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## Client Bulletin

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### **YOUR COMPANY'S GOOD FAITH EFFORTS TO COMPLY WITH ANTI-DISCRIMINATION LAWS CAN BAR PUNITIVE DAMAGE AWARDS.**

Punitive damages, or exemplary damages, are those that a judge or jury can award over and above compensatory damages, like lost wages, to punish a losing party's willful or malicious misconduct. However, the U.S. Supreme Court case, *Kolstad v. American Dental Assoc.*, ruled that employers may not be liable for punitive damages if they make good faith efforts to comply with anti-discrimination laws. Although employers may be liable for compensatory and economic damages when their employees discriminate, employers may not be liable for punitive damages if the actions are contrary to the employer's overall efforts to eliminate discrimination. The Supreme Court explained that to do otherwise would reduce an employer's incentive to implement anti-discrimination programs and educate themselves about Title VII restrictions.

*Well written anti-discrimination policies are a good start.* Interestingly, the Supreme Court noted that, in certain cases, the existence of a written policy instituted in good faith has operated as a total bar to employer liability for punitive damages. However, some lower court cases since *Kolstad* have ruled that certain policies were not sufficient to bar awarding punitive damages to the plaintiffs. For example, where the employer's only contention regarding its good faith efforts was that it encouraged employees to contact higher management with grievances; or where the employer only had a generalized policy of equality and respect for individuals in the workplace; or where the employer's anti-discrimination policies were too vague and did not include complaint mechanisms; or where the policy only prohibited sexual harassment, and did not include a section regarding race discrimination or other forms of illegal behavior. In other instances, the policies were not distributed uniformly to all employees; they were not posted in the workplace, and several management level employees, including the company president, testified at trial that they had not read the policies. These efforts were not sufficient to prevent plaintiffs from receiving punitive damage awards.

*Practice what you preach.* Some courts interpreting *Kolstad* note that it is not enough to simply have an anti-discrimination policy in place. For the good faith exception to apply there must be an anti-discrimination policy in both word and in practice. For example, where the employer's highest-level management employees knowingly violated the policy, one court found that the discriminatory actions by the policy-making managers constituted bad faith. On the other hand, some courts have barred plaintiffs from receiving punitive damages, where the employer established an anti-harassment policy that contained alternative complaint mechanisms, the policy was distributed to all its employees, and all employees received training on the policy; or where the employer had a policy prohibiting discrimination and providing a complaint mechanism, the plaintiff complained about alleged harassment as the policy provided, and his complaints were met with a swift and timely investigation.

## **SOLUTION:**

- Have a well written anti-discrimination policy in place.
- Review your policy to make sure it covers all the bases for discrimination, harassment and retaliation.
- Make sure the policy has an effective complaint mechanism.
- Distribute the policy and get written acknowledgments of employees reading and receiving it.
- Reinforce the policy through on-going training and education, at annual conferences or in company newsletters.
- Make sure complaints are handled swiftly and confidentially.

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