No. 07-1346

In the Supreme Court of the United States

FEDERAL EXPRESS CORPORATION,
DBA FEDEX EXPRESS, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the jury's award of punitive damages, in an amount well below the statutory cap on such damages, where the jury specifically found that petitioner acted with "malice or reckless indifference" to an employee's rights under the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*, and did not undertake good-faith efforts to comply with the law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 513 F.3d 360. The opinion of the district court denying petitioner's post-verdict motions (Pet. App. 38a-43a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 2008. The petition for a writ of certiorari was filed on April 22, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A jury in the United States District Court for the District of Maryland found petitioner liable for violating the Americans with Disabilities Act of 1990 (ADA), 42

U.S.C. 12101 *et seq.*, by failing to provide reasonable accommodations to an employee with a disability. The jury awarded compensatory and punitive damages for the violation, and the district court denied petitioner's motion for judgment as a matter of law or for remittitur of the punitive damages award. Pet. App. 38a-43a. The court of appeals affirmed. *Id*. at 1a-37a.

1. The ADA prohibits employers from discriminating against a qualified individual with a disability, and defines the term "discriminate" to include failure to provide a reasonable accommodation. 42 U.S.C. 12112(a) and (b)(5)(A). The ADA incorporates the remedial provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* See 42 U.S.C. 12117(a). In 1991, Congress expanded the remedies for intentional discrimination under both Title VII and the ADA by providing for compensatory and punitive damages. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1072 (42 U.S.C. 1981a(a)(1) and (2)).

Section 1981a authorizes punitive damages in only those cases where a complaining party demonstrates that the employer not only discriminated unlawfully, but did so "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. 1981a(b)(1). Section 1981a further provides that an employer will not be liable in damages for violation of the ADA's reasonable-accommodation requirement if the employer can demonstrate its "good faith efforts" to identify and provide a suitable accommodation. 42 U.S.C. 1981a(a)(3). In addition, Section 1981a imposes a $300,000 cap on the total amount of compensatory and punitive damages that a plaintiff may recover from an employer of petitioner's size. 42 U.S.C. 1981a(b)(3)(D).

2. Ronald Lockhart has been profoundly deaf since birth. He is unable to speak or to read lips, but he is fluent in American Sign Language (ASL), which is his primary language. Lockhart uses ASL to communicate with his wife, who is also deaf, and his children. Pet. App. 3a. English is Lockhart's second language, and his use of written English is "not very good." *Id.* at 8a (quoting C.A. App. 224).

Lockhart applied to work part-time for petitioner as a package handler at the company's facility at what is now Baltimore-Washington International Thurgood Marshall Airport (the BWI Ramp). Pet. App. 3a. Lockhart requested an ASL interpreter for his job interview, but the Operations Manager for the BWI Ramp, Ronald Thompson, denied this request. Lockhart had to bring a friend to translate during the job interview and, after he was hired, at the multi-day orientation session. *Id.* at 6a.

Thompson informed his immediate supervisor, Pat Hanratty, that he had hired a deaf employee. Upon receiving this information, "Hanratty immediately 'ask[ed Thompson] why' he had done so." Pet. App. 6a.

Lockhart's job duties at the BWI Ramp included sorting, scanning, and stacking packages and letters. Lockhart did not need or request any ADA accommodations for his routine job duties. Pet. App. 6a-7a. Petitioner, however, also required its employees to attend daily briefings before each work shift and various employee meetings and training sessions at less frequent intervals. Petitioner used these mandatory sessions to address "essential topics for its employees, such as workplace safety, job training, and employee benefits." *Ibid.* Without an ASL interpreter or other accommodation, Lockhart was not able to understand the content of

these briefings, training sessions, and other meetings. *Id*. at 7a. Lockhart repeatedly asked his supervisors for accommodations that would allow him to understand these sessions; specifically, he asked for complete written notes from the daily briefings and for ASL translation or closed-captioned videos at the monthly meetings so he could understand and participate in these sessions. *Ibid*.

Soon after Lockhart started work, Victor Cofield replaced Thompson as Lockhart's supervisor and as the point of contact for many of Lockhart's requests for accommodation. Pet. App. 7a. Although Cofield was aware of Lockhart's disability, he routinely ignored Lockhart's requests for accommodation, or provided accommodations that Lockhart found inadequate. *Id.* at 7a-9a. Cofield had received no ADA training from petitioner, even after he specifically asked Hanratty for ADA training. *Id.* at 12a-13a.

For his first two years of employment, Lockhart was never given ASL translation of any live presentations; received meeting notes only occasionally, and then only in incomplete form; and sometimes did not even have the benefit of closed-captioning on videotaped training materials. Pet. App. 7a-8a. Because Lockhart could not understand much of the training he received, petitioner directed "team leader[s]," and eventually Cofield himself, to sit with Lockhart during the written tests that followed these training programs and even to answer the test questions for him if Lockhart answered incorrectly. *Id.* at 9a. Lockhart later testified that he was "very embarrass[ed]" by these test-taking arrangements because his co-workers knew about them and necessarily assumed Lockhart was "just stupid." *Ibid.*

Petitioner's failure to provide accommodations also delayed Lockhart in obtaining the security badge required of airport employees following the September 11, 2001 attacks. For several months, Lockhart worked without the mandatory badge and feared he would be fired or laid off for noncompliance with federal aviation regulations. Pet. App. 10a.

Lockhart filed a formal charge of disability discrimination with the Equal Employment Opportunity Commission (EEOC) on October 17, 2001. Pet. App. 4a. The charge was served on Hanratty, who was petitioner's Senior Operations Manager at the BWI Ramp, responsible for all personnel matters at that location. *Id.* at 12a, 14a. Hanratty was familiar with the ADA and its reasonable-accommodation requirement. He had also received ADA training from petitioner and was familiar with the its internal ADA compliance policy, which states that petitioner "provides reasonable accommodation in the employment of the handicapped upon request where such accommodation does not cause undue hardship" and gives examples of reasonable accommodations. *Id.* at 12a & n.4 (citation omitted). Hanratty did not inform Cofield of the EEOC charge, nor did Hanratty attempt to verify whether his subordinates were addressing Lockhart's ADA accommodation needs properly. *Id.* at 14a. Furthermore, although Hanratty knew that petitioner employed deaf individuals at its nearby facility at Dulles International Airport, he did not share that information with Cofield, nor did he consult with the Dulles manager himself. *Id.* at 12a.

Beginning in 2002, Cofield gradually began to provide Lockhart with some accommodations, including occasional assistance by a certified ASL interpreter. Sometime in the fall of 2002, Cofield also began ordering

training videos with closed-captioning. Petitioner still did not provide Lockhart with ASL assistance for daily briefings, training sessions, or quarterly meetings with Hanratty and petitioner's other senior management. Pet. App. 11a, 14a. During this time, Cofield made a number of inquiries with senior officials about the substance of the company's obligation under the ADA to provide reasonable accommodation; none of these officials referred him to petitioner's written ADA policy. *Id.* at 12a-14a. Only after making these inquiries and gradually increasing the assistance made available to Lockhart did Cofield learn of Lockhart's EEOC charge. *Id.* at 14a.

After hearing that Lockhart had filed an EEOC charge, Cofield began, on a consistent basis, to provide Lockhart with written notes on the daily staff briefings. Cofield also began providing Lockhart with "bulleted outlines" for some of the monthly meetings. These were not comprehensive notes, however, and Cofield made these outlines available to Lockhart for only some, but not all, of the monthly meetings. Pet. App. 11a. In January 2003—nearly three years after Lockhart began working at the BWI Ramp—Cofield finally provided Lockhart with the approved form for requesting disability accommodations. *Ibid*. Petitioner terminated Lockhart's employment later that month. *Ibid*.

3. The EEOC investigated Lockhart's charge of disability discrimination and attempted to resolve it through conciliation. When those efforts were unsuccessful, the EEOC brought this action against petitioner in the United States District Court for the District of Maryland, alleging that petitioner was liable under the ADA for failing to provide Lockhart with a reasonable accommodation so he could participate in the employee

meetings and training sessions that he was required to attend. The case proceeded to trial. Pet. App. 4a-5a.

At trial, the jury was instructed that, to award punitive damages, it had to find, first, "that a higher management official of [petitioner] personally acted with malice or reckless indifference to Mr. Lockhart's federally-protected rights" and, second, that petitioner itself did not "act[] in good faith in an attempt to comply with the law by adopting policies and procedures designed to prohibit such discrimination in the workplace." Pet. App. 16a. Petitioner did not preserve any objection to these instructions. See *id.* at 16a, 23a n.10, 24a.

The district court clarified the good-faith issue by explaining that for an employer to avoid liability for the misdeeds of its managers, the actions of its managerial employees must have been "contrary to the employer's own good faith efforts to comply with the law by *implementing* policies and programs designed to prevent such unlawful discrimination in the workplace." Pet. App. 16a (emphasis added) (citation omitted). The district court further explained that a "party that . . . delays the interactive process is not acting in good faith" and that a "party who fails to communicate, by way of initiation or response, may also be acting in bad faith." *Id.* at 17a (citation omitted).

The jury returned a verdict against petitioner. In a special verdict, the jury found that petitioner had discriminated against Lockhart by failing to offer him reasonable accommodation for his disability; that "a higher management official of [petitioner] acted with malice or reckless indifference to [Lockhart's federally protected rights," and that petitioner "did *not* act in a good faith attempt to comply with the law by adopting policies and procedures designed to prohibit such discrimination."

Pet. App. 17a (citation omitted). The jury awarded $8,000 in compensatory damages and $100,000 in punitive damages. *Ibid*.

4. The district court denied petitioner's post-trial motion for judgment as a matter of law as to the punitive damages or, in the alternative, for a remittitur. Pet. App. 38a-43a. Petitioner contended that there was no evidentiary basis for the jury to find that any of its managers acted in disregard of Lockhart's needs because Cofield and Hanratty eventually provided Lockhart with "reasonable accommodations such as notes, meeting handouts, and closed-captioned videotapes." *Id*. at 40a. Petitioner further contended that, in any event, it had proven beyond dispute that it made good-faith attempts to comply with the ADA because "it implemented a company wide anti-discrimination policy regarding disabled employees." *Ibid.* The district court rejected these contentions as insufficient to justify setting aside the jury award and held that the jury's verdict was supported by sufficient evidence. *Id.* at 40a-41a.

5. The court of appeals affirmed. Pet. App. 1a-37a. As relevant here, the court agreed with the district court's assessment that there was sufficient evidence in the record to support the jury's award of punitive damages.

The court of appeals recognized that, under Section 1981a and this Court's precedent, an award of punitive damages under the ADA (or Title VII) requires a finding that the employer "acted with the requisite state of mind," which is, "at a minimum, * * * 'recklessness in its subjective form.'" Pet. App. 21a (quoting *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 536 (1999)). Proof of recklessness requires "at least" a showing that an employer "discriminate[d] in the face of a perceived risk

that its actions [would] violate federal law." *Ibid.* (quoting *Kolstad*, 527 U.S. at 536). The court also recognized that an employer is *not* vicariously liable for punitive damages if the employer's managerial agents acted "'contrary to the employer's good-faith efforts to comply with' the applicable federal law." *Ibid.* (quoting *Kolstad*, 527 U.S. at 545).

With respect to the first question, the court first noted that the uncontested evidence established that both Hanratty and Cofield qualified as managerial employees whose actions could be attributed to the company, and that petitioner did not contest that conclusion. Pet. App. 22a-23a. The court then concluded that the evidence was sufficient to support a finding that either Hanratty or Cofield "discriminated in the face of a perceived risk that the decision would violate federal law." *Id.* at 22a; see *id.* at 24a-27a.

The court of appeals rejected petitioner's argument that the evidence showed that "Cofield and Hanratty * * * 'believed they were making sufficient accommodations' for Lockhart" and therefore did not act recklessly. Pet. App. 23a (quoting Pet. C.A. Br. 23).[1] The court concluded that the jury could rationally have found that Hanratty knew that Lockhart was deaf; knew that the ADA and petitioner's internal policy required reason-

[1] The court of appeals noted that in prior cases, it had found evidence sufficient to support a jury finding of "perceived risk" "where the employer's managerial agent had 'at least a rudimentary knowledge' of the import of a federal anti-discrimination statute." Pet. App. 24a (quoting *Anderson* v. *G.D.C., Inc.*, 281 F.3d 452, 460 (4th Cir. 2002)). Here, by contrast, petitioner admitted that Hanratty and Cofield "knew that accommodations were required," and it contended only that the two officials allegedly thought they were providing sufficient accommodations. *Id*. at 23a (quoting Pet. C.A. Br. 23).

able accommodation; and despite this knowledge, took no action to see that his subordinates were taking appropriate steps to accommodate Lockhart's needs, even after Lockhart filed an EEOC charge. To the contrary, under Hanratty's management, Lockhart's supervisors repeatedly denied and ignored Lockhart's requests for accommodation. And Hanratty failed to provide Cofield with ADA training even after Cofield requested it. *Id.* at 25a-26a. The court also determined that the jury could have reached a similar conclusion with respect to Cofield. See *id.* at 26a.

With respect to either one of these supervisory employees, the court of appeals held, the trial evidence was sufficient for the jury to find "that a managerial official of [petitioner] perceived the risk that his failure to provide Lockhart with reasonable accommodations would contravene the ADA." Pet. App. 27a. Therefore, the court concluded that the evidence supported a finding that "[petitioner] had acted, in *Kolstad*'s terms, with 'recklessness in the subjective form.'" *Ibid.*

Turning to the second question, the court of appeals rejected petitioner's argument that the adoption of an ADA compliance policy and an internal grievance policy for handling employee complaints demonstrated as a matter of law that petitioner had "acted in good faith to comply with the ADA." Pet. App. 27a. The court noted that an employer must do more than simply maintain a policy; it "must also take affirmative steps to ensure its implementation." *Id.* at 27a-29a. "On the evidence," the court concluded, "the jury was entitled to find that [petitioner] failed to sufficiently take affirmative steps to ensure the implementation of its ADA compliance policy with respect to Lockhart." *Id.* at 29a. In particular, the court noted, petitioner repeatedly failed to provide

proper training and guidance to Cofield concerning the ADA requirements, despite repeated requests by Cofield and knowledge by the company that Cofield was supervising a deaf employee who needed accommodation. *Id*. at 29a-30a.

Petitioner also argued that its internal grievance procedure was evidence of its good-faith efforts, but the court of appeals held that the jury could reasonably have found that petitioner had never made this procedure available to Lockhart—indeed, that petitioner had taken years even to provide him with the company's form for requesting accommodation. Pet. App. 27a, 30a. "[I]n the context of this case," the court concluded, the evidence supported the view that petitioner's "commitment to implementing its grievance process did not go beyond including the procedure in" its human-resources manual. *Id.* at 31a.

Because the court of appeals found sufficient evidence to sustain the jury's key findings—that petitioner's supervisory employees acted with reckless disregard for Lockhart's rights, and that petitioner's implementation of its nondiscrimination policy did not sufficiently show the good faith necessary to exonerate petitioner from liability—it affirmed the award of punitive damages.

ARGUMENT

The court of appeals properly reviewed the punitive-damages award within the parameters that this Court set out in *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999). The court's approach is also consistent with that used in other circuits, and its conclusion is amply supported by the trial record in this case. Further re-

view of petitioner's fact-bound challenge to the jury verdict is therefore unwarranted.

1. Petitioner incorrectly suggests (Pet. 9, 10) that the court of appeals' standard for evaluating supervisors' subjective intent conflicts with this Court's decision in *Kolstad*. In fact, the court of appeals drew its standard directly from this Court's opinion, and its application of that standard is consistent with the governing statute as this Court has interpreted it.

The court of appeals recognized that a supervisor acts "'with reckless indifference to [an employee's] federally protected rights'" when the supervisor acts despite "perceiv[ing a] risk that the decision would violate federal law." Pet. App. 21a, 22a (quoting 42 U.S.C. 1981a(b)(1)). That interpretive gloss is fully consistent with *Kolstad*, in which this Court construed Section 1981a(b)(1) for the first time. The Court explained that it would "gain an understanding of the meaning of * * * 'reckless indifference,' as used in § 1981a, from" *Smith* v. *Wade*, 461 U.S. 30 (1983), an earlier decision that involved punitive damages under 42 U.S.C. 1983. *Kolstad*, 527 U.S. at 535. In *Smith*, the Court had made clear that a punitive-damages award requires either malice or "recklessness in its subjective form." *Id.* at 536. That form of recklessness, the Court specified in *Kolstad*, involves knowledge of "a risk of illegality or injury" and a decision to proceed with "'conscious indifference to [the] consequences.'" *Ibid.* (quoting 1 Theodore Sedgwick, *A Treatise on the Measure of Damages* § 368, at 529 (8th ed. 1891)). See also *Smith*, 461 U.S. at 38 n.6 (explaining that recklessness may involve "indifference toward or disregard for consequences"). "Applying this standard in the context of § 1981a," the Court concluded that "an employer must at least discriminate

in *the face of a perceived risk that its actions will violate federal law* to be liable in punitive damages." *Kolstad*, 527 U.S. at 536 (emphasis added).

Petitioner suggests that examining mere "awareness" of a risk is insufficient and that punitive damages should be imposed only when an employer acts from a "'bad motive.'" Pet. 8-9 (quoting *Kolstad*, 527 U.S. at 538). But in both *Kolstad* and *Smith* this Court took care to give the statutory term "reckless indifference" independent force, rather than treat it as essentially synonymous with malice as petitioner appears to advocate here. See *Smith*, 461 U.S. at 38 n.6 (explaining that recklessness involves "[c]onsciousness of consequences or of wrongdoing" but not necessarily "injurious intent or motive"); *Kolstad*, 527 U.S. at 536.

As this Court recognized in *Kolstad*, the recklessness standard ensures that employers will not be held liable for punitive damages when they attempt in good faith to conform their conduct to the requirements of the law. For example, employers may believe that they are not required to offer particular accommodations, or that the steps they have already taken are sufficient. See *Kolstad*, 527 U.S. at 536-537 (noting that "intentional discrimination [will] not give rise to punitive damages liability" when "the employer discriminates with the distinct belief that its discrimination is lawful"). But, under *Kolstad*, a jury may find that an employer that is fully aware of the ADA's requirements, but disregards the risk that its inaction will violate those requirements, has acted recklessly and is therefore susceptible to punitive damages. The court of appeals properly applied that principle here. Indeed, there was ample evidence that Hanratty was unconcerned about complying with the ADA. See, *e.g.*, Pet. App. 25a-26a.

Thus, petitioner is incorrect in asserting (Pet. 9) that the decision below "will allow the issue [of punitive damages] to go automatically to the jury in every ADA case involving the interactive process, regardless of the employer's state of mind in attempting to comply with its obligations." Pet. 9; see Pet. 11-13, 19. First, as explained above, in this case the court of appeals properly affirmed punitive-damages liability based on record evidence of petitioner's *reckless* failure to accommodate, not just the mere fact that petitioner ultimately was found not to have accommodated Lockhart.

Second, even where the evidence demonstrates such reckless disregard on the part of an employer's managerial agents, an employer can avoid the imposition of punitive damages by demonstrating that it engaged in good-faith efforts to comply with the law. Pet. App. 22a-23a, 27a-31a; see also *Kolstad*, 527 U.S. at 545-556. The Fourth Circuit expressly applied *Kolstad*'s "good faith" standard here. See Pet. App. 22a (citing *Lowery* v. *Circuit City Stores, Inc.*, 206 F.3d 431, 443-445 (4th Cir.), cert. denied, 531 U.S. 822 (2000)); *id.* at 27a-31a. Petitioner ignores this component of the Fourth Circuit's analysis. See, *e.g.*, Pet. 18 (asserting that "the knowledge of FedEx of its ADA obligations and the jury's finding of liability * * * were the *only* factors that the Fourth Circuit required to warrant punitive damages") (emphasis added).

Petitioner therefore errs in asserting that employers' knowledge of the ADA will alone be enough to subject them to punitive damages liability for any ADA violation. Moreover, the good-faith principle, which ensures that employers have an incentive to "detect and deter" discrimination, *Kolstad*, 527 U.S. at 545-546, answers petitioner's objection (Pet. 9) that the court of appeals'

standard will "discourage[] efforts to comply with the ADA." This same purpose is reflected in Section 1981a's "good faith" provision, which permits an employer to avoid punitive damages in the context of ADA reasonable accommodation claims by "demonstrat[ing] good faith efforts, in consultation with the person with the disability * * * to identify and [provide an effective] reasonable accommodation." 42 U.S.C. 1981a(a)(3). The Fourth Circuit had no occasion to apply the statutory "good faith" defense in this case, however, because petitioner never raised it below (nor would it be supported by the facts, which show that petitioner repeatedly ignored Lockhart rather than "consult[] with" him about a reasonable accommodation).

2. Petitioner's allegations of a circuit conflict rest on its inaccurate characterization of the court of appeals' holding here. In fact, the decision below comports with all of the other appellate decisions applying *Kolstad*'s standard for determining when an employer has acted in "reckless indifference" to an employee's ADA rights. Where the evidence has shown the employer's awareness of the law and subjective consciousness that it might be violating the law, combined with actions (or inaction) that demonstrated the employer's indifference to its legal obligations, courts of appeals have upheld punitive damages. Where, on the other hand, the evidence has demonstrated that the employer reasonably believed that its actions complied with the ADA or had no awareness that its actions might violate the ADA, courts of appeals have found the evidence insufficient to support punitive damages, even where the evidence has supported the finding of an ADA violation. This is the inquiry established by *Kolstad*, and petitioner identifies no conflict concerning its application. The difference in

outcomes among these cases is simply the result of applying the same legal standard to different facts.

a. Petitioner incorrectly asserts (Pet. 18) that the court of appeals in this case joined the Tenth Circuit in applying a "diminished standard." That description inaccurately characterizes the decision below, as shown above, and it also inaccurately describes the law in the Tenth Circuit. In the decision petitioner cites, *EEOC* v. *Heartway Corp.*, 466 F.3d 1156 (10th Cir. 2006), the court of appeals held that the jury could consider punitive damages based on evidence of the employer's reckless disregard for the employee's ADA rights. The jury found that an employee was regarded as disabled as a result of hepatitis C and that a supervisor had fired her because of that perceived disability. *Id.* at 1159-1160, 1169. From the supervisor's testimony, the jury could have concluded that he knew "that it was a violation of the ADA to fire someone because they were disabled due to having hepatitis." *Id.* at 1170 (emphasis omitted). The supervisor therefore acted "in the face of a perceived risk that [his] actions would violate federal law," and fired the employee anyway. *Id.* at 1169 (citation omitted). Thus, the evidence of recklessness did not consist only of the supervisor's knowledge of federal law and the ultimate finding of disability; it also included his disregard of the legal risk from his actions, which (as discussed above) suffices to prove recklessness.[2]

[2] The employer apparently did not attempt to avail itself of the "good faith" defense, but the Tenth Circuit has recognized in other cases that an employer will be immune from punitive-damages liability if it knows of its ADA obligations and makes a good-faith effort to implement them. See, *e.g.*, *EEOC* v. *Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1248-1249 (1999).

b. Properly understood, the decisions of the Fourth and Tenth Circuits are consistent with those of other courts of appeals. For instance, the case on which petitioner principally relies, *Gile* v. *United Airlines*, 213 F.3d 365 (7th Cir. 2000), applied the identical principles. The *Gile* court concluded that, as a factual matter, the employer had not disregarded the risk of an ADA violation but had actively sought to avoid it—albeit unsuccessfully. The employer relied on its regional medical director to evaluate Gile's claim of psychological disability; the medical director concluded that Gile was not disabled and in any event could not be accommodated through the shift transfer she requested. *Id.* at 369-370, 375-376. Thus, "United did not exhibit the requisite reckless state of mind regarding whether its treatment of Gile violated the ADA." *Id.* at 376.

Similarly, in *Sturgill* v. *United Parcel Service*, 512 F.3d 1024 (2008), the Eighth Circuit concluded that an employer's failure to reasonably accommodate an employee's religious belief did not warrant punitive damages, because the employer had acted on its good-faith belief that accommodation would disrupt its business operations and therefore was not legally required. See *id.* at 1035. The thoughtful process that the employer followed in that case, even though ultimately found inadequate, demonstrated that the employer's decision-makers did not act with reckless indifference to the employee's Title VII rights. *Ibid*.

Unlike those decisions, this case involves ample evidence from which to sustain the jury's verdict that one or more supervisors not only knew of the ADA's obligations but recklessly disregarded them. There was no good-faith dispute about Lockhart's disability or about whether he truly needed accommodation. Nor was there

any good-faith reliance on one of the ADA's defenses, such as undue hardship to business operations, 42 U.S.C. 12112(b)(5)(A). Furthermore, here petitioner was given the opportunity to exonerate itself from punitive-damages liability by showing its own good faith. Petitioner failed to convince the jury and does not challenge that fact-bound finding here.

Petitioner's remaining case, *Weissman* v. *Dawn Joy Fashions, Inc.*, 214 F.3d 224 (2000), likewise presents no conflict. In *Weissman*, the Second Circuit applied the "perceived risk" standard from *Kolstad* to an ADA claim. *Id.* at 235. The court found no evidence to "support a finding that Dawn Joy discriminated 'in the face of a perceived risk that its actions will violate federal law.'" *Id.* at 236 (quoting *Kolstad*, 527 U.S. at 536). Indeed, even the plaintiff admitted that his evidence on this point was "not . . . compelling," and he principally relied on an alternative theory of punitive damages based on the employer's litigation conduct. *Id.* at 235-236. The court decided the case based on the factual record, and did not rely on any legal principle about whether knowledge of ADA obligations suffices; indeed, the court of appeals did not discuss *at all* the extent to which the employer knew of and reasonably assessed its ADA obligations. See *ibid.*

Other courts of appeals have similarly applied *Kolstad*'s punitive damages standard in the context of ADA accommodation claims, with consistent results on similar facts. In *Gagliardo* v. *Connaught Laboratories, Inc.*, 311 F.3d 565 (2002), the Third Circuit upheld a jury's award of punitive damages under a "reckless indifference" standard, citing *Kolstad*'s discussion of "perceived risk." The Third Circuit explained that the employer had known Gagliardo had multiple sclerosis, and that

the company human-resources representative had understood the limitations imposed by the disease, had been aware of Gagliardo's numerous requests for accommodation, and had been familiar with the ADA's requirements. The court held that the employer's refusal to act on any of Gagliardo's multiple requests for accommodation, notwithstanding that knowledge, established the necessary predicate for a punitive-damages award. *Id.* at 573.

More recently, in *EEOC* v. *E.I. Du Pont de Nemours & Co.*, 480 F.3d 724 (2007), the Fifth Circuit applied *Kolstad*'s punitive damages standard in affirming a jury's punitive-damages award for violation of the ADA where the evidence showed that the employer "was aware of its responsibilities under the ADA" but "made [the plaintiff's] job more difficult" over time rather than attempting to accommodate her physical difficulties. *Id.* at 733. The Fifth Circuit concluded that the jury could reasonably have found that the employer "perceived [the] risk that its actions [would] violate" the ADA, *id.* at 732 (quoting *Kolstad*, 527 U.S. at 536), based on evidence that the employer knew the employee had a medical condition that made it difficult for her to walk, but placed her computer printer more than 100 feet from her desk, whereas other employees' printers were adjacent to their desks. The employer also refused to allow her to demonstrate her ability to evacuate, and then terminated her for an alleged inability to evacuate. *Id.* at 733.

Nothing in these courts' statements of the relevant legal standard (all of which were drawn directly from *Kolstad*) or the application of that standard to particular facts indicates any division among the circuits on this legal issue. Petitioner in essence presses a fact-bound

dispute over the sufficiency of the evidence presented to the jury in this case. Further review of that claim is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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