukes v. J & R Entm't, LLC*, No. 2:11-CV-409-CSC, 2012 WL 5187761, at *5 (M.D. Ala. Oct. 19, 2012) (motion for punitive damages granted).

[4] *Snow v. Waffle House, Inc.*, No. CV 06-0321-CB-C, 2007 WL 9717482 (S.D. Ala. Aug. 14, 2007); *Smith v. Target*, No. CV-03-CO-1764-W, 2005 WL 8158369 (N.D. Ala. Apr. 27, 2005); *Wilbur v. Corr. Servs. Corp.*, No. 5:02CV220-OC10GRJ, 2003 WL 23009901 (M.D. Fla. Nov. 14, 2003), *aff'd*, 393 F.3d 1192 (11th Cir. 2004).

standard the sole reason for dismissal. In 12 of those 15 cases, the punitive damages claim was also dismissed on other alternative grounds - - the application of the *Kolstad* "malice or reckless indifference" standard and/or the *Kolstad* "good faith defense."[5] In the almost 20 years since *Dudley*, it is extremely rare within the Eleventh Circuit that a punitive damage claim is dismissed based solely on the

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[5] *E.E.O.C. v. Dillard's, Inc.*, No. 607-CV-1496-ORL-19GJ, 2009 WL 789976 (M.D. Fla. Mar. 23, 2009) (punitive damages claim also dismissed because no showing of actual malice or reckless disregard); *Baldelamar v. Jefferson S. Corp.*, No. 415CV00209HLMWEJ, 2016 WL 9331114 (N.D. Ga. Dec. 5, 2016) (same); *Ward v. Casual Rest. Concepts Inc.*, No. 8:10-CV-2640-EAK-TGW, 2012 WL 695846 (M.D. Fla. Mar. 1, 2012) (same); *Johnson v. TMI Mgmt. Sys., Inc.*, No. CIV.A. 11-0221-WS-M, 2012 WL 3257809 (S.D. Ala. Aug. 7, 2012) (same); W*ilcox v. Corr. Corp. of Am.*, No. 1:11-CV-4365-ODE, 2017 WL 5247923 (N.D. Ga. Mar. 31, 2017), *aff'd,* 892 F.3d 1283 (11th Cir. 2018) (same); *E.E.O.C. v. DMK of JAX, Inc.*, No. 3:07-CV-920-16HTS, 2008 WL 5191586 (M.D. Fla. Dec. 10, 2008) (same); *Benitez v. Univ. of Miami*, No. 05-21334-CIV, 2007 WL 9701796 (S.D. Fla. Jan. 29, 2007) (same); *Leblanc v. Coastal Mech. Servs., LLC*, No. 04-80611-CIV, 2005 WL 8156079 (S.D. Fla. Aug. 24, 2005) (same); *Howell v. Compass Grp.*, No. 4:07-CV-00186-RDP, 2009 WL 10674379 (N.D. Ala. Apr. 17, 2009), *aff'd in part*, 448 Fed. Appx. 30 (11th Cir. 2011) (same).

Laughlin v. Pilot Travel Centers, LLC, No. 5:05-CV-342-OC-10GRJ, 2007 WL 121344 (M.D. Fla. Jan. 11, 2007) (punitive damages claim also dismissed because employer established good faith defense); *Tesler v. BJ's Wholesale Club, Inc.*, No. 3:12-CV-411-J-20JBT, 2013 WL 12155447 (M.D. Fla. Nov. 8, 2013) (same); *Hithon v. Tyson Foods, Inc.*, No. CIV A 96-RRA-3257-M, 2008 WL 4921515 (N.D. Ala. Sept. 30, 2008), *rev'd sub nom. Ash v. Tyson Foods, Inc.*, 392 Fed. Appx. 817 (11th Cir. 2010), *opinion vacated on reconsideration,* 664 F.3d 883 (11th Cir. 2011), and *aff'd sub nom. Ash v. Tyson Foods, Inc.*, 664 F.3d 883 (11th Cir. 2011) (same).

application of the imputation standard. Dismissal of the punitive damages claim in the instant case, while important to Travis, is not of sufficient import generally to warrant Supreme Court review.

IV. TRAVIS SEEKS THE AVAILABILITY OF PUNITIVE DAMAGES IN EVERY TITLE VII CASE

Travis also seeks to reinstate punitive damages by claiming that Exel designated site general manager Dave Harris as one of many persons to whom she could raise complaints of discrimination, citing *Deters v. Equifax Credit Information Services*, 202 F.3d 1264 (10th Cir. 2000) and *Swinton v. Potomac Corp.*, 270 F.3d 794 (9th Cir. 2001). (Petition, p. 12.) These cases arise in the sex harassment context and support Exel's good faith defense argument. In *Deters*, the proper management official was notified of egregious harassment and responded with "utter disregard," "actually condoning the harassment for the sake of protecting Equifax's revenue producing employees." *Deters*, 202 F.3d at 1271. In *Swinton*, the designated management official was not only aware that plaintiff was repeatedly being subjected to inflammatory racial jokes, but also "laughed along" at plaintiff when the jokes were made. *Swinton*, 270 F.3d at 799, 811. No such harassing conduct is alleged here and, more importantly, Travis did not complain to anyone about the at-issue promotion denial. (App., pp. 46 n. 23, 78-79.)

Travis' logic leads to punitive damages in virtually every Title VII case where the employer implements an EEO policy and a jury finds liability. The manager knew it was against the law to discriminate, therefore

malice is shown. The manager was authorized to make the employment decision, therefore he/she is acting in a "managerial capacity" and the decision found unlawful is imputed to the employer. The manager ignored the EEO policy, therefore the policy is ineffective and the employer cannot establish the *Kolstad* good faith defense. Rather than a plaintiff facing "daunting obstacles" and punitive damages being an "extraordinary remedy," punitive damages would be readily available in virtually every case. That is contrary to Congressional intent when it amended Title VII and made punitive damages available in only a subset of discrimination cases. *Kolstad*, 527 U.S. at 534.

V. PUNITIVE DAMAGES ARE SUBJECT TO DISMISSAL ON ALTERNATIVE GROUNDS; THIS CASE DOES NOT WARRANT REVIEW

Exel raised three (3) separate Rule 50(b) arguments in the Eleventh Circuit seeking judgment as a matter of law on the punitive damages claim. First, there is insufficient evidence of malice or reckless indifference with respect to the June 2008 job selection decision. Second, there is insufficient evidence to impute punitive damages liability to Exel. Third, Exel maintains, disseminates and enforces equal employment opportunity policies and otherwise established the good faith defense to punitive damages set forth in *Kolstad*. The Eleventh Circuit addressed only the imputation argument and could have affirmed dismissal on any of these grounds. *Calhoun v. Lillenas Publ'g*, 298 F.3d 1228, 1230 n.2 (11th Cir. 2002).

Here, like in the 12 cases cited in footnote 5 *supra*, Exel is also entitled to dismissal of the punitive damages claim based on those alternative grounds not addressed by the Eleventh Circuit - - no malice or reckless indifference and Exel established the *Kolstad* good faith defense. This further demonstrates that Supreme Court review is not warranted in this case involving a routine employment decision made over ten years ago.

A. Travis did not establish malice or reckless indifference

Not every "sufficient proof of pretext and discrimination is sufficient proof of malice or reckless indifference. Nor is there a useful litmus for marking the point at which proof of violation sufficient to impose liability becomes sufficient to also support a finding of malice or reckless indifference." *Hardin v. Caterpillar, Inc.*, 227 F.3d 268, 270 (5th Cir. 2000). "Malice" or "reckless indifference" pertain to "the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." *Kolstad*, 527 U.S. at 535.

Dismissal of the punitive damages award could have been affirmed for this reason alone. The case involved the routine filling of a single job opening by a low level manager at a small work site with a priority transfer candidate. There is no allegation that Travis was harassed, verbally abused, or had even a single sex-based negative or derogatory comment made to her. There is no pattern of discrimination even alleged. Travis never complained about the at-issue decision, as the lower courts correctly found. (App., p. 78; R. 147, p. 31.) Travis did not apply for the position. (App.,

p. 60.) No one other than Harris (human resources or higher management) was even aware that Travis supposedly verbally expressed to Harris an interest in the position, and no one (human resources or higher management) approved or countenanced Harris' decision not to promote her. (App., pp. 46 n. 23, 78-79.)

The United States District Court Magistrate Judge recommended summary judgment dismissal on liability, finding that not even a *prima facie* case of sex discrimination was established. (R. 76) Eleventh Circuit Judge Tjoflat wrote a vigorous dissent, stating that Exel's motion for judgment as a matter of law on liability should have been granted. (App., pp. 48-49.) Concurring Eleventh Circuit Judge Moody stated that "[h]ad it been my decision", he would have ruled that there was insufficient evidence to support the liability finding. (App., p. 14.) Liability was at best a close call. There is insufficient evidence to establish the requisite "malice" or "reckless indifference." This was not and is not a proper case for the disfavored and extraordinary remedy of punitive damages.

B. Exel established the *Kolstad* good faith defense

Exel also established the *Kolstad* good faith defense, "[g]iving punitive damages protection to employers who make good-faith efforts to prevent discrimination in the workplace accomplishes Title VII's objective of 'motivat[ing] employers to detect and deter Title VII violations.'" 527 U.S. at 545-46 (internal citations omitted). Exel has written policies prohibiting discrimination on the basis of sex and other protected categories. (App., pp. 16-18; PX 3, Sections 1.1-1.3.; R. 165, pp. 145-46; R. 166, pp. 302-06, 345-46, 217, 239,

264; R. 167, pp. 400, 447-50.) Exel disseminates and conducts training on that policy. *Id.* Exel not only promulgated effective EEO policies, but enforced them on the at-issue worksite. *Id.* Travis and Harris and all other witnesses questioned about these EEO policies testified they had received and were familiar with them. *Id.*

Travis argued that Harris ignored the EEO policies that he admits existed and applied to his employment decisions. Manager disregard of rules, however, is the exact conduct for which employers are insulated by the *Kolstad* defense. *See Harsco Corp. v. Renner*, 475 F.3d 1179, 1189 (10th Cir. 2007) ("If failure of supervisors to comply with company policy were sufficient evidence to prove the lack of a good-faith effort to train, the *Kolstad* defense would be effectively eliminated.") Harris testified that he knew that it was a violation of the EEO policy to make an employment decision based on sex. (R. 166, pp. 344-45.)

> The district court did not err [in vacating the punitive damages award]. The theory that [plaintiff's counsel] pitched to the jury, and pitches to us, is that an employer's good faith efforts to prevent discrimination in employment decisions do not matter so long as someone in a position to make a hiring or promotion decision violated that policy even once. If accepted, that theory would butcher precedent and eviscerate the good faith defense. . . . If, as [plaintiff's counsel] insists, a single misuse of managerial authority resulting in discrimination establishes that the employer did not make good faith efforts to prevent that discrimination, then the

> good faith defense does not exist. Under her theory the only time that the good faith defense to vicarious liability for punitive damages could come into play would be when there was no violation of the job discrimination laws to begin with, and therefore no basis for compensatory or punitive damages. Counsel has not explained to us the utility of a defense that exists only when there is no need for it.

Ash, 664 at 906-907.

These alternative grounds for punitive damages dismissal further support denial of Travis' Petition.

CONCLUSION

For these reasons, Exel respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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