

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: CAROLE KOLSTAD, Petitioner v. AMERICAN DENTAL  
ASSOCIATION

CASE NO: 98-208 C-2

PLACE: Washington, D.C.

DATE: Monday, March 1, 1999

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CAROLE KOLSTAD, :

4 Petitioner :

5 v. : No. 98-208

6 AMERICAN DENTAL ASSOCIATION :

7 - - - - -X

8 Washington, D.C.

9 Monday, March 1, 1999

10 The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States at  
12 10:04 a.m.

13 APPEARANCES:

14 ERIC SCHNAPPER, ESQ., Seattle, Washington; on behalf of  
15 the Petitioner.

16 SETH P. WAXMAN, ESQ., Solicitor General, Department of  
17 Justice, Washington, D.C.; for United States, as amicus  
18 curiae, supporting Petitioner.

19 RAYMOND C. FAY, ESQ., Washington, D.C.; on behalf of the  
20 Respondent.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in No. 98-208, Carole Kolstad v. the American Dental  
5 Association.

6 Mr. Schnapper.

7 ORAL ARGUMENT OF ERIC SCHNAPPER

8 ON BEHALF OF THE PETITIONER

9 MR. SCHNAPPER: Mr. Chief Justice, and may it  
10 please the Court:

11 The 1991 Civil Rights Act made several  
12 fundamental changes in the method of enforcing Title VII  
13 and the Americans with Disabilities Act. Section 1981a(a)  
14 authorizes awards of punitive damages if punitive or  
15 compensatory damages are sought, and either party has a  
16 statutory right to trial by jury.

17 The determination of whether punitive damages  
18 should be awarded proceeds in two distinct stages. First,  
19 Section 1981a establishes several statutory prerequisites  
20 which must be satisfied before a jury or, in the case of a  
21 bench trial, a judge, is authorized to consider an award  
22 of punitive damages.

23 Satisfaction of the statutory requirements only  
24 permits, but does not require, an award of such damages.

25 QUESTION: Well, is it your position -- and I

1 take it that it is -- that every case of intentional  
2 discrimination should at least go to the jury on the  
3 question of punitives?

4 MR. SCHNAPPER: That is not our position. Our  
5 position is that there must be proof of either reckless  
6 indifference or malice. And there are a number --

7 QUESTION: Well, does proof of intentional  
8 discrimination suffice for a jury to find punitives?

9 MR. SCHNAPPER: Not necessarily. There are a  
10 wide variety of circumstances under Title VII, as well as  
11 the ADA, in which one might have intentional  
12 discrimination, but not reckless disregard. Because, for  
13 example --

14 QUESTION: Reckless disregard of what?

15 MR. SCHNAPPER: Of the -- of the rights -- the  
16 federally protected rights of the plaintiff.

17 QUESTION: And where do you get that out of the  
18 statute -- that it should be reckless disregard of --

19 MR. SCHNAPPER: I'm sorry -- reckless  
20 indifference. I misspoke. That is the statutory  
21 standard: reckless indifference.

22 QUESTION: But one ordinarily thinks that  
23 intentional is a higher level of -- of mens rea than  
24 recklessness. And so -- but in -- in this statute, you  
25 have to find intentional discrimination to find liability.

1 MR. SCHNAPPER: But there -- there could be  
2 circumstances, as was true in the Hazen case, in which  
3 the -- for example, the law was sufficiently unclear as to  
4 whether or not a particular act of discrimination,  
5 although technically intentional, was, nonetheless,  
6 illegal. The Court noted in Hazen, for example, that  
7 there was a BFOQ exception under the ADEA, the same  
8 exception as this --

9 QUESTION: So, it's kind of like qualified  
10 immunity in a --

11 MR. SCHNAPPER: Well, it -- it's a little bit  
12 analogous. And I think the standard is not as -- as  
13 stringent as for qualified immunity. But --

14 QUESTION: But, Mr. -- I'm sorry --

15 MR. SCHNAPPER: If -- if you had a situation in  
16 which -- the standard that we propose with regard to  
17 reckless indifference is that the defendant either knew or  
18 should reasonably have known that what it was doing was  
19 probably illegal. Now, there are circumstances involving  
20 intentional discrimination where you couldn't say that.

21 QUESTION: Well, do you think that, just in  
22 general, that Congress probably intended, as is normally  
23 the case, to make it more difficult to get -- to be  
24 entitled to punitive damages than to gain compensatory  
25 relief?

1 MR. SCHNAPPER: The -- the statutory standard  
2 for -- for punitive damages in many Title VII cases will,  
3 as a practical matter, be satisfied by proof of intent,  
4 but not all. The standard is different. And -- but I  
5 think we -- we would acknowledge that --

6 QUESTION: Well, you didn't answer my question,  
7 though.

8 MR. SCHNAPPER: I'm sorry.

9 QUESTION: Which is, do you think Congress  
10 intended for it to be more difficult to get punitive  
11 damages than to get compensatory damages?

12 (Pause.)

13 QUESTION: I'm sorry to hear you pause. I -- I  
14 thought from your briefs that you said yes.

15 MR. SCHNAPPER: Well, I -- I -- I think the  
16 textual answer is yes. I'm -- I'm reflecting over the  
17 legislative history. And it's -- I can't --

18 QUESTION: Oh, you think Congress may have made  
19 a mistake?

20 MR. SCHNAPPER: No, no, no.

21 QUESTION: It ended up that way, but they really  
22 didn't --

23 MR. SCHNAPPER: No. I'm -- I'm -- insofar as  
24 the -- the intent of Congress is -- is to be inferred from  
25 the language of the statute, the statute sets a different

1 standard.

2 QUESTION: Well, Mr. Schnapper --

3 MR. SCHNAPPER: If that's a question about --  
4 about whether it was debated, I think I purport it was  
5 not.

6 QUESTION: I see.

7 QUESTION: Mr. Schnapper, help me on one thing.  
8 In order to be found liable for an intentional violation,  
9 does the -- does the defend -- does it have to be shown  
10 that the defendant was aware of Title VII, or is it  
11 sufficient to show that the defendant discriminated,  
12 intentionally discriminated, said, I am going to prefer a  
13 woman because she is a woman?

14 MR. SCHNAPPER: It does not require any  
15 knowledge of the law for there to be --

16 QUESTION: All right. Doesn't the punitive  
17 damage standard require knowledge of the law? It's  
18 indifference to the defendant's rights. And I presume  
19 that means rights under the statute.

20 MR. SCHNAPPER: Yes, it would require either  
21 knowledge or -- or, as the Court said, I think, in  
22 McLaughlin, recklessness in determining what the  
23 defendants knew their obligations were.

24 QUESTION: Okay. So, the -- so, the -- the  
25 reference of the two standards are different. With



1     respect to the intentionality that is required for  
2     liability, all that has to be shown was that there was an  
3     intentional discrimination, period. In order to get  
4     punitive damages, there has to be shown that there was  
5     either knowledge or indifference to the -- the likelihood  
6     of a statutory violation. And -- and because you have to,  
7     in effect, prove this reference to the statute, the  
8     reference to the legal source of the rights, that is more  
9     difficult, and that's why it makes sense to say that the  
10    punitive damage standard requires proof of something more;  
11    isn't that the key to it?

12           MR. SCHNAPPER: Yes.

13           QUESTION: Well, then, if you're correct in  
14    that, Mr. -- then it -- it bears a remarkable resemblance  
15    to qualified immunity.

16           MR. SCHNAPPER: The -- the -- the difference,  
17    Your Honor, as we formulate the standard, is that the  
18    knowledge required here is that the action is probably  
19    illegal. Under qualified immunity, there would have to be  
20    a clearly established right. So, that's a -- that's a  
21    higher --

22           QUESTION: And you would charge -- you would  
23    charge the jury to find whether or not something was  
24    probably illegal?

25           MR. SCHNAPPER: If -- if, in a particular --

1 QUESTION: I mean, you would have to, wouldn't  
2 you? If that's the test, and it's for the jury to decide,  
3 you would have to say, You of the jury, would you find  
4 this was probably illegal?

5 MR. SCHNAPPER: Your Honor, if -- if there was a  
6 question as to whether or not the action was probably  
7 illegal, our view is that that would be a question the  
8 judge would have to decide.

9 QUESTION: But --

10 QUESTION: Is the statute not --

11 QUESTION: No, but you'd have to charge the jury  
12 as to what the defendant knew, whether he thought it was  
13 probably illegal --

14 MR. SCHNAPPER: The defendant's knowledge or the  
15 defendant's lack of care in ascertaining the law would be  
16 jury questions.

17 QUESTION: Yes. What --

18 MR. SCHNAPPER: But the question of whether or  
19 not -- what the state of the law in fact was --

20 QUESTION: The jury -- the jury --

21 QUESTION: What about the malice standard?

22 There -- there are two tests. One is -- one is reckless  
23 indifference; the other one is malice. Does malice mean  
24 certain knowledge that it's illegal?

25 MR. SCHNAPPER: No. I -- I had not yet come to

1 that separate clause. Our view is that malice can be  
2 satisfied by proof of one of three things: ill will, an  
3 intent to injure, or an attempt to violate the statute.  
4 Those are the -- those are the concept of evil motive that  
5 are in this Court's opinion in Smith v. Wade.

6 QUESTION: You mean usually -- I mean, my  
7 goodness -- you mean usually there's -- there's no intent  
8 to injure when you -- when you discriminate on this basis?  
9 I would think that exists in most of the cases, doesn't  
10 it?

11 MR. SCHNAPPER: I think a desire that the victim  
12 be injured is not necessarily present in -- in a case like  
13 this, where the defendant has been found to have preferred  
14 to hire -- to promote Mr. Spangler because he's a man.  
15 That doesn't necessarily mean they wanted the -- the  
16 plaintiff to -- to -- to suffer.

17 QUESTION: Mr. Schnapper, you gave one such  
18 example. You said that the -- the compensatory damages --  
19 now, the jury doesn't have to find probably, they have to  
20 find there is a violation. Then, for punitive, awareness  
21 of the legal standard. And you gave as an example of  
22 intentional discrimination -- treat a man differently than  
23 a woman, the BFOQ defense. Are there other instances in  
24 which there would be intentional discrimination;  
25 therefore, compensatory damages would be a must, not a

1 "may," and yet, not reckless indifference to the  
2 plaintiff's federally protected right -- that's the  
3 statutory phrase?

4 MR. SCHNAPPER: Yes, Your Honor. We've set out  
5 in our briefs some 15 different kinds of circumstances in  
6 which that might arise, simply on the face of the statute,  
7 questions about whether the defendant, for example, under  
8 Walters, was covered by the statute, questions about other  
9 circumstances in which, for example, religion/conscience  
10 decisions are legal under the statute for certain  
11 defendants. And there are, in addition to the specific  
12 statutory issues that we noted there, there continue to be  
13 issues that arise in the lower courts as to whether  
14 particular practices which are intentionally  
15 discriminatory are nonetheless legal under Title VII.  
16 What --

17 QUESTION: Well, I take it what Congress was  
18 trying to do was to tell us that there are degrees of  
19 culpability insofar as the defendants are concerned. Is  
20 it relevant to say that a corporation or an association,  
21 such as you have here, a corporate employer, has a -- has  
22 an admirable employment policy and makes -- has very, very  
23 clear guidelines, you have one employer in a management  
24 position who departs, is it relevant to tell the jury that  
25 the employer might not be chargeable with those punitive

1 damages if the jury finds certain criteria?

2 MR. SCHNAPPER: Yes. But let me -- let me  
3 explain why I say yes to that with reference to the two  
4 distinct stages of determination on punitive damages. The  
5 circumstances that you describe would not be relevant to  
6 the statutory prerequisite, but they would be relevant to  
7 the discretion the jury has to exercise in deciding  
8 whether to award punitive damages.

9 QUESTION: How does the -- how does the jury --  
10 how is the jury instructed?

11 MR. SCHNAPPER: Well, at this point in time,  
12 with regard to the second phase, the -- the practices vary  
13 quite widely as to whether juries are in fact given much  
14 guidance as to how to exercise that discretion. But  
15 certainly it would be appropriate in the case that you  
16 describe to advise the jury that that would be a factor  
17 the jury could consider, and it would militate against  
18 punitive damages.

19 QUESTION: Mr. Schnapper, what about -- what  
20 about attribution? Normally, in -- in tort law, a -- a  
21 higher -- what should I say -- a higher agency principle  
22 is applied for punitive damages than for compensatory  
23 damages. So that if -- I mean, an agent of the company  
24 can render the company liable for compensatory damages,  
25 but not for -- not for punitive. Is that the -- is that



1 also true here?

2 MR. SCHNAPPER: We don't believe so. But I  
3 should start by saying that's not an issue in this case.  
4 In this case, the culpable officials included the  
5 executive director of the defendant, the highest ranking  
6 official they had.

7 QUESTION: Well -- well --

8 QUESTION: He's a proxy for the company --

9 QUESTION: Well, it -- it's relevant to the  
10 extent that -- whose -- whose mental condition you have to  
11 look to -- Wheat, who is a lower one, or -- who was the  
12 higher one, I forgot his name?

13 MR. SCHNAPPER: Allen.

14 QUESTION: Allen. Yeah, Allen was the highest,  
15 and he was the one that -- that did the -- the  
16 non-promotion. And if we look only to Allen, we -- you  
17 would instruct the jury differently as to whose mental --  
18 whose mental state was relevant.

19 MR. SCHNAPPER: I think, if -- if one were to  
20 look only at agency principles, even -- even Wheat would  
21 be high enough. But -- but if I could respond in some  
22 more detail to that.

23 QUESTION: Was -- Wheat was the head of the  
24 Washington office?

25 MR. SCHNAPPER: Yes.

1                   QUESTION: And Allen was the executive director  
2 of the whole operation?

3                   MR. SCHNAPPER: That's exactly right.

4                   MR. SCHNAPPER: I -- I think that mechanically  
5 carrying over here the principles of agency law with  
6 regard to punitive damages would not be appropriate for --  
7 for two distinct reasons. And I note, to begin with, that  
8 this Court indicated in Faragher and Ellerth that -- that  
9 these kinds of issues had to be determined both by looking  
10 at agency law and by looking at the purposes and  
11 principles underlying Title VII.

12                   There are two reasons that I -- I suggest  
13 that -- that one couldn't mechanically use agency  
14 principles. The first one is that one of the central  
15 purposes that prompted Congress to adopt punitive damages  
16 was to assure more effective monetary relief to deter and  
17 punish discrimination in the cases of sexual harassment.  
18 If one were to apply mechanically provisions of the  
19 restatement of torts to sexual harassment, it would -- it  
20 would be a rare case, if ever, that you could get --

21                   QUESTION: Well, how do I know that that was the  
22 reason?

23                   MR. SCHNAPPER: Because --

24                   QUESTION: I mean, all I see is the text of the  
25 statute. And from the text of the statute, it says

1 punitive damages. I would apply normal punitive damages  
2 agency principles. And -- and to tie into Justice  
3 Kennedy's question, I would think that a company who has a  
4 policy against this -- this kind of activity, and if one  
5 of its lower employees, even -- even an officer such as  
6 Wheat -- violates that policy, I would think, under normal  
7 agency principles, you would not punish the company.

8 If you wanted to sue -- if you wanted to sue  
9 Wheat individually, that's a different question. But,  
10 normally, the -- the company has to be a bad actor. And  
11 here, the company has this policy, and it's -- it's Wheat  
12 who violated it.

13 MR. SCHNAPPER: Let me -- let me take another  
14 try at answering this. With regard to the first part of  
15 your question, How would you know that, reading the  
16 statute? The stat -- statute has statements of -- of  
17 purpose and findings, which both refer to the need for  
18 additional remedies about sexual harassment. With  
19 regard -- a bit of an aside to Wheat -- it's not under  
20 prevailing law, at least in the lower courts -- it's not  
21 possible to sue individuals for compensatory and punitive  
22 damages. It's the employer or nobody.

23 The -- in addition to --

24 QUESTION: Mr. Schnapper, may I just interject  
25 this thought? Although references to legislative history

1 won't persuade Justice Scalia, some of the rest of us are  
2 interested in what you might say about it.

3 (Laughter.)

4 MR. SCHNAPPER: Well, in this case, I would hope  
5 I could persuade even Justice Scalia, because this is in  
6 fact in the text of the statute. It's not in Section  
7 1981a; it is in the -- in the -- in the Public Law that  
8 was adopted by Congress.

9 In -- in addition to that, the -- I'd note that  
10 the -- the statute, on its face --

11 QUESTION: It's not in your appendix A. It's --  
12 it's in the prologue of the -- of the statute? I mean, I  
13 don't see it in any of the -- in your statutory appendix.

14 MR. SCHNAPPER: I -- I believe that's right.  
15 It -- it's been the Public Law --

16 QUESTION: I'll be happy to look at the Public  
17 Law.

18 MR. SCHNAPPER: Thank you, Your Honor. I'd like  
19 to reserve --

20 QUESTION: May I ask -- now, the position of the  
21 en banc dissenters here supported the notion that it must  
22 be the company or the Dental Association itself that acted  
23 recklessly or with malice here, was it not? I mean, that  
24 was the position taken, as I read it, by the en banc  
25 dissenters.

1 MR. SCHNAPPER: I think that's -- I think that's  
2 probably the right -- correct reading. Our view is that  
3 that issue would not go to the statutory prerequisite, it  
4 would only go to a guideline for the jury.

5 Thank you.

6 QUESTION: Thank you, Mr. Schnapper.

7 General Waxman, we'll hear from you.

8 ORAL ARGUMENT OF SETH WAXMAN

9 FOR UNITED STATES, AS AMICUS CURIAE,

10 SUPPORTING PETITIONER

11 GENERAL WAXMAN: Mr. Chief Justice, and may it  
12 please the Court:

13 This case presents to the Court, in the context  
14 of the Disabilities Act and Title VII, very much the same  
15 questions that this Court considered under the ADEA in TWA  
16 v. Thurston and Hazen Paper Company. This is a case of  
17 statutory interpretation. And the statute provides  
18 explicitly that in cases of intentional employment  
19 discrimination under the Disabilities Act or Title VII,  
20 punitive damages may be awarded.

21 QUESTION: Well, Mr. -- General Waxman, that's  
22 quite true. But, obviously, looking at the divided  
23 opinion of the Court of Appeals, there are several  
24 different possible -- possible ways of interpreting that.  
25 And why isn't one possible canon of construction that



1 punitive damages are not favorites of the law? This Court  
2 has held a couple of times that there are constitutional  
3 limitations on them.

4 So, when there is reasonable doubt as to whether  
5 they're available or not, the -- the Court's answer should  
6 be they're not available.

7 GENERAL WAXMAN: Mr. Chief Justice, it is  
8 entirely appropriate for this Court, and other courts, to  
9 proceed on the assumption that punitive damages are  
10 generally not favored in the law, and that, as this Court  
11 demonstrated in BMW v. Gore, there are constitutional  
12 limitations on the amount of punitive damages that are  
13 awarded.

14 But in this case, as under the ADEA that this  
15 Court considered in TWA and Hazen, Congress has made that  
16 determination, and it has explicitly stated what standard  
17 the plaintiff must prove before the jury may consider the  
18 independent question of whether punitive damages can be  
19 considered. And I think you were quite right, Mr. Chief  
20 Justice -- I think it was you -- to observe that as -- as  
21 Judge Randolph did in his concurring decision below, that  
22 traditionally, at law, reckless indifference, or reckless  
23 disregard, is viewed essentially as a lesser included  
24 offense of knowledge.

25 The reason why there isn't a collapse of what

1 was called the two tiers of liability here, as there  
2 was -- as this Court found there was not under the ADEA,  
3 is that the two tests look at two different things. In  
4 order to establish liability for intentional violation,  
5 you look at the volition of the defendant. That is, did  
6 the defendant treat someone differently on the --  
7 deliberately -- on the basis of a prohibited  
8 characteristic?

9 The further question that the jury has to  
10 consider in evaluating whether to exercise its  
11 discretionary moral judgment to consider punitive damages  
12 is the defendant's consciousness of wrongdoing.

13 QUESTION: Should it be the consciousness of the  
14 company itself or, in this case, the Association, or some  
15 lesser employee?

16 GENERAL WAXMAN: Well, clearly, the defendant in  
17 the case is the employer. And although this Court has  
18 never directly confronted the issue, the lower courts are  
19 unanimous that individual employees or supervisors may not  
20 be sued under Title VII and, I think presumably,  
21 analogously, under the Disabilities Act.

22 So, in a case, which I -- I agree with  
23 Mr. Schnapper, is not really presented here because the  
24 two officials that --

25 QUESTION: Well, I'm asking you for a principle.

1                   GENERAL WAXMAN:   Well --

2                   QUESTION:   Because I want to keep that in mind  
3   as we decide this case.   And what is your position on  
4   that?

5                   GENERAL WAXMAN:   I think our position on it,  
6   Justice O'Connor -- let me first say that, following this  
7   Court's decisions in Faragher and Ellerth last spring,  
8   there has already developed a split in the circuits,  
9   between the Fifth and the 11th Circuit, in cases, both  
10   coincidentally involving Wal-Mart, over whether the  
11   paradigm that this Court created in Faragher and Ellerth  
12   should be directly applied to punitive damages, or whether  
13   you should do what the -- whether you should start from  
14   the place this Court began in those cases.   Which is to  
15   say, we know we have to look at traditional agency  
16   principles and we have to look at the purposes of Title  
17   VII.

18                   Now, Justice Scalia was quite right that  
19   traditional agency principles apply differently in the  
20   case of punitive damages than they do in the case of  
21   compensatory damages.   In Faragher and Ellerth, this  
22   Court, I would say, expressed considerable doubt over  
23   whether somebody who was engaging in -- an employee or a  
24   supervisor engaging in sexual harassment that did not rise  
25   to the level of a tangible employment action could ever be

1 said to be acting within the scope of employment.

2 And I think that's correct. But the Court found  
3 that a comp -- an employer might, nonetheless, be liable  
4 because one could say that, with reference to traditional  
5 agency principles, the supervisor was aided in the agency  
6 relationship.

7 Now, at common law -- and this is reflected in  
8 Restatement -- the Restatement (Second) of Torts, 909, and  
9 the Restatement of Agency, 217(c), which are identical:  
10 An employer is vicariously liable for punitive damages  
11 only if the employee acted in a managerial capacity within  
12 the scope of employment.

13 Now, the -- the EEOC, prior to Faragher and  
14 Ellerth -- and I don't think this Court's opinion changes  
15 it any -- has taken the position that if a supervisor,  
16 vested with the company's authority to hire or fire, fires  
17 somebody in an act of intentional discrimination, the  
18 company -- the jury may consider whether or not punitive  
19 damages may be awarded.

20 QUESTION: But if the EEOC considers something  
21 like that, I mean, it's not on the basis of running jury  
22 trials, is it?

23 GENERAL WAXMAN: Well, no. But it -- it is --  
24 the EEOC -- these are the instructions that it requests  
25 from the jury, and this -- this is the position --

1 QUESTION: Well, why -- why does the EEOC have  
2 any business laying down jury instructions?

3 GENERAL WAXMAN: The EEOC, Your Honor, under  
4 Title VII, is a plaintiff -- is a plaintiff in very many of  
5 these cases.

6 QUESTION: So, you're talking about not the EEOC  
7 as an administrative body, but when it goes to court?

8 GENERAL WAXMAN: Oh, sure. The EEOC has no  
9 authority under the statute to dictate jury instructions.  
10 It does have general enforcement and interpretive  
11 authority with respect to Title VII. The question was,  
12 what position has the United States taken? And the United  
13 States is in court most frequently on this in the posture  
14 of the EEOC as a plaintiff.

15 QUESTION: Well, have you answered my question  
16 yet?

17 GENERAL WAXMAN: I haven't fin --

18 QUESTION: Because I'm not sure you have.

19 QUESTION: You're winding up, though.

20 (Laughter.)

21 GENERAL WAXMAN: I would -- our position,  
22 Justice O'Connor, is that in cases resulting in tangible  
23 employment consequences, as in this case, the EEOC --

24 QUESTION: By that, you mean not hiring?

25 GENERAL WAXMAN: Not fired -- not fired, not



1 hired, demoted, promoted. The way this Court used those  
2 terms in Faragher and Ellerth. In those cases --

3 QUESTION: Well, that's 90 percent of the cases,  
4 but go ahead.

5 GENERAL WAXMAN: In those cases, we believe that  
6 the -- the principle expressed in the Restatement, that if  
7 the employee acted in a managerial capacity and was within  
8 the scope of his employment, the company is liable for  
9 punitive damages in the jury's discretion. And we have --

10 QUESTION: Is that the same as the traditional  
11 agency principles for when you subject a company to  
12 punitive damages liability?

13 GENERAL WAXMAN: That -- that -- what I've told  
14 you --

15 QUESTION: Or is some variation of that?

16 GENERAL WAXMAN: Well, what I've -- the  
17 articulation I've given you is verbatim out of the  
18 Restatement of Torts. We have a -- maybe it's an  
19 interpretation of that -- we've interpreted "managerial  
20 capacity" to include regional supervisors and store  
21 managers who have authority to fire, where there is a  
22 tangible employment action.

23 In the area of sexual harassment, where there  
24 may not be a tangible employment relation -- consequence,  
25 as in the case -- as this Court considered in Faragher and

1 Ellerth -- as a result of Faragher and Ellerth, the EEOC  
2 is in fact at this point evaluating its position and  
3 trying to come to a conclusion as to the position that it  
4 will advocate in those cases, which actually have --

5 QUESTION: General Waxman, could --

6 GENERAL WAXMAN: -- almost never arisen.

7 QUESTION: Can I ask you, before you sit down,  
8 what charge would you request or what charge would you say  
9 fits with your interpretation of the law? How should a  
10 jury in this case, for example, be charged on the issue of  
11 punitive damages?

12 GENERAL WAXMAN: Well, I think that the jury  
13 ought to be charged in the language of the statute that  
14 Congress set out. That is, the jury ought to be told that  
15 before you can award punitive damages, you must --  
16 compensatory damages -- you must find that the defendant  
17 intentionally discriminated. That is, treated this  
18 person --

19 QUESTION: Suppose you have a case in which the  
20 employer tells the female employee, you're -- you're  
21 carrying a child, you're going to be a mother soon, we  
22 think this position is -- is just going to put too much  
23 stress on you, because women have special bonds with the  
24 child. A violation of the law, in -- insensitive, and yet  
25 a person who acts in good faith. Can the jury consider

1     that --

2                 GENERAL WAXMAN:  Well, that --

3                 QUESTION:  -- and say, well, this man was wrong  
4     under the law, but he acted in, really, her best interest,  
5     he wasn't malice -- malicious in the usual sense of that  
6     term; could the jury --

7                 GENERAL WAXMAN:  Well, if the -- if the -- if --

8                 QUESTION:  -- consider that among themselves in  
9     their own deliberations?

10                GENERAL WAXMAN:  The answer is certainly yes.  I  
11     would say further --

12                QUESTION:  Okay.  Then can -- can you instruct  
13     the jury that they could consider that?

14                GENERAL WAXMAN:  Well, with respect to punitive  
15     damages --

16                QUESTION:  Yeah, if you could complete the --  
17     you didn't get to finish what your instruction would be.  
18     So --

19                GENERAL WAXMAN:  No.  I think the instruction  
20     would be, and all the pattern instructions, not just with  
21     respect to this statute, but with respect to liability  
22     under the civil rights statutes generally, under Smith v.  
23     Wade, instruct the jury -- and may I just finish this  
24     sentence -- instruct the jury in the language of the  
25     statute.  Which is that you may consider but are not

1 required to impose punitive damages if you find that the  
2 defendant acted with malice or with reckless indifference  
3 to the employee's federally protected rights.

4 Thank you.

5 QUESTION: Thank you, General Waxman.

6 We'll hear from you, Mr. Fay.

7 ORAL ARGUMENT OF RAYMOND C. FAY

8 ON BEHALF OF THE RESPONDENT

9 MR. FAY: Mr. Chief Justice, and may it please  
10 the Court:

11 The fundamental difference in perspective  
12 between the two sides in this case is that the  
13 Petitioner's focus, exclusive focus, on the term "reckless  
14 indifference" ignores the fundamental starting point:  
15 that this is a statute about punitive damages. And when  
16 Congress uses the term "punitive damages" or other terms  
17 derived from common law in a statute, those terms, absent  
18 a contrary indication by Congress, have the same meaning  
19 as they do at the common law.

20 And at common law, there were three hallmarks of  
21 punitive damages. First, the focus is on the nature of  
22 the conduct, not purely the mental state, as the  
23 Petitioner says. Secondly, the conduct is outrageous or  
24 egregious. And, thirdly, the purpose is to punish or --  
25 or to deter. It's egregious conduct.

1 QUESTION: May -- may I just -- I'm just not  
2 quite sure I followed your argument. The -- the common  
3 law term that we are comparing this to is "punitive  
4 damages," or is it the common law meaning of the words  
5 "reckless indifference" and "malice"?

6 MR. FAY: It's both, Justice Stevens. Because  
7 this is a statute that says punitive damages may be  
8 awarded under a particular standard. And my point is that  
9 if we focus solely on the word "reckless" or  
10 "indifference," or the two together, we're losing sight of  
11 the fact that Congress was imposing punitive damages for a  
12 particular action here, and that -- and there is no  
13 indication the Congress was meaning anything other than  
14 the traditional meaning of punitive damages --

15 QUESTION: So, your answer would be different,  
16 and -- and you would -- would you concede that Plaintiff  
17 is correct, if instead of saying "punitive damages" it had  
18 been called "liquidated damages"? And the same thing, a  
19 jury may award liquidated damages if it finds the  
20 defendant acted with reckless indifference to the  
21 federally protected rights of the aggrieved individual?

22 MR. FAY: That may -- very well may be a -- a  
23 different signal, Your Honor. Because, for example, in  
24 the cases that were brought up before, the ADEA cases, the  
25 reference there, liquidated damages for a willful



1 violation, was to a statute -- that is, the Fair Labor  
2 Standards Act -- whereas the reference here is to punitive  
3 damages without embellishment, meaning we look to the  
4 common law.

5 QUESTION: Well, I'm -- I'm proposing liquidated  
6 damages without embell -- embellishment, or, say, if it  
7 had said statutory damages.

8 MR. FAY: And -- and my answer is that I agree  
9 that that may very well have a different meaning. Because  
10 punitive damages has a common law root, whereas liquidated  
11 damages does not.

12 QUESTION: How about civil penalties?

13 MR. FAY: Civil penalties come in different --  
14 different shapes. There is a rich body of law about what  
15 types of civil penalties there may be. Just using the  
16 term "civil pen -- penalties," I think --

17 QUESTION: Mr. Fay -- Mr Fay, I'm -- you said  
18 the -- the language, it's reckless indifference to the  
19 federally protected rights. The reckless indifference has  
20 a definite frame of reference in the statute.

21 MR. FAY: It certainly does. And that  
22 reference, first of all, is in the common law. And this  
23 Court, on many occasions -- a case in point in *Molzof v.*  
24 *United States -- States --* and *Smith v. Wade*, which is  
25 cited in the legislative history here, and from which the

1 words were borrowed to put -- to put those words in this  
2 statute. Reckless indifference is the equivalent of  
3 malice. It is the equivalence in the sense that, again,  
4 we look to the conduct. Because reckless indifference to  
5 federally protected rights means acting, or failing to  
6 act, in putting a person at substantial risk of serious  
7 harm. It's the consequences and the conduct that are  
8 focused --

9 QUESTION: No, but malice -- malice is conduct?

10 MR. FAY: Well, when -- again, the statute is  
11 framed this way. It says: the discriminatory practices  
12 are committed with malice or reckless indifference. The  
13 reference is always back to the discriminatory practice or  
14 the conduct.

15 QUESTION: Well, the reference is to the  
16 statute -- to the -- to the rights. The statute uses the  
17 word "rights."

18 MR. FAY: It also tells us, Justice Souter, that  
19 it is the -- it is the discriminatory practice that is  
20 done with respect to those rights. So, we look to both  
21 the mental state and the conduct.

22 QUESTION: And the mental state looks to rights,  
23 not to the conduct or consciousness of the conduct, or  
24 even consciousness of the tangible consequences of the  
25 conduct.

1 MR. FAY: It does both, Your Honor. And what --  
2 what our point is --

3 QUESTION: Well, at the very least, then, you  
4 agree that it does look to consciousness or -- or  
5 indifference to the existence of the sources of the legal  
6 rights?

7 MR. FAY: That's correct.

8 QUESTION: Okay.

9 MR. FAY: And what I'm saying is you can't  
10 divorce that from the conduct that's at issue. Otherwise  
11 what happens is you look at the mental state without  
12 regard to whether the underlying discriminatory conduct  
13 was serious enough to impose punitive damages, or even  
14 whether the underlying discriminatory conduct was a  
15 violation at all.

16 QUESTION: Why isn't it up to the jury? I mean,  
17 it's not as though the seriousness of it will -- will --  
18 will not come into the case. What we're talking about  
19 here is what -- what this language permits the factfinder  
20 to determine. And it'll usually be a jury, I assume.  
21 What -- what is the problem about letting the jury take  
22 into account the egregiousness issue? I suppose they may.

23 MR. FAY: They certainly would take it into  
24 account. But the -- but the test that's advocated by the  
25 Petitioner would be to usurp the traditional role of the

1 court in determining whether there is evidence of this  
2 higher standard of culpability in the statute to impose  
3 punitive damages. The Petitioner would say virtually all  
4 cases of intentional discrimination go to the jury.

5 QUESTION: Well, what --

6 QUESTION: I take it --

7 QUESTION: Isn't that what the statute says? I  
8 mean, that -- that's the -- the way I've read the  
9 statute -- and I'd like you to -- it's the same as what  
10 Justice Souter has been asking, and I think Justice  
11 Stevens.

12 MR. FAY: It is.

13 QUESTION: What it says specifically is the  
14 first question in these cases is, was there intentional  
15 discrimination, say, on the ground of gender? And,  
16 normally, they're defended on the ground that it was a  
17 pretext, that it wasn't a pretext. I fired her because  
18 she was always late. No, that's a pretext. You fired her  
19 because she was a woman. So, you have to establish the  
20 facts.

21 Once the facts are established, and if the  
22 plain -- the plaintiff wins on the facts, that means that  
23 the person has intentionally discriminated on the ground  
24 of gender. So, then, there'd be a second question: Did  
25 that defendant know that intentional discrimination

1 against a woman is illegal? And if the answer to that  
2 question is yes, he did know it's illegal, that's the end  
3 of this case; you can assess punitives.

4 Now, there's a third very rare situation, where  
5 the answer to the second question is no, he didn't know;  
6 he thought it was legal. I don't know that there's a  
7 human being in the United States who thinks it's legal,  
8 intentionally, to discriminate against women or on grounds  
9 of race. But if we find that human being, the next  
10 question would be -- the next question would be: should  
11 he have known -- now just should he have known, but should  
12 he really, really have known? That's reckless disregard.  
13 Okay.

14 Now, it seems to me that's what the statute  
15 says. And even though it means punitives now could be  
16 assessed pretty regularly with intentional discrimination,  
17 it might have meant there'd be far fewer cases at the time  
18 this was enacted, when people didn't know what the law is.  
19 But that's what it seems to say.

20 And if that's what it seems to say, what's the  
21 answer -- what's the argument that we should do something  
22 other than what it says?

23 MR. FAY: I -- I think that your second  
24 question, Justice Breyer, does not take into account what  
25 types of damages these are. These are punitive damages.



1 These are not damages that are assessed simply on a  
2 separate inquiry about what someone thinks. They are --  
3 they are based on a common law tradition of a more  
4 difficult standard of proof, and they are also based on  
5 the tying together of the discriminatory practice with the  
6 required mental state.

7 QUESTION: Mr. Fay, do I understand that you are  
8 riding -- putting your heaviest weight on the label  
9 "punitive damages"? That is, you answered me that if the  
10 statute had said liquidated damages or statutory damages,  
11 then you would have no problem with Justice Breyer, what  
12 he said is the proper; is that right?

13 MR. FAY: The second part of my answer to the --  
14 to your previous question, Your Honor, was that at common  
15 law, reckless indifference was, as stated in footnote 10  
16 of the Smith v. Wade opinion, the equivalent of malice.

17 QUESTION: Oh, so, then, the label doesn't  
18 matter, and you'd say the same thing, even if it said  
19 "liquidated damages" or "statutory damages" and not  
20 "punitive damages"? So, it's not --

21 MR. FAY: No. I -- I stand by my previous  
22 answer, that that tells us what the statutory reference  
23 point is. It is not liquidated damages, as in the ADEA,  
24 where the sole reference point --

25 QUESTION: So, suppose the label were

1 "liquidated damages." Then, is Justice Breyer's  
2 description of how the case would unfold correct?

3 MR. FAY: It would be very much closer to  
4 Justice Breyer's description.

5 QUESTION: Well, you're saying, I guess, then,  
6 that there's got to be deliberate indifference with  
7 respect to the -- to the -- to the right, as such, but  
8 there's got to be some egregiousness in addition to that.  
9 Does that -- are you saying there's got to be an egregious  
10 deliberate indifference?

11 MR. FAY: I'm saying that it -- it has to be, as  
12 part of it, in this statutory framework.

13 QUESTION: Well, if that's the case, then why  
14 doesn't deliberate -- egregious, deliberate indifference  
15 just collapse into malice? Because malice, I suppose,  
16 under this statute, the -- the paradigm example of  
17 malice -- would in fact be consciousness of the legal  
18 prohibition and intentional discrimination in the face of  
19 that consciousness.

20 MR. FAY: That's correct.

21 QUESTION: And I -- I don't know quite how I  
22 would draw a line between malice, in that sense of  
23 consciousness, and some kind of egregious degree of -- of  
24 indifference.

25 MR. FAY: Well --

1 QUESTION: I don't know how -- I don't know how  
2 a jury would ever tell them apart.

3 MR. FAY: The -- in terms of the classical  
4 definitions of malice, which is actual evil motive or  
5 intent to injure, and --

6 QUESTION: No, but you've just given -- I don't  
7 want to put words in your mouth if you don't want to take  
8 them -- but I thought you had -- had agreed with me that  
9 malice here probably means a -- an actual knowledge of the  
10 legal prohibition.

11 MR. FAY: Oh, it may --

12 QUESTION: You -- you don't agree with me on  
13 that?

14 MR. FAY: -- malice may have a actual intent  
15 which is irrespective of the knowledge of the requirements  
16 of the law.

17 QUESTION: Malice is an intent to be -- to be  
18 nasty, to hurt.

19 MR. FAY: Yes. Exactly.

20 QUESTION: You --

21 QUESTION: Gee, an actual intent to be nasty or  
22 to hurt may -- may well disprove the -- the sexual  
23 discrimination charge. I mean, it would usually be the  
24 defendant's defense. He'd come in and say, no, I didn't  
25 discriminate against this person because she -- she was a

1 woman. I just didn't like her. I really hated her. And  
2 I --

3 MR. FAY: And that's --

4 QUESTION: How could that be malice?

5 MR. FAY: And that's precisely why, Justice  
6 Scalia --

7 QUESTION: So, I think malice may well mean --  
8 malice may well mean actual knowledge that it's against  
9 the law, and nothing but that.

10 MR. FAY: Well --

11 QUESTION: Because you have to read it: malice  
12 or deliberate indifference. Deliberate indifference is  
13 always a lesser state of whatever malice is.

14 MR. FAY: That's true. But the -- but the  
15 reference point in the statute is to the discriminatory  
16 practice. So, if it's not a discriminatory practice  
17 that's committed with malice -- that is, to discriminate  
18 because the applicant was a woman, instead of personal  
19 animus -- then it wouldn't be discriminatory to begin  
20 with. You have to tie the two together by the structure  
21 of the statute.

22 QUESTION: Exactly. But you don't have to know  
23 that it's unlawful to be in violation of the statute.

24 MR. FAY: I agree -- I agree with that.

25 QUESTION: So, actual knowledge of unlawfulness

1 is malice; you agree with that?

2 MR. FAY: I -- I don't think you need actual  
3 knowledge of unlawfulness to get to malice. I think you  
4 need to commit the -- the intentional act, which may or  
5 may not relate to a consciousness of what the statute  
6 requires, with an evil motive or intent to injure that  
7 individual. And whether you even knew anything about the  
8 requirements of the Act, I don't think bears on that  
9 aspect of it.

10 QUESTION: Again, my problem isn't even an  
11 intention to injure. The individual negates, it seems to  
12 me, the -- the sex discrimination charge.

13 MR. FAY: If it's unrelated to the sex  
14 discrimination.

15 QUESTION: Well, but isn't discriminating  
16 against someone because of sex -- isn't that an intent --  
17 intent to injure them? You're denying them, say, a job  
18 promotion. And you're denying them because of -- because  
19 of their sex.

20 MR. FAY: And that is -- that is injurious. And  
21 in a case in which the conduct is serious enough, then it  
22 should go to the jury on the question of punitive damages.

23 QUESTION: But how -- you say the conduct is  
24 serious enough. But what more do we need?

25 MR. FAY: The -- the classic example of -- of



1 the difference between the two -- and Congress' intending  
2 to have only the more serious cases go to the jury -- is  
3 that this Court, in McDonnell Douglas v. Green, and  
4 follow-up cases, has established a paradigm of proof for  
5 intentional discrimination in which there may be very  
6 little known about what the employer thinks; that pretext  
7 alone may suffice, by judicial presumptions and  
8 inferences, to get to the jury on the question of  
9 intentional discrimination.

10 QUESTION: You don't suggest, Mr. Fay, that  
11 every time there's an intent to discriminate, there's also  
12 the intent to harm the individual? Supposing the police  
13 force decides they think, in a particular neighborhood,  
14 they'd like to promote an African American officer, so  
15 white officers didn't get the job. There's no intent to  
16 harm the white person, they just made perhaps an  
17 impermissible decision.

18 MR. FAY: And that would also be -- be true in  
19 the pretext cases.

20 QUESTION: Sure.

21 MR. FAY: It -- it is classified as intentional  
22 discrimination, but it certainly does not carry with it  
23 any reckless indifference to their rights or malicious  
24 intent.

25 QUESTION: Why? Why not? Why not, the pretext

1 was a pretext?

2 MR. FAY: Well --

3 QUESTION: The pretext was a pretext. There's a  
4 finding that the -- the person --

5 MR. FAY: Because a person could be --

6 QUESTION: -- on the facts, discriminated  
7 intentionally.

8 MR. FAY: Well, for example, an employer may be  
9 misguided in thinking that they need to foster affirmative  
10 action, when affirmative action might result --

11 QUESTION: If -- if in fact the employer thinks  
12 that if I'm doing this intentionally, I don't know if it's  
13 illegal, I agree that then you would have, on I think what  
14 I'm taking is the opposite theory from yours, as I said,  
15 that if the employer believes that intentional  
16 discrimination is not unlawful, then punitives would not  
17 be assessable unless he should have known that it was  
18 unlawful. I agree with that. So, maybe we don't agree.

19 Can I ask you one other question? Which is,  
20 why -- why, if the statute is -- I think is -- why should  
21 we fight so hard to resist eligibility for punitives in a  
22 statute that has two other checks? One is the check that  
23 the jury might not assess the punitive, but, more  
24 importantly, is the unusual check that the punitives are  
25 rather limited in amount? I think it's like \$300,000, or

1     \$30,000, or \$50,000, depending on the firm. Am I right  
2     about that?

3             MR. FAY: That's correct. The total cap is  
4     \$300,000 for the largest employers.

5             QUESTION: And so -- so, given the cap that's in  
6     the statute, why do we think that Congress would not have  
7     wanted them widely assessable?

8             MR. FAY: One answer I think is that there were,  
9     as this Court is aware, many, many compromises in reaching  
10    this -- this Act the second time around. And the caps and  
11    the punitive damages and the pun -- and the compensatory  
12    damages, at times, ran on different tracks. So, in a  
13    sense, the question of -- of what is the standard for  
14    punitive damages was decided apart from the very political  
15    compromise as to the caps.

16            And the -- the stigma and the seriousness of  
17    punitive damages, I would submit, should be decided apart  
18    from what the caps are, which might be amended tomorrow.

19            QUESTION: I -- I just want to make it clear  
20    what you're -- do -- do you agree that every time the  
21    employer knows, or should have known, that his official --  
22    or its official action is a violation of the law and the  
23    employer then proceeds to take that action in any event,  
24    that there is malice or reckless disregard?

25            MR. FAY: No.

1 QUESTION: All right. What -- what are the  
2 instances in which there is no malice or reckless  
3 disregard?

4 MR. FAY: If -- the instances are in which there  
5 is no risk of serious physical, psychological or, in the  
6 rare instance, economic, harm to the individual. And that  
7 analysis has to be done, in our view, in the first  
8 instance, by the district judge.

9 QUESTION: Was that true in this case?

10 MR. FAY: It was certainly true in this case.  
11 The judge decided that there was no evidence to satisfy  
12 the statutory standard. And the district court's comments  
13 were -- were based on the fact that the majority -- almost  
14 all of the evidence in this case was based on  
15 pre-selection and pretext.

16 QUESTION: But wasn't -- wasn't the woman, in  
17 her -- in her own mind and in her own psyche, injured,  
18 disturbed, et cetera, et cetera, et cetera?

19 MR. FAY: No. She did not claim any type of  
20 compensatory damages for pain and suffering or emotional  
21 distress and the like.

22 QUESTION: If she had, the result would have  
23 been different?

24 MR. FAY: If she --

25 QUESTION: If she said, you know, I really knew

1 I was discriminated against for being a woman -- woman,  
2 and it -- it hurt me very, very badly, it upset me,  
3 et cetera, et cetera?

4 MR. FAY: If there had been inter -- first of  
5 all, that would have qualified for -- for compensatory  
6 damages under the statute. And that's one of the big  
7 changes that was made in this law. Secondly, if the  
8 evidence had shown that there was interaction, to show  
9 that the -- the employer was punishing her or treating her  
10 poorly because she was having that reaction, that would be  
11 the type of case that would go to the jury; yes, Your  
12 Honor.

13 QUESTION: So -- so, you capture this by  
14 instructing the jury in terms of egregious behavior?

15 MR. FAY: I don't think you need to capture it  
16 by instructing the jury of that, because it's up to the  
17 judge to make the threshold determination. And then it  
18 would go to the jury on instructions which may --

19 QUESTION: Well, then -- then we capture it by  
20 putting the law of this Court, that it has to be egregious  
21 behavior?

22 MR. FAY: Because that's what's required at the  
23 common law.

24 QUESTION: And that all comes from the label  
25 "punitive," because the common law wasn't that way for



1 liquidated or statutory?

2 MR. FAY: It's more than from the label  
3 "punitive," Your Honor. Because, for example, if Congress  
4 wanted to modify the meaning of punitive damages, it could  
5 have done that, as, for example, it did with compensatory  
6 damages. It said you get compensatory damages here, but  
7 then it says certain things don't count as --

8 QUESTION: Why did it say malice or deliberate  
9 indifference, then, if it wasn't -- if it wasn't changing  
10 what -- what punitive damages were at the common law? Why  
11 didn't they just say the jury may award punitive damages,  
12 period?

13 MR. FAY: Because it was using as its reference  
14 point the case -- this Court's decision in Smith v. Wade,  
15 in which malice and reckless indifference were defined as  
16 standards for punitive damages under the common law. And  
17 it -- it, almost word for word, carried those words from  
18 the opinion into the statute. But this Court's decision  
19 in Smith v. Wade emphasizes that outrageous conduct is  
20 required to meet those standards of malice or reckless  
21 indifference.

22 And -- and the difference between our view and  
23 the Petitioner's is you don't focus simply on the state of  
24 mind; you have to focus on the discriminatory conduct.  
25 And it has to be serious enough to impose --

1 QUESTION: Let me just be sure about one thing.  
2 Your view is that this statute adopts the same standard  
3 that the majority adopted in Smith against Wade?

4 MR. FAY: I -- yes, I think that its common law  
5 roots are the same, Your Honor.

6 QUESTION: Did Smith and -- did Smith and Wade  
7 refer to indifference to rights?

8 QUESTION: Yes, it says callous indifference to  
9 the federally protected rights of others. It's the same  
10 language.

11 MR. FAY: That -- those were the very words --

12 QUESTION: Yeah.

13 MR. FAY: -- from Smith v. Wade that were  
14 incorporated here. The -- the main difference, of course,  
15 is that this was a decision of this Court explicating the  
16 common law, whereas Congress then embodied that into a  
17 statute. And the first question is: When Congress used  
18 those words in the statute, did it mean to alter the  
19 common law? There's a suggestion in the government's  
20 brief, and a footnote, that it did. There's nothing in  
21 the legislative history that shows that Congress intended  
22 to alter the common law in incorporating these words.

23 There's no reference as there was, for example,  
24 that we were trying to mimic --

25 QUESTION: Let me go one step further with you,

1 to be sure I -- there was a very sharp debate in Smith  
2 against Wade as to exactly what the common law did mean.  
3 And the majority took one view and the dissenters very  
4 persuasively argued the other view.

5 (Laughter.)

6 QUESTION: But your view is that the majority  
7 view is the one that we should follow?

8 MR. FAY: That's -- that's the rule which  
9 explicates the common law and was carried forward in this  
10 statute.

11 QUESTION: We usually do that, don't we?

12 (Laughter.)

13 MR. FAY: Yes, Your Honor.

14 QUESTION: Will you also clarify whether -- at  
15 one point you said that malice is a synonym for reckless  
16 indifference to the federally protected rights of the  
17 aggrieved individual, and at another point you seem to  
18 suggest that those two terms had discrete meanings. So,  
19 which is it? Does malice mean something different than  
20 reckless indifference to the federally protected rights?

21 MR. FAY: I -- certainly malice implicates the  
22 actual intent, and recklessness implicates more than  
23 negligence but less than the actual intent, in terms of  
24 looking at the mental state. What I was referring to was  
25 the passage in Smith v. Wade, in footnote 10, at 461 U.S.,

1 on page 43, and in the text, which says that reckless  
2 indifference implicates behavior that is so bad that it  
3 becomes the equivalent of malicious behavior. That's what  
4 I was referring to in that context. That is, in terms of  
5 the conduct.

6 QUESTION: So, but let's take these words  
7 written into this statute. It says "malice." And then it  
8 says "or reckless indifference to the federally protected  
9 rights." What you read suggests that there's no  
10 difference; that reckless indifference, when it's bad  
11 enough, becomes malice. But the statute seems to have two  
12 discrete categories. One is malice. The other reckless  
13 indifference to federally protected rights.

14 MR. FAY: And my point is -- is that the  
15 reckless indifference is not so radically different from  
16 the malice standard that it becomes a statutory standard  
17 whereby all cases of intentional discrimination would go  
18 to the jury. And --

19 QUESTION: Well, we've already established that  
20 there are some cases, like good faith but wrong judgment,  
21 about the exceptions under the law, the BFOQ, when you're  
22 allowed to make a religious preference.

23 MR. FAY: And our position on that, Your Honor,  
24 frankly, is that it's better not to establish any type of  
25 classes of cases that would be exempt from punitive

1 damages. Because as soon as someone says, well, the BFOQ  
2 case won't go to the jury, someone else will come back and  
3 say, well, that BFOQ really was not invoked in good faith;  
4 that was a sham; it was concocted after the fact. And if  
5 it's egregious enough, why shouldn't that case go to -- to  
6 the jury on punitive damages?

7 So, I don't think there should be any -- any --

8 QUESTION: Well, what egregious -- I mean, what  
9 do you mean by -- by an -- an egregious act? This Act  
10 only covers firing. It doesn't involve murder or torture  
11 or anything else. How can you -- how can you have a  
12 really egregious firing?

13 (Laughter.)

14 QUESTION: Unless -- unless it's the motive.  
15 Unless it's the motive, which -- which you assert is not  
16 the point.

17 MR. FAY: If you look at it in terms of -- of  
18 the risk of harm that someone is put to, it -- it -- there  
19 can be aggravating circumstances, where someone is put  
20 into a horrible mental state because of the actions that  
21 took place with the firing. Like I say, it's rare that  
22 it's going to happen in the economic context, but perhaps  
23 an --

24 QUESTION: So, if --

25 QUESTION: But you just said it's the conduct,



1 it's what the defendant does, not the -- I mean, punitive  
2 damage is not going to turn on whether the plaintiff is  
3 thin-skinned, is it?

4 MR. FAY: In -- earlier, I answered a question,  
5 saying that the interaction between the plaintiff and the  
6 defendant might make -- might show that the defendant's  
7 behavior is more serious.

8 QUESTION: I have it: Firing on Christmas Eve.  
9 That would do it, wouldn't it?

10 (Laughter.)

11 QUESTION: That is really --

12 MR. FAY: Timing has been an issue in the case  
13 law, at -- that is cited as one of the factors.

14 QUESTION: Well, why -- why isn't intentional --  
15 intentional discrimination -- you have to assume the facts  
16 show it -- we intentionally dismissed someone from her --  
17 her job on the basis, let's say, of gender, because she's  
18 a woman, or of race, and I -- the employer does it  
19 intentionally, for that reason, knowing that it's unlawful  
20 under the law of the United States; why isn't that  
21 egregious?

22 MR. FAY: It may -- it very well may be.

23 QUESTION: Just in and of itself? That,  
24 intentional discrimination on the grounds of race, knowing  
25 that that's illegal, no BFOQ things, et cetera. I mean,

1     that's it. Is that, in your opinion, egregious and goes  
2     to the jury?

3             MR. FAY: It very well could be. Because, in  
4     that case, the -- the Court is citing -- or Your Honor is  
5     citing an example where someone knows that, in terms of  
6     this statute, which protects against various types of  
7     discrimination, that harm is going to occur.

8             QUESTION: Well --

9             QUESTION: But you still -- to say it goes to  
10    the jury, you still have to resolve the question of  
11    whether the intent of the particular supervisor is going  
12    to be attributed to the corporation, don't you?

13            MR. FAY: Yes. And that -- that is -- and one  
14    thing I think we all agree here is that that precise issue  
15    is not before the Court. But I did want to -- to state  
16    that -- that we believe --

17            QUESTION: And it's not before -- before the  
18    Court why?

19            MR. FAY: Well, the -- the question of -- of the  
20    difference in standards that was referred to by  
21    Mr. Schnapper and the Solicitor General is not precisely  
22    before the Court. But we would submit that the higher  
23    agency principles, under common law, would apply to  
24    punitive damages. And common law --

25            QUESTION: The question presented is, in what

1 circumstances may punitive damages be awarded under Title  
2 VII of the 1964 Civil Rights Act? If that isn't included  
3 in the -- in the question presented, I don't know what is.

4 MR. FAY: In -- in direct response to the  
5 question, the -- I don't think the Petitioner or the  
6 Respondent briefed this issue at length. One of the  
7 amicus parties did. The Chamber of Commerce, in its  
8 brief, starting on page 22, did explicate the common law  
9 to show that there is -- there is no vicarious liability  
10 for punitive damages at common law. It is different from  
11 some of the things that we've been discussing today.

12 QUESTION: In your answer to Justice Breyer's  
13 question --

14 MR. FAY: Yes.

15 QUESTION: -- you said there's an intentional  
16 violation; why isn't that the end of the case?

17 MR. FAY: Because --

18 QUESTION: You said "It may very well be." But  
19 I need to know your description of those class --  
20 classifications of the cases where it is not so. I know  
21 it may very well be --

22 MR. FAY: One -- one way I can --

23 QUESTION: -- but I -- I want to know when it  
24 isn't.

25 MR. FAY: One way to describe the very

1 difference in approach between the Petitioner and the  
2 Respondent here is -- is to contrast the EEOC's policy  
3 guidance, which is referred to in the government's brief,  
4 and some of the examples that the government gives that  
5 would get you to the jury on punitive damages. And, for  
6 example, they say resentment of Federal civil rights laws.

7 Well, that may be unfortunate, that someone  
8 resents the civil rights laws, but that, in and of itself,  
9 should not get you to the jury on punitive damages. It is  
10 not tied to discrimination against the individual.

11 Another example that --

12 QUESTION: Where are you reading from?

13 MR. FAY: I -- I'm reading from pages 11 and 12  
14 of the government's brief, where it sets forth a list of  
15 things that would be examples to go to the jury. And I'm  
16 saying that those -- those examples that -- that the  
17 government gives, that have only to do with the isolated  
18 mental state, without reference to the discriminatory  
19 conduct in this case, are not appropriate for submission  
20 to the jury.

21 Sophistication of the employer is another one.  
22 That's -- that's something that should have nothing to do,  
23 because it doesn't have -- it doesn't describe the  
24 seriousness of the discriminatory conduct at issue.

25 The EEOC's policy guidance, also cited in note 7

1 of the government's brief, on page 11, is much more  
2 allegiant to the statutory standard.

3 QUESTION: Well, I'm glad we don't carry over  
4 the government's resentment of Federal civil rights law  
5 into the income tax.

6 (Laughter.)

7 QUESTION: May I go back to your answer to  
8 Justice Breyer's question for a different purpose? You  
9 said that if -- if there is in fact awareness of the -- of  
10 the Federal Civil Rights Act and a -- and an intentional  
11 discrimination in disregard of -- of what one knows is a  
12 legal duty, that -- that may very well be malice, and at  
13 least it would go to the jury.

14 MR. FAY: Yes.

15 QUESTION: You -- you've also said that the --  
16 that the indifference standard in the statute is -- is  
17 virtually identical, or tantamount, to that kind of  
18 malice. So, I suppose, in any case in which the -- the  
19 indifference is shown, that would at least get to the  
20 jury, too; is that right?

21 MR. FAY: In that instance, we are focusing  
22 solely on the mental state, and I think there is a  
23 difference to -- his question, as I understood it, was if  
24 somebody knew darn well that they were violating the law.

25 QUESTION: Well, the -- Justice Breyer's



1 question focused only on the mental state.

2 MR. FAY: That's right.

3 QUESTION: And -- and you said, yes, that would  
4 be enough to get to the jury.

5 MR. FAY: Because he was posing an example -- I  
6 thought Justice Breyer was posing an example where the  
7 employer knew that there was a violation of the law.

8 QUESTION: That's right.

9 MR. FAY: We get into a -- a different area -- a  
10 little bit different area where, instead of actual  
11 knowledge of an intentional violation, someone is acting  
12 recklessly as to -- as to whether or not those actions are  
13 in violation.

14 QUESTION: Right.

15 MR. FAY: But, again, I don't -- I don't think  
16 you can take any of that into consideration without  
17 looking at the statutory framework, which says we're  
18 talking about punitive damages --

19 QUESTION: Well, I -- I just -- I just want  
20 to -- to go further in terms of your answer to his  
21 question. And I -- and I guess my -- my question is,  
22 if -- if malice -- I'm sorry -- if knowledge -- if  
23 discrimination with knowledge of the Act goes to the jury,  
24 and the indifference is, I guess, virtually tantamount to  
25 that, why doesn't every indifference case also go to the

1 jury without anything more?

2 MR. FAY: Because both would require serious  
3 actions.

4 Thank you.

5 QUESTION: Thank you, Mr. Fay.

6 Mr. Schnapper, you have four minutes remaining.

7 REBUTTAL ARGUMENT OF ERIC SCHNAPPER

8 ON BEHALF OF THE PETITIONER

9 MR. SCHNAPPER: I'd like to respond to a number  
10 of the questions that have been asked by the Court by  
11 returning to the distinction I made at the outset between  
12 the statutory prerequisites and instructions that might be  
13 given to guide the discretion of the jury.

14 Section 1981a sets forth two and only two  
15 prerequisites: intent, first; and, second, either  
16 reckless indifference or malice. We don't think that the  
17 courts are at liberty to add a third prerequisite to that  
18 list. The statute says that if those requirements are  
19 met, punitive damages may be awarded.

20 Now, a number of the concerns the Court raised I  
21 think could properly be contained in guidance that would  
22 shape the jury's exercise of its discretion, but that's  
23 fundamentally different.

24 To return, for example, to the question put to  
25 me by Justice Scalia, Section 909 of the Restatement of

1 Torts contains very specific requirements, under agency  
2 principles, for the imposition of punitive damages. None  
3 of them are in the statute. The statute does not say  
4 indifference, reckless indifference, intent, and  
5 compliance with the principles of the Restatement of  
6 agency --

7 QUESTION: But in -- in the Faragher case last  
8 year, we certainly imported standards from the Restatement  
9 that weren't in the statute.

10 MR. SCHNAPPER: You weren't -- you weren't  
11 dealing with this specific statute, which is -- is  
12 quite --

13 QUESTION: Well, we weren't dealing with the  
14 same statute, but I -- I don't see why that bears on the  
15 desirability or vel non.

16 MR. SCHNAPPER: I --

17 QUESTION: I mean, this -- this statute is  
18 simply confusing to -- no -- no one can pretend that it's  
19 a clear guideline as to where -- where a court is to go.

20 MR. SCHNAPPER: I think that the text of the  
21 statute does -- does provide some guidance.

22 QUESTION: Well, look -- look at the way the  
23 Court of Appeals split on it. It suggests that reasonable  
24 people can surely differ as to what it means.

25 MR. SCHNAPPER: I don't want to characterize six

1 members of the D.C. Court of Appeals as unreasonable.  
2 But, in all fairness, the words "reckless indifference"  
3 could not possibly mean egregious conduct. That's simply  
4 not within the range of -- of possible meanings of those  
5 words.

6 QUESTION: Well, but I mean, the argument made  
7 by -- by your opponent is not an unreasonable one. It --  
8 it comes down to whether punitive damages is a term of  
9 art. And the -- the later limit -- the -- the later  
10 specification of malice and reckless indifference is a  
11 limitation upon normal punitive damages. Punitive damages  
12 may be awarded. That is, damages for egregious conduct.  
13 But only if there is malice or -- now, that's one way to  
14 read it.

15 And the other way to read it is -- is not as a  
16 term of art, and just to say, punitive damages -- that is,  
17 damages that punish the defendant -- may be awarded  
18 whenever there is malice or reckless indifference. It  
19 seems to me both readings are plausible ones.

20 MR. SCHNAPPER: I certainly wouldn't want to  
21 disagree with you as to whether that's plausible. But --  
22 but I think, in all fairness, that Congress has  
23 specifically address the prerequisites in -- in the  
24 statute. And it's spelled out, too --

25 QUESTION: The question is whether they are

1 limitations upon normal punitive damages or whether they  
2 are a re-description of what punitive damages consist of.  
3 And they could be either.

4 MR. SCHNAPPER: Either way, I don't think the  
5 Court is -- is free to add to them, and I don't think  
6 egregious conduct is a possible interpretation of -- of  
7 any provision in the statute.

8 QUESTION: Well, there was one brief, at least,  
9 that said, inherent in the very word "punitive damages" is  
10 this egregiousness notion. So, by using the word  
11 "punitive," Congress meant egregious.

12 MR. SCHNAPPER: I -- I think that that really is  
13 a stretch of the language. When Congress says "punitive  
14 dam" -- if Congress had said you can award punitive  
15 damages, it might make sense to look to the common law for  
16 standards. But when Congress goes ahead and spells out  
17 the standards that it has in mind, I don't think it's  
18 appropriate to add to them.

19 QUESTION: When the Court summarized its holding  
20 in Smith against Wade, did it use the word "egregious"?

21 MR. SCHNAPPER: It did not.

22 QUESTION: Suppose -- suppose it said  
23 compensatory damages may be awarded if there is malice  
24 or -- or reckless indifference. Now, in reading that,  
25 wouldn't you say that the damages that can be awarded can



1 be no more than the loss which the plaintiff incurred?  
2 Because the Congress used the word "compensatory damages."  
3 Wouldn't you read it that way?

4 MR. SCHNAPPER: I would agree, Your Honor.

5 QUESTION: Okay.

6 CHIEF JUSTICE REHNQUIST: Thank you,  
7 Mr. Schnapper. The case is submitted.

8 (Whereupon, at 11:04 a.m., the case in the  
9 above-entitled matter was submitted.)

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## CERTIFICATION

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CAROLE KOLSTAD, Petitioner v. AMERICAN DENTAL ASSOCIATION  
CASE NO: 98-208

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BY: *Liona M. May*  
(REPORTER)