No. 18-533

In the Supreme Court of the United States

CONTRICE TRAVIS, PETITIONER

v.

EXEL, INC.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (42 U.S.C. 2000e *et seq.*), makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1). The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, authorizes punitive damages against private-sector employers that engage in intentional discrimination "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. 1981a(b)(1). In addition to showing such malice or reckless indifference, the plaintiff "must impute liability for punitive damages" to the employer. *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 539 (1999).

The question presented is whether to impute liability to respondent for punitive damages based on the discriminatory conduct of a local facility manager.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-49) is reported at 884 F.3d 1326. The order of the district court (Pet. App. 50-82) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 2018. A petition for rehearing was denied on June 7, 2018 (Pet. App. 83-86). The petition for a writ of certiorari was filed on September 4, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The U.S. Equal Employment Opportunity Commission (EEOC) brought this enforcement action against respondent Exel, Inc., alleging that respondent violated Title VII of the Civil Rights Act of 1964, Pub. L. No. 85-352, 78 Stat. 253 (42 U.S.C. 2000e *et seq.*), when Dave Harris, the manager of a 25-employee distribution site

on respondent's campus in Fairburn, Georgia, refused to promote petitioner because of her sex. A jury found in favor of the EEOC and petitioner and awarded back pay, compensatory damages, and punitive damages. Pet. App. 16, 52. The district court vacated the punitive damages award, *id.* at 50-82, and the court of appeals affirmed, *id.* at 1-49.

1. Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1). In 1991, Congress amended Title VII to authorize punitive damages against a private-sector employer if the employer, including any of its agents, engages in intentional discrimination "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. 1981a(b)(1); see 42 U.S.C. 2000e(b)-(d) and (n).

In *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999), this Court explained that, in addition to showing malice or reckless indifference by an agent of the company, a Title VII plaintiff "must impute liability for punitive damages" to the employer. *Id.* at 539. The Court observed that "[t]he common law has long recognized that agency principles limit vicarious liability for punitive awards," which "is a principle, moreover, that this Court historically has endorsed." *Id.* at 541-542 (citing authorities). The Court also observed that courts of appeals had relied on common-law agency principles in interpreting Section 1981a. See *id.* at 541 (citing cases, including *Dudley* v. *Wal-Mart Stores, Inc.*, 166 F.3d

1317 (11th Cir. 1999)). The Court noted that "[t]he common law as codified in the Restatement (Second) of Agency (1957), provides a useful starting point" for defining the common law as it stood when Congress authorized the imposition of punitive damages in 1991. *Kolstad*, 527 U.S. at 541-542.

The Court in *Kolstad* noted that, under the Restatement (Second) of Agency, "[p]unitive damages can properly be awarded against a master or other principal because of an act by an agent" in four circumstances, including if "the agent was employed in a managerial capacity and was acting in the scope of employment." § 217C(c); see Restatement (Second) of Torts § 909(c) (1979) (same). The *Kolstad* Court explained that determining whether an employee is acting in a managerial capacity "requires a fact-intensive inquiry" into "'the type of authority that the employer has given to the employee, the amount of discretion that the employee has in what is done and how it is accomplished.'" 527 U.S. at 543 (citation omitted). The Court further explained that, according to examples provided in the Restatement (Second) of Torts, the employee must be "important," but perhaps need not be among the employer's "top management, officers, or directors," to be acting in a "managerial capacity." *Ibid.* (citations omitted).

Having permitted punitive damages liability for employees acting in a managerial capacity, the *Kolstad* Court acknowledged that "[h]olding employers liable for punitive damages when they engage in good faith efforts to comply with Title VII * * * is in some tension with the very principles underlying common law limitations on vicarious liability for punitive damages." 527 U.S. at 544. The Court therefore recognized a good-

faith exception to traditional vicarious-liability rules whereby, "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where th[o]se decisions are contrary to the employer's good-faith efforts to comply with Title VII." *Id.* at 545 (citation and internal quotation marks omitted). That defense applies where the employer has taken good-faith efforts "'to detect and deter'" civil rights violations and to "enforce an antidiscrimination policy." *Id.* at 546 (citation omitted).

2. a. Respondent Exel Inc. is a company that provides supply-chain management services such as shipping, receiving, and warehouse storage to customers across a variety of industries. Pet. App. 15. It is a subsidiary of Deutsche Post DHL (DHL), a global corporation headquartered in Germany. *Ibid.*[1] In 2008, respondent was headquartered in Ohio and employed 25,000 workers throughout 450 locations in North America. *Id.* at 15-16.

One of those locations was a campus in Fairburn, Georgia, which had 1300 employees working in ten distribution sites. Pet. App. 16. One of the smaller distribution sites on the Fairburn campus serviced Pittsburgh Paint & Glass (PPG) and had about 25 employees. *Id.* at 11, 16-17 & n.5. The PPG site received, stored, and shipped PPG's paint and painting-related products. *Id.* at 16. Harris was the general manager overseeing the PPG site; he was one of 329 general managers in the company within North America. *Id.* at 11, 16. Harris was the highest-ranking employee at the PPG site and had authority over hiring and promotions. *Id.* at 17, 71-

[1] In January 2016, respondent changed its name to DHL Supply Chain. Pet. App. 15 n.1.

72. Harris reported to Tom McKenna, a director of operations located on the Fairburn campus. *Id.* at 71-72.

b. In 2005, petitioner Contrice Travis began working for respondent as an hourly worker at the PPG site. Pet. App. 22. Within a year, the general manager that preceded Harris promoted petitioner to inventory control lead. *Id.* at 22 & nn.13-14. In June 2008, Harris promoted James Teal—petitioner's direct supervisor—to operations manager, which created a vacancy in Teal's supervisor position. *Id.* at 2, 23. Petitioner told Harris that she wanted to be considered for the vacant position, and Teal recommended to Harris that petitioner be promoted. *Id.* at 2-3, 7-8. Harris instead selected another internal applicant, Michael Pooler, to fill the vacant position. *Id.* at 2-3.

After Pooler began working at the PPG site, Harris assigned petitioner to train Pooler on the site's inventory procedures and systems. Pet. App. 25. When petitioner realized that she was training Pooler for Teal's vacated supervisor position, she became frustrated and began to look for a new job. *Ibid.* Petitioner found a job with another company in July 2008. *Id.* at 26. After she left Exel, petitioner filed a charge of discrimination with the EEOC alleging sex discrimination. *Ibid.* The EEOC investigated and found reasonable cause to believe that respondent had discriminated against petitioner based on her sex. *Id.* at 26, 28.

c. After an attempt at informal conciliation failed, the EEOC brought this enforcement action alleging that respondent had violated Title VII by refusing to promote petitioner because of her sex. Pet. App. 28; see 42 U.S.C. 2000e-2(a)(1). The EEOC sought injunctive relief, back pay, and compensatory and punitive dam-

ages under 42 U.S.C. 1981a. Pet. App. 2. Petitioner intervened as a plaintiff in EEOC's suit. *Id.* at 51; see 42 U.S.C. 2000e-5(f)(1).

At trial, the EEOC and petitioner presented evidence that Harris had a history of bias against women and that he had declined to promote petitioner because she was a woman. Pet. App. 3, 7-8. Harris testified that he had hired Pooler—who was scheduled for layoff because his work site was closing down—pursuant to respondent's "priority transfer practice" (PTP), which was a practice of transferring employees to vacant positions instead of laying them off. *Id.* at 2, 24.

The jury returned a verdict in favor of the EEOC and petitioner and awarded back pay (stipulated to be $1,184.37), $25,000 in compensatory damages, and $475,000 in punitive damages. Pet. App. 52, 80. In accordance with Title VII's statutory limits, 42 U.S.C. 1981a(b)(3)(D), the district court reduced the punitive damages award to $275,000. Pet. App. 52. Respondent filed a motion for judgment as a matter of law or for a new trial, arguing that the evidence did not support the jury's verdict as to liability or punitive damages. *Id.* at 2, 52, 57.

3. The district court denied respondent's motion as to liability but granted it as to the punitive damages award. Pet. App. 50-82.

On the issue of liability, the district court determined that sufficient evidence existed for a reasonable jury to find that sex was a motivating factor in respondent's failure to promote petitioner in June 2008. Pet. App. 69; see *id.* at 57-69.

With respect to punitive damages, the district court determined that the evidence supported the jury's finding that respondent had acted with malice or reckless

indifference under 42 U.S.C. 1981a(b)(1), and that respondent had failed to establish the good-faith defense recognized by this Court in *Kolstad*. Pet. App. 70; see *Kolstad*, 527 U.S. at 545-546. The district court further determined, however, that under binding circuit precedent, Harris was not "high-enough-up-the-ladder * * * for his actions to be imputed to [respondent]" for purposes of punitive damages. Pet. App. 73; see *id.* at 72-76. "More specifically," the district court explained, "while the evidence shows that Harris was a member of management, there was another level of management above him in the form of a Director of Operations," and Harris "was in charge of * * * a small number of employees in comparison to the total number of employees [respondent] employed in North America." *Id.* at 74. The court vacated the punitive damages award. *Id.* at 79, 82.

4. A divided panel of the court of appeals affirmed. Pet. App. 1-49.

a. The panel majority determined that there was sufficient evidence presented at trial for a reasonable jury to find that Harris's hiring decision was motivated by discrimination based on petitioner's sex. Pet. App. 4-9. All of the panel members agreed, however, that petitioner had failed to present sufficient evidence "to meet our standard in this circuit for imputing punitive damages to [respondent]" based on Harris's conduct. *Id.* at 9, 15.

The panel majority explained that it had previously held in *Dudley*, *supra*, that a plaintiff may impute liability for punitive damages to her employer by showing "either that the discriminating employee was high[] up the corporate hierarchy, or that higher management

countenanced or approved [the discriminating employee's] behavior." Pet. App. 9-10 (quoting *Dudley*, 166 F.3d at 1323) (first set of brackets in original). Applying that standard in *Dudley*, the court had determined that punitive damages could not be awarded against Wal-Mart because the two discriminating employees "were store managers at one of Wal-Mart's more than 2,000 stores" and thus were not "'high enough up Wal-Mart's corporate hierarchy.'" *Id.* at 10 (quoting *Dudley*, 166 F.3d at 1323).

A few months after the court of appeals decided *Dudley*, this Court issued its decision in *Kolstad* recognizing managerial-capacity liability for punitive damages. As explained above, in providing guidance on when an employee is acting in a managerial capacity, the *Kolstad* Court instructed lower courts to consider an employee's authority and discretion, as well as an employee's importance within the company. See pp. 2-3, *supra* (quoting *Kolstad*, 527 U.S. at 543). The panel majority here, however, viewed *Kolstad* as focused only "on the discriminating employee's authority and responsibilities." Pet. App. 10. The panel majority therefore perceived a conflict between *Kolstad* and the court's own "higher management standard, which looks to the size of the employer and the discriminating employee's rank in the corporate hierarchy." *Ibid.*

The panel majority noted, however, that it had continued to apply *Dudley*'s higher-management standard after *Kolstad* and that it was bound to follow circuit precedent. Pet. App. 11. Applying that standard here, the panel majority affirmed the district court's vacatur of the punitive damages award, finding that Harris "was not sufficiently high up [respondent's] corporate hierar-

chy to impute, under *Dudley*, punitive damages to [respondent]." *Id.* at 11-12. That determination was based on "the high number of other employees with [Harris's] same title and the low number of employees under his supervision." *Id.* at 11.

b. Judge Moody, sitting by designation, concurred. Pet. App. 13-14. "Had it been [his] decision," he would have concluded that petitioner had not presented sufficient evidence to show that respondent's reason for not promoting petitioner (*i.e.*, the PTP practice) was pretextual. *Ibid.* But he acknowledged that his view of the evidence was not the only reasonable view and that "there was enough evidence for a reasonable jury to conclude that Harris did not hire [petitioner] because she was a woman." *Id.* at 14.

c. Judge Tjoflat dissented. Pet. App. 15-49. He agreed with the district court's vacatur of the punitive damages award, but saw no reason to address that issue because, in his view, "no reasonable juror could find that sex discrimination motivated, in whole or in part, [respondent's] decision to deny [petitioner] the promotion she sought." *Id.* at 15.

ARGUMENT

In *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999), this Court held, based on common-law agency principles, that an employer may be subject to punitive damages under Title VII for discriminatory conduct by employees acting in a "managerial capacity." To determine whether an employee is acting in a managerial capacity, the *Kolstad* Court instructed lower courts to conduct "a fact-intensive inquiry" into "the type of authority that the employer has given to the employee" and "the amount of discretion that the employee has in

what is done and how it is accomplished." *Id.* at 543 (internal quotation marks omitted). Based on the relevant common-law principles and examples, the Court concluded that "an employee must be important, but perhaps need not be the employer's top management, officers, or directors, to be acting in a managerial capacity." *Ibid.*

Petitioner contends (Pet. 5-12) that the decision below conflicts with *Kolstad* because, in determining whether an employee acts in a managerial capacity, the court of appeals adheres to a "higher management" standard that focuses on the employee's position within the corporate structure. There is no conflict with *Kolstad*. The common-law authorities on which *Kolstad* relied treated an employee's corporate position as an important factor in determining managerial capacity, and the *Kolstad* Court was clear that liability for punitive damages would not extend far beyond upper management. Petitioner is correct (Pet. 9-12), however, that the decision below conflicts with the decisions of some other courts of appeals. In the government's view, that conflict does not presently warrant this Court's review, because none of the circuits has analyzed the common-law authorities on which *Kolstad* relied. As explained below, those authorities shed considerable light on both *Kolstad*'s reasoning and when employees are acting in a managerial capacity.

1. As originally enacted in 1964, the only available remedies for a violation of Title VII were back pay, injunctive relief (such as reinstatement), and other equitable relief. 42 U.S.C. 2000e-5(g)(1); see *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 252-253 (1994). In 1991, Congress amended Title VII to authorize compensatory and punitive damages against private-sector employers

that engage in intentional discrimination. 42 U.S.C. 1981a. In addition to showing that the employer, including any of its agents, engaged in discrimination "with malice or with reckless indifference to the federally protected rights of an aggrieved individual," 42 U.S.C. 1981a(b)(1), a plaintiff seeking punitive damages under Title VII must also "impute liability for punitive damages" to the employer. *Kolstad*, 527 U.S. at 539.

In *Kolstad*, this Court held that common-law "agency principles place limits on vicarious liability for punitive damages" in the Title VII context. 527 U.S. at 539. The Court observed that "[t]he common law has long recognized that agency principles limit vicarious liability for punitive awards"; the Court "historically has endorsed" this principle; and courts of appeals "have relied on these liability limits in interpreting § 1981a." *Id.* at 541 (citing authorities). For that latter point, the Court cited the court of appeals' then-recent decision in *Dudley* v. *Wal-Mart Stores, Inc.*, 166 F.3d 1317 (11th Cir. 1999). See *Kolstad*, 527 U.S. at 541. The Court further explained that "Congress has directed federal courts to interpret Title VII based on agency principles," *id.* at 541 (quoting *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 754 (1998)), and that "[o]bserving the limits on liability that these principles impose is especially important when interpreting the 1991 Act" because "Congress conspicuously left intact" the common-law limits on vicarious liability, *id.* at 541-542.

In defining those limits, the Court observed that "[t]he common law as codified" in the Restatement (Second) of Agency and the Restatement (Second) of Torts, "provide[s] a useful starting point." *Kolstad*, 527 U.S.

at 542.[2] The Court thus looked to the common law as it stood in 1991 when Congress authorized the imposition of punitive damages in Section 1981a. Under those common-law principles, punitive damages generally are not authorized for vicarious liability. See Restatement (Second) of Torts § 909 cmt. b. Punitive damages properly may be awarded, however, "if, but only if," (a) the principal authorized the employee's specific conduct; (b) the principal was reckless in employing or retaining an obviously unfit employee; (c) the employee was acting in a "managerial capacity" and within "the scope of employment"; or (d) the principal ratified or approved the employee's conduct. *Id.* § 909; see Restatement (Second) of Agency § 217C (same).

Three of those Subsections—Subsections (a), (b), and (d)—require some affirmative conduct by the employer, whether authorizing the conduct before the fact, ratifying it after the fact, or acting recklessly by employing the person in the first place. "In these cases," the Restatement (Second) of Torts explains, although it is "improper ordinarily to award punitive damages" for vicarious liability, "punitive damages are granted primarily because of the principal's own wrongful conduct." § 909 cmt. b. "It is * * * within the general spirit of the rule to make liable an employer who has recklessly employed or retained a servant or employee who

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[2] The Court in *Kolstad* did not distinguish between the Restatement (Second) of Agency and the Restatement (Second) of Torts because the relevant sections—Section 217C of the Agency Restatement and Section 909 of the Torts Restatement—are effectively identical. The Agency Restatement incorporates the comments and illustrations provided in the Restatement (First) of Torts § 909 (1939), see Restatement (Second) of Agency § 217C cmt. a, which were carried forward into the Restatement (Second) of Torts.

was known to be vicious." *Ibid.* "Nor is it unjust that [an employer] be responsible for an outrageous act * * * if, with full knowledge of the act and the way in which it was done, he ratifies it, or * * * he expresses approval of it." *Ibid.* The Restatement's accompanying illustrations make clear that the employer is subject to punitive damages in these circumstances because of its own highly culpable conduct. See *id.* illus. 1 and 2.

By contrast, Subsection (c) requires only that the discriminating employee was serving "in a managerial capacity" and acting within the scope of his employment. Restatement (Second) of Torts § 909(c). In that circumstance, "there has been no fault on the part of a corporation or other employer," but some common-law courts nevertheless concluded that "if a person acting in a managerial capacity either does an outrageous act or approves of the act by a subordinate, the imposition of punitive damages upon the employer serves as a deterrent to the employment of unfit persons for important positions." *Id.* § 909 cmt. b. The Restatement gives as an example an operations manager of a series of retail stores who suspects that a clerk at one of the stores is stealing; the operations manager directs the store manager to "imprison" the clerk and permits the store manager "to use outrageous means of intimidation." *Id.* § 909, illus. 3. If the clerk sues the corporation, he may obtain punitive damages for the operations manager's outrageous conduct. *Ibid.*

Surveying those authorities in *Kolstad*, the Court did not attempt to define what it means to act in a "managerial" capacity. Indeed, the Court observed that "no good definition of what constitutes a 'managerial capacity' has been found." 527 U.S. at 543 (citation and internal quotation marks omitted). The Court did explain,

however, that the determination requires a "fact-intensive inquiry" into "the type of authority that the employer has given to the employee, the amount of discretion that the employee has in what is done and how it is accomplished." *Ibid.* (citations omitted). Of particular relevance here, the Court then stated: "Suffice it to say here that the examples provided in the Restatement of Torts suggest that an employee must be important, but perhaps need not be the employer's top management, officers, or directors, to be acting in a managerial capacity." *Ibid.* (citation and internal quotation marks omitted). And as support for that statement, the Court cited comment b and illustration 3 to Section 909 of the Restatement. *Ibid.*

2. Petitioner incorrectly contends (Pet. 9) that, in light of this Court's intervening decision in *Kolstad*, the court of appeals' "higher management" standard has been "undermined to the point of abrogation." First, the court of appeals adopted its higher-management standard in *Dudley*, *supra*, which this Court cited a few months later with seeming approval in *Kolstad* for "rel[ying] on [common-law] liability limits in interpreting 42 U.S.C. § 1981a." 527 U.S. at 541. Second, the court of appeals' higher-management standard requires a Title VII plaintiff seeking punitive damages to show "either that the discriminating employee was high[] up the corporate hierarchy, or that higher management countenanced or approved [his] behavior." *Dudley*, 166 F.3d at 1323 (citation and internal quotation marks omitted; brackets in original). That test reflects the *Kolstad* Court's statement "that an employee must be important, but perhaps need not be the employer's top management, officers, or directors, to be acting in a

managerial capacity." 527 U.S. at 543 (citation and internal quotation marks omitted). In arguing not that the court of appeals has interpreted its standard too stringently, but that it has erred in looking to the discriminating employee's corporate position at all, it is petitioner that is at odds with *Kolstad*.

That is also clear from the common-law authorities on which *Kolstad* relied. The Restatement (Second) of Torts explains that the reason for permitting punitive damages when a managerial employee engages in (or approves of) outrageous conduct is to "serve[] as a deterrent to the employment of unfit persons for *important positions*." § 909 cmt. b (emphasis added). In the accompanying illustration, an operations manager—a supervisor of multiple retail stores—directs a local manager to imprison a low-level employee and then approves of the local manager's use of outrageous means of intimidation. *Id.* § 909 illus. 3. The illustration thus specifically contemplates a higher-management standard: it premises corporate liability for punitive damages on the fact that the operations manager directed and then approved outrageous conduct by a local manager. Although both managers engage in loathsome conduct, it is the acts of the operations manager—not the local manager—that result in punitive damages against the corporation.[3]

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[3] The Reporter's Note cites *Simmons* v. *Kroger Grocery & Baking Co.*, 104 S.W.2d 357 (Mo. 1937), in which a corporate defendant was held subject to punitive damages for the conduct of a grocery store manager. *Id.* at 358-361. The defendant argued that it could not be held vicariously liable for punitive damages; the court did not address any argument in the alternative that the store manager was not sufficiently senior in management to trigger the exception. *Id.* at 359-360. The Restatement (Second) of Torts therefore is best read as citing *Simmons* to support its recognition of a managerial-

To be sure, the Court in *Kolstad* also stated that whether an employee acts in a managerial capacity is a "fact-intensive inquiry" into "the type of authority that the employer has given to the employee, the amount of discretion that the employee has in what is done and how it is accomplished." 527 U.S. at 543 (citation omitted). In context, however, the Court meant that in determining whether an employee occupies an "important" position within the corporate structure, lower courts should examine that employee's delegated authority and discretion. *Ibid.* The Court cannot have meant, as petitioner maintains (Pet. 9-11), that an employee's authority and discretion over the workplace are all that matters and one's corporate rank is irrelevant. In the very next sentence, the *Kolstad* Court said that the "employee must be important, but perhaps need not be the employer's top management, officers, or directors." 527 U.S. at 543. (citation and internal quotation marks omitted). The Court did not itself attempt to explain where along the corporate ladder punitive damages would no longer be appropriate, but it relied on the Restatement (Second) of Torts, which draws the line in larger organizations between regional managers and local managers. See § 909 illus. 3.

Petitioner's test would permit the imposition of punitive damages for malicious or recklessly indifferent conduct by any employee with authority over the relevant employment decision. As a practical matter, in larger organizations local managers will often, if not typically, possess that type of authority over hiring, fir-

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capacity exception despite the general rule against punitive damages for vicarious liability, not as support for the notion that even local managers may trigger that exception.

ing, or promotion. Petitioner's test thus would eliminate the "managerial capacity" limitation altogether; it would require only that the discriminating employee be acting within "the scope of [his] employment." Restatement (Second) of Torts § 909(c); see Restatement (Second) of Agency § 217C(c) (same). That is the approach the *Third* Restatement of Agency adopts. Whereas the Second Restatement of Agency relaxed the general rule against punitive damages for vicarious liability in managerial-capacity cases, the Third Restatement relaxes the rule yet further to discard the managerial-capacity limitation. An employee need only be acting within the scope of his employment when committing a tort to subject his employer to punitive damages. See Restatement (Third) of Agency § 7.03 cmt. e (2006). Whatever may be said for that approach, it was not treated as the prevailing common-law approach when Congress provided for punitive damages in 1991—and thus it is not the approach to which this Court looked in *Kolstad*.

3. Petitioner contends (Pet. 9-11) that, since *Kolstad*, nearly every other court of appeals has held that "the proper test for imputing punitive damages depends on the employee's authority and discretion, irrespective of the employee's rank." That is an overstatement of the cases cited in the petition, but the courts of appeals have reached inconsistent results.

a. Many of the cases cited by petitioner consider the discriminating employee's rank within the company and impose punitive damages when the employee is in central or regional management, which is consistent with the court of appeals' decision in this case. In *Lowery* v. *Circuit City Stores, Inc.*, 206 F.3d 431 (cited at Pet. 10-11), cert. denied, 531 U.S. 822 (2000), the Fourth Circuit

explained that the discriminating employee, who reported directly to a corporate vice president, not only had sole hiring authority for her department at Circuit City's corporate headquarters, but also held a sufficiently important position in the company to justify punitive damages. *Id.* at 437, 444. The Fifth Circuit in *Deffenbaugh-Williams* v. *Wal-Mart Stores, Inc.*, 188 F.3d 278 (1999) (cited at Pet. 11), determined that a regional manager and a district manager for departments across six Wal-Mart stores were both "sufficiently high in the Wal-Mart hierarchy" to impute punitive damages to the company for their discriminatory conduct. *Id.* at 285.[4]

In *Tisdale* v. *Federal Express Corp.*, 415 F.3d 516 (2005) (cited at Pet. 7-8), the Sixth Circuit upheld a punitive damages award where a discriminatory termination was (i) instigated by the operations manager of FedEx's Nashville distribution center and (ii) approved by a regional manager with "authority * * * to supervise all of FedEx's operations in the [southern] district." *Id.* at 532. Similarly, the Eighth Circuit in *Ogden* v. *Wax Works, Inc.*, 214 F.3d 999 (2000), upheld a punitive damages award against a company based on the dis-

[4] Although the Fifth Circuit analyzed the employees' corporate rank in *Deffenbaugh-Williams*, the court subsequently held that an account manager for a staffing company acted in a managerial capacity when he refused to let a deaf woman apply for a job, without assessing the account manager's role in the corporate hierarchy. *EEOC* v. *Service Temps, Inc.*, 679 F.3d 323, 327, 337 (5th Cir. 2012). The court did not address the reasoning of its earlier opinion in *Deffenbaugh-Williams*.

criminatory actions of a district manager who supervised several of the company's stores within a geographic region. *Id.* at 1003, 1010.[5]

None of these cases holds, as petitioner contends (Pet. 9-11), that corporate rank is irrelevant to the punitive damages analysis. Rather, all of these cases involved conduct by a managerial employee with a more important role in the company than a local store manager, or at the very least approval of a local manager's discriminatory conduct by a regional manager. Petitioner's cited authorities thus do not bear out her claim that the First, Fourth, Fifth, Sixth, and Eighth Circuits have adopted approaches clearly at odds with the Eleventh Circuit's higher-management standard.[6]

b. Petitioner is correct, however, that the Seventh, Ninth, and Tenth Circuits have imputed liability to employers for punitive damages based on discriminatory conduct by employees who are akin to local managers or supervisors, not importantly different from Harris's position here. For example, in *Hertzberg* v. *SRAM*

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[5] Petitioner does not cite *Ogden*; she instead cites (Pet. 9 n.7) another Eighth Circuit case, *Foster* v. *Time Warner Entm't Co.*, 250 F.3d 1189 (2001). That case is not instructive because "Time Warner d[id] not dispute that [the discriminating employees] were managers acting within the scope of their employment," *id.* at 1196-1197, and the court therefore did not analyze the managerial-capacity issue.

[6] Petitioner also cites (Pet. 9) the First Circuit's decision in *Romano* v. *U-Haul Int'l*, 233 F.3d 655 (2000), cert. denied, 534 U.S. 815 (2001). But in that case, U-Haul's argument against imputation was limited to the assertion that the employee who ordered a discriminatory firing allegedly did not work for U-Haul International. *Id.* at 669. The court rejected that claim without analyzing whether the employee acted in a managerial capacity. *Id.* at 669-670.

Corp., 261 F.3d 651 (2001) (cited at Pet. 11), cert. denied, 534 1130 (2002), the Seventh Circuit upheld a punitive damages award where a plant manager with authority to discipline and terminate employees had failed to address discriminatory conduct. *Id.* at 662-664; see *Bruso* v. *United Airlines, Inc.*, 239 F.3d 848, 858, 860 (7th Cir. 2001) (cited at Pet. 11) (concluding that three employees of United Airlines were managerial agents based on their authority and discretion, without analyzing whether the employees were sufficiently important to warrant imputation of liability on United Airlines for punitive damages).

Similarly, in *EEOC* v. *Wal-Mart Stores, Inc.*, 187 F.3d 1241 (1999), the Tenth Circuit concluded that an assistant manager and manager of a Wal-Mart store acted in a "managerial capacity" without any discussion of their role in the corporate hierarchy. *Id.* at 1247. And in *Swinton* v. *Potomac Corp.*, 270 F.3d 794 (9th Cir. 2001) (cited at Pet. 12), cert. denied, 535 U.S. 1018 (2002), the court concluded that a shipping supervisor acted in a "managerial capacity" for purposes of imputing liability for punitive damages irrespective of his importance within the company, where the supervisor was designated as the recipient for complaints about harassment. *Id.* at 810-811 (citation omitted).[7] These courts thus

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[7] Petitioner cites (Pet. 12) *Swinton* and *Deters* v. *Equifax Credit Information Services, Inc.*, 202 F.3d 1262 (10th Cir. 2002), for the proposition that "[e]ven in circuits referencing the ranking of the discriminating employee, courts acknowledge that the ranking is immaterial when the offending employee is an individual designated by the Company to receive or respond to complaints of discrimination." This case, however, involves allegations that Harris refused to promote petitioner based on her sex; petitioner's claims are not based on the failure of Harris (or anyone else) to respond to claims

have imputed liability for punitive damages to an employer based on the actions of an employee who was akin to a local manager, without analyzing whether the employee held a sufficiently important position in the company to justify that result.

c. Notwithstanding the tension in the courts of appeals, this Court's review is not presently warranted. The lower courts have not analyzed in any detail either the role of corporate rank in the managerial-capacity standard described in *Kolstad* or the common-law authorities on which *Kolstad* relied. Further percolation may therefore be warranted to permit the lower courts to analyze those authorities. Indeed, the line between local and regional managers described in the illustration provided in the Restatement (Second) of Torts § 909, illus. 3, would straightforwardly resolve virtually all of the cases cited above. Further analysis by the lower courts may be especially warranted because the EEOC has taken a different view in this and other cases, arguing that the actions of a local store manager can be imputed to a large company for purposes of awarding punitive damages. Lower courts may benefit from the views of the United States on this Court's reasoning in *Kolstad* and the common-law managerial-capacity standard.

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of discrimination after being designated by the company to receive such complaints.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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