1994

A Standard for Punitive Damages Under Title VII

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A STANDARD FOR PUNITIVE DAMAGES
UNDER TITLE VII

Judith J. Johnson*

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at Austin; J.D., 1974, University of Mississippi. I would like to thank Matt Steffey, J. Allen
Smith, Elizabeth Jones, Carol West, Phillip McIntosh, and Lindsey Patterson for editorial
assistance and Cynthia Morrison, Catherine Scallan, and Tammy Barham for editorial and
research assistance.
I. INTRODUCTION

Under the Civil Rights Act of 1991, the plaintiff in an employment discrimination case who alleges intentional discrimination may recover punitive damages if she demonstrates that her employer engaged in the discriminatory practice with "malice" or "reckless indifference" to

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(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e-2, 2000e-3, 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.


(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

federally protected rights. To prove a case of disparate treatment under Title VII, the plaintiff bears the burden of persuading the trier of fact that her employer intended to discriminate against her. In other words, to be liable in a disparate treatment case, the employer has to specifically intend to treat the plaintiff differently based, for example, on her sex. If the defendant is found liable in such a case, the plaintiff may recover punitive damages by showing recklessness or malice on the part of the defendant. Recklessness requires a less culpable state of mind than specific intent to discriminate, and malice includes both recklessness and specific intent.

The standard that Congress intended to set for the imposition of punitive damages is not immediately obvious. Looking at the plain language of the statute, Congress seems to have set either the same, or a lower standard for the imposition of punitive damages than for liability, since proof of intent to discriminate necessarily includes malice and certainly includes recklessness. This article posits that setting the same, or a lower standard for punitive damages than for liability is a flaw in the 1991 Act. This flaw has been carried over from


(b) Compensatory and punitive damages
(1) Determination of punitive damages
A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

Id.

7. See supra note 3.
8. Compare infra text accompanying notes 84-86 with infra note 101.
9. See infra text accompanying notes 92-93.
10. See infra note 103.
11. See infra note 93 and accompanying text.
analogous law under sections 1981 and 1983 and already has caused problems for the courts under Title VII as it has under sections 1981 and 1983.

The article proposes a new standard for punitive damages under Title VII: punitive damages should be presumptively appropriate in all cases in which the defendant has intentionally discriminated. To avoid the imposition of punitive damages, the defendant should bear the burden of persuasion to show that she acted reasonably and in good faith. This standard comports with related law, is more analytically sound, and will lead to more uniform results than the standards the courts presently use.

This article examines the meanings of "intent to discriminate," "malice," and "reckless indifference" in analogous areas of law to suggest the approach stated above to the problem of defining a rational standard for punitive damages under Title VII. Section II of the article examines the theories of discrimination and burdens of proof under Title VII, as well as the background, passage, and provisions of the Civil Rights Act of 1991. Section III discusses the states of mind required by Title VII and its amendments and then relates these to the states of mind required in analogous and related areas of law. Criminal law is used as an analogous area of law to construct a model, and the related areas of law discussed are sections 1981 and 1983 and the Age Discrimination in Employment Act.

Section IV proposes the standard for punitive damages under Title VII, and section V concludes.

II. THEORIES OF DISCRIMINATION AND THE CIVIL RIGHTS ACT OF 1991

The Supreme Court has developed two theories of discrimination under Title VII: disparate treatment and disparate impact. As the Court said in *International Brotherhood of Teamsters v. United States*, disparate treatment is easier to understand and occurs when the employer intentionally discriminates against an employee based on

14. See infra part III.C.
his race, sex, religion, color, or national origin. In contrast, the
disparate impact theory, first explained by the Court in \textit{Griggs v. Duke
Power Co}. applies to employment criteria which have a disparate
impact on a protected class, because the use of such criteria eliminates
more persons of that class than others. The Court explained in \textit{Griggs}
that proof of intent to discriminate is unnecessary in a disparate impact
case.\footnote{Id. at 335 n.15.}

\footnote{Id. at 335 n.15.} \footnote{401 U.S. 424 (1971).} \footnote{See Willborn, \textit{supra} note 16, at 800.} \footnote{See \textit{Griggs}, 401 U.S. at 432. The main method of proof in disparate impact cases is
Decision: Women Struggle to Join the Club}, 44 \textit{Ohio St. L.J.} 841, 878 n.294 (1983) (noting that
statistical proof also may be used in disparate treatment cases). The plaintiff presents statistics
to show that an employment criterion screens out, for example, significantly more blacks than
in these 'disparate impact' cases usually focuses on statistical disparities, rather than specific
incidents, and on competing explanations for those disparities." \textit{Id.} at 987. Once the plaintiff has
made out a prima facie case, the burden shifts to the employer to justify the practice by proving
that business necessity justified the criterion. \textit{See Griggs}, 401 U.S. at 431-32. \textit{See generally
Alfred W. Blumrosen, Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of
Employment Discrimination}, 71 \textit{Mich. L. Rev.} 59, 81-89 (1972) (discussing the scope of the
business necessity defense in disparate impact cases); Martha Chamallas, \textit{Evolving Conceptions

Professor Brodin opines that the disparate impact theory makes the employer strictly
liable for this form of discrimination. Mark S. Brodin, \textit{The Role of Fault and Motive in Defining
Because the employer has a defense, I am not sure I agree. Under the criminal law, which I am
using as a model in this article, if the defendant does the proscribed act or brings about the
proscribed result, he is guilty if the crime is a strict liability offense. WAYNE R. LAFAVE &
AUSTIN W. SCOTT, JR., CRIMINAL LAW 242 (2d ed. 1986). If he can interpose a defense, then
the crime is not a strict liability crime. \textit{See id.} (stating that any absence of fault defense is
irrelevant in true strict liability cases).

It may even be that disparate impact is more akin to criminal negligence or recklessness
in some cases. When the employer applies a criterion that he knows or should know will screen
out more women than men but does not impose the criterion for that reason, but instead for a
business reason, he does not intend to discriminate. \textit{See Personnel Adm'r v. Feeney}, 442 U.S.
256, 279 (1979). If the business reason is obviously insufficient, it can be argued that the
defendant was criminally negligent or reckless, depending on the nature of the reason and the
likelihood of the discrimination. For example, in \textit{Feeney}, Massachusetts gave veterans preference
for civil service positions. \textit{See id.} at 259. The preference operated overwhelmingly in favor of
males. \textit{Id.} Although the Court said the policy was not intentionally discriminatory, \textit{see id.} at 279,
it surely would have to be considered reckless at least: the defendant, the legislature of
Massachusetts, must have been subjectively aware of a high degree of risk that more women
than men would be screened out. \textit{See id.} at 278. The Court said that to be intentionally
discriminatory, the criterion would have to be chosen "because of" its discriminatory effect and
"not merely 'in spite of' " those effects. \textit{Id.} at 279.
In the early days of Title VII, when courts interpreted its provisions broadly,\(^{22}\) the Act appeared likely to achieve its goal of equal employment opportunity. As time passed and the courts became more conservative generally and perhaps disenchanted with Title VII and the amount of time they were spending on it, interpretations of the Act became more restrictive.\(^{23}\) Because of these restrictive interpretations, plaintiffs had difficulty proving violations.\(^{24}\)

Even when plaintiffs succeeded in proving a violation, the remedies provided in Title VII were inadequate.\(^{25}\) Prior to the Civil Rights Act of 1991, only equitable remedies, such as reinstatement with backpay, were allowed for Title VII violations.\(^{26}\) The plaintiff had to mitigate backpay\(^{27}\) and rarely desired reinstatement, so the remedies were fairly negligible.\(^{28}\) Consequently, plaintiffs did not have a sufficient incentive to enforce their rights.\(^{29}\) Following the Court's decision in \textit{Wards Cove Packing Co. v. Atonio},\(^{30}\) employers' incentive to refrain from discriminatory acts was weakened even further.\(^{31}\) Finally, since the remedies were equitable, the plaintiff was not entitled to a jury trial\(^{32}\)

\begin{itemize}
\item 24. See Oppenheimer, supra note 16, at 971 & n.327.
\item 27. 42 U.S.C. § 2000e-5(g) (1988) ("[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the backpay otherwise allowable").
\item 28. See Lilling, supra note 25, at 251-52 (pointing out inadequacies of pre-1991 remedies).
\item 29. See id. at 251.
\item 30. 440 U.S. 642 (1989) (holding, among other things, that the plaintiff is required to identify the criterion causing the disparate impact and that the plaintiff must bear the burden of persuasion throughout a disparate impact case).
\item 31. Oppenheimer, supra note 16, at 934-35.
\end{itemize}
but rather appeared before a (sometimes jaded) district judge.\(^3\)

Another consideration served as an impetus for change, especially in the remedial provisions of Title VII: while plaintiffs alleging national origin or racial discrimination could sue under 42 U.S.C. § 1981, as well as Title VII,\(^4\) and recover compensatory and punitive damages, plaintiffs alleging sex and religious discrimination were limited to equitable relief allowed by Title VII.\(^5\) Proponents of the equalization of remedies in Title VII and section 1981 cases also pointed out that often the plaintiff suffers no loss of pay or position in a sexual harassment case.\(^6\) Consequently, the plaintiff would be afforded no real relief even if she prevailed.

After \textit{Wards Cove}, in which the Supreme Court rendered a decision significantly limiting the disparate impact model,\(^7\) Congress began working to overturn that ruling, as well as others.\(^8\) Congress passed the Civil Rights Act of 1990, which changed the remedial provisions of Title VII, among other things.\(^9\) The President vetoed the legislation, and Congress failed to override the veto by one vote.\(^10\) The Civil Rights Act of 1991, a somewhat weakened version of the Civil Rights Act of 1990, became law the next year.\(^11\) One section of the 1991 Act

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\(^3\) This was my experience as counsel for management in employment discrimination cases for several years.

\(^4\) See infra text accompanying note 121.


\(^6\) See id.

\(^7\) See \textit{Wards Cove}, 490 U.S. at 660-61; Oppenheimer, supra note 16, at 934-35 (discussing \textit{Wards Cove} and its demise by statute).

\(^8\) Some other significant rulings Congress sought to overturn included EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227, 1236 (1991) (holding that Title VII does not apply to United States citizens working for American companies out of the United States); Patterson v. McLean Credit Union, 491 U.S. 164, 178-79 (1989) (holding that because § 1981 applies only to the formation and enforcement of contracts, and not to the breach of their terms, discrimination in hiring, for example, is actionable under § 1981, but racial harassment relating to conditions of employment is not); Lorance v. AT&T Technologies, 490 U.S. 900, 911 (1989) (holding that the statute of limitations for attacking a facially neutral and neutrally applied seniority system begins to run when the system is adopted); Martin v. Wilks, 490 U.S. 755, 759-61 (1989) (allowing persons who could have intervened before the final approval of consent decrees providing goals for promotion of blacks and setting forth an extensive remedial scheme to attack the decrees later); Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989) (holding that an employer who takes gender into account in making an employment decision shall not be liable if it proves that it would have made the same decision even if it had not taken gender into account). For other cases some members of Congress wanted to overturn or modify, see Lilling, supra note 25, at 217 n.18.

\(^9\) See Lilling, supra note 25, at 216-17.

\(^10\) See id. at 216.

\(^11\) See supra note 1.
changed the remedial provisions of Title VII, allowing plaintiffs who proved intentional discrimination to recover compensatory and punitive damages.\footnote{42} The 1991 Act provides in section 1981a that the plaintiff may recover compensatory and punitive damages in addition to any relief allowed by Title VII.\footnote{43} In order to recover punitive damages, the plaintiff must demonstrate that the defendant "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."\footnote{44} This article focuses on the meaning of these italicized terms, which neither the Act nor the legislative history defines.

### III. STATES OF MIND REQUIRED

The Civil Rights Act of 1991 allows the imposition of punitive damages only in cases of intentional discrimination and specifically excludes disparate impact cases from the provision.\footnote{45} This part of the article begins by considering the general meanings of the words of intent now embodied in Title VII by statute or interpretation: "intent to discriminate," "malice," and "reckless indifference."

"Intent to discriminate" has a fairly settled meaning under Title VII.\footnote{46} Because Congress passed the amendments to Title VII only recently, however, the courts have not had much experience to date in interpreting "malice" and "reckless indifference," the words of intent contained in the punitive damages provision.\footnote{47} Although there is some Title VII caselaw on the subject which this article examines,\footnote{48} for the most part the meanings of "malice" and "reckless indifference" must be divined with reference to analogous and related areas of law.

\footnote{43}{Id. This relief is available in an action alleging intentional discrimination, but not in actions alleging disparate impact discrimination. Id. The section further stipulates that the plaintiff may recover compensatory and punitive damages provided that he cannot recover under 42 U.S.C. § 1981. Id. For text of the section, see supra note 2. It is not clear whether Congress meant to prohibit double damages to a plaintiff in a race or national origin discrimination case who brings a claim under both Title VII and § 1981, or whether damages are only recoverable in situations in which the plaintiff has no cause of action under § 1981, such as in sex or religious discrimination cases. Under the latter interpretation, the plaintiff must sue under § 1981 to recover damages in a race or national origin discrimination case. Cathcart & Snyderman, supra note 35, at 858. Another possibility is that the plaintiff must elect to proceed under either § 1981 or Title VII if he has a cause of action under both. See id.}
\footnote{44}{42 U.S.C. § 1981a(b)(1) (Supp. V 1993) (emphasis added); supra note 3.}
\footnote{45}{42 U.S.C. § 1981a(a)(1) (Supp. V 1993); supra note 3.}
\footnote{46}{See infra text accompanying notes 84-87.}
\footnote{47}{See 42 U.S.C. § 1981a(b)(1) (Supp. V 1993); supra note 3.}
\footnote{48}{See infra notes 176-208 and accompanying text (standards under Title VII caselaw).}
The operative state of mind for disparate treatment, which is intent to discriminate, is the same as an intentional or purposeful state of mind under the criminal law. "Recklessness" and "malice" also have relatively settled meanings under the criminal law, making it an authoritative source for interpreting words of intent. The criminal law, then, is an appropriate analytical framework for this discussion.

Section 1981 affords another remedy for private racial and ethnic discrimination. Along with the amendment to Title VII providing for compensatory and punitive damages, Congress stipulated that this recovery was only available if the plaintiff could not recover under section 1981. Congress surely, then, intended that the standards under both laws be construed consistently. The standard for punitive damages under section 1981, therefore, is the most analogous law to use as a source to interpret the meaning of the provision for punitive damages under Title VII.

49. See infra notes 84-87. Employment discrimination may be classified as a tort, see, e.g., Truvillion v. King's Daughters Hosp., 614 F.2d 520, 528 (5th Cir. 1980), and the meaning ascribed to "intent to discriminate" in Title VII cases corresponds with the state of mind required for intentional torts. Compare Restatement (Second) of Torts § 8A (1963) (using "intent" to denote that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it) and W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 8 (5th ed. 1984) (stating that the three most basic elements of the common usage of "intent" by courts are (1) that it is a state of mind, (2) about consequences of an act (or omission), which (3) encompasses both having in mind a purpose to bring about given consequences and having in mind a belief that given consequences are substantially certain to result from the act) with 42 U.S.C. § 1981a(a)-(b) (Supp. V 1993). I prefer, however, to use the criminal law model. There is some confusion in the courts in this regard, as there is with the standard for punitive damages and the definition of malice in torts. See, e.g., infra note 129 and accompanying text (discussing Smith v. Wade, 461 U.S. 30 (1983)). All of the words of intent under Title VII have better analogies under the criminal law, which is the original source of law for the idea that one should be liable based on subjective intent. See infra text accompanying notes 88-105.


   All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id.

52. See infra text accompanying notes 116-74.
The Age Discrimination in Employment Act (ADEA)\textsuperscript{53} is also a useful reference because the discrimination provisions of the ADEA were taken word for word from Title VII.\textsuperscript{54} The ADEA provides for liquidated damages for a willful violation.\textsuperscript{55} The liquidated damages provision in the ADEA is similar in purpose to the punitive damages provision in Title VII; both are designed to punish an employer who has discriminated.\textsuperscript{56}

The first question to resolve at this point is what the courts mean by intent to discriminate under Title VII. The starting point for this issue is a description of the proof of intent to discriminate.

\textbf{A. Title VII}

1. Proving Intent to Discriminate

The defendant is liable for intentional discrimination under Title VII when she intentionally treats one person differently from another because of that person’s race, sex, religion, color, or national origin.\textsuperscript{57} Caselaw provides four ways to prove disparate treatment. The first involves circumstantial evidence of disparate treatment for which the Supreme Court constructed a model of proof in \textit{McDonnell Douglas Corp. v. Green}.\textsuperscript{58} The plaintiff must show (1) that he is a member of a protected class; (2) that he applied and was qualified for a position for which the employer was seeking applicants; (3) that despite his qualifications, he was rejected; and (4) that the employer continued to seek applicants having the same qualifications as the plaintiff.\textsuperscript{59} In order to establish a prima facie case of disparate treatment, then, the

\begin{itemize}
\item \textsuperscript{54} See, e.g., Hodgson v. First Fed. Sav. & Loan Ass’n, 455 F.2d 818, 820 (5th Cir. 1972) (“With a few minor exceptions the prohibitions of this enactment are in terms identical to those of Title VII of the Civil Rights Act of 1964 except that ‘age’ has been substituted for ‘race, color, religion, sex, or national origin.’” (footnote omitted)); Lorillard v. Pons, 434 U.S. 575, 584 (1978) (“[T]he prohibitions of the ADEA were derived \textit{in haec verba} from Title VII.”).
\item \textsuperscript{55} 29 U.S.C. § 626(b) (1988).
\item \textsuperscript{56} See Trans World Airlines v. Thurston, 469 U.S. 111, 125 (1985) (“The legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature.”).
\item \textsuperscript{57} See Michael J. Zimmer & Charles A. Sullivan, \textit{The Structure of Title VII Individual Disparate Treatment Litigation}: Anderson v. City of Bessemer City, \textit{Inferences of Discrimination, and Burdens of Proof}, 9 HARV. WOMEN’S L.J. 25, 26 (1986). For a good discussion of burdens of proof in both disparate treatment and disparate impact cases, see Belton, \textit{supra} note 5, at 1235-50.
\item \textsuperscript{58} 411 U.S. 792 (1973).
\item \textsuperscript{59} \textit{Id.} at 802. The Court noted that this exact formulation of a prima facie case may not be applicable to a case involving different facts. \textit{Id.} at 802 n.13.
\end{itemize}
plaintiff must eliminate the most common nondiscriminatory causes for rejection, such as lack of qualifications and unavailability of a position.\textsuperscript{60} Only then will the court require the employer to “articulate some legitimate, nondiscriminatory reason” for rejecting the plaintiff.\textsuperscript{61}

The Court later clarified that the employer must produce evidence of a reason for rejecting the plaintiff\textsuperscript{62} but need not persuade the court that she was motivated by that particular reason.\textsuperscript{63} The Court said that the plaintiff’s initial burden was not onerous and that the burden of persuasion remained on the plaintiff at all times.\textsuperscript{64} Once the employer produces evidence of a legitimate, nondiscriminatory reason, the plaintiff bears the burden of persuading the court that the reason given by the employer was not the true reason for the employer’s action but rather was a pretext for discrimination.\textsuperscript{65}

A second model of proof of intentional discrimination is necessary when the plaintiff has direct evidence of intentional discrimination. The

\begin{itemize}
  \item [60.] See Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981);
  \textit{McDonnell Douglas}, 411 U.S. at 802.
  \item [61.] \textit{McDonnell Douglas}, 411 U.S. at 802.
  \item [62.] See \textit{Burdine}, 450 U.S. at 253.
  \item [63.] \textit{Id.} at 254.
  \item [64.] \textit{Id.} at 253.
  \item [65.] \textit{See McDonnell Douglas}, 411 U.S. at 804; \textit{Zimmer & Sullivan, supra} note 57, at 41-42. At one time the lower courts held that a plaintiff who established that a defendant’s proffered reasons were pretextual was entitled to a judgment as a matter of law. Melissa A. Essary, \textit{The Dismantling of McDonnell Douglas v. Green: The High Court Muddies the Evidentiary Waters in Circumstantial Discrimination Cases}, 21 \textit{PEPP. L. REV.} 385, 403 (1994). The courts assumed that, if the employer lied about the reason, the employer must have intentionally discriminated against the plaintiff. \textit{See id.} The Supreme Court recently reinterpreted its decisions with regard to this issue in \textit{St. Mary’s Honor Ctr. v. Hicks,} 113 S. Ct. 2742 (1993). In that case, the Court said that the trier of fact may resolve the ultimate issue of discrimination vel non based on its disbelief of the employer’s reasons for its action, but that such disbelief does not necessarily satisfy the plaintiff’s ultimate burden of proving discrimination. \textit{Id.} at 2749. The plaintiff must prove not only that the employer’s reasons were untrue but also that discrimination was the real reason for the employer’s action. \textit{Id.} at 2752. The Court apparently recognized the unfortunate reality that employers may lie about the grounds for their decisions for a variety of reasons, some of which are not discriminatory. \textit{See id.} at 2754. I concede that an employer may lie because his real reason is ludicrous or arbitrary but not actually discriminatory. The proper step at this point, however, is to put the burden of persuasion on the employer to prove the real reason, rather than adding an additional, and in many cases, impossible burden on the employee. Given \textit{St. Mary’s Center}, however, if the employee has to show more than that the employer lied, it is even more obvious that the employer who lies and is adjudged to have intentionally discriminated should be punished with punitive damages.

Since my proposed solution requires the defendant to prove good faith to avoid punitive damages, \textit{see infra} text accompanying notes 227-78, it should be noted here that it would be unlikely that a defendant could interpose a defense of good faith in a pretext case.
McDonnell Douglas test is not appropriate in situations in which the plaintiff has direct proof of discrimination. In such a case, if the plaintiff's evidence is credible the burden of persuasion shifts to the employer to prove that the employer would have made the same decision even absent the discriminatory factor.

The third type of intentional discrimination case is characterized by mixed motives and is exemplified by the case of Price Waterhouse v. Hopkins. In that case, the plaintiff proved that the defendant had considered her gender in its decision to deny her partnership. Because the plaintiff's poor interpersonal skills also entered into the defendant's decision, the Supreme Court analyzed the case as an instance of mixed motives. A four-Justice plurality of the Court, while affirming that an employer who acts on the basis of sex stereotyping has acted on the basis of gender, voted to remand the case to allow the employer to avoid liability by proving that it would have made the same decision based on permissible factors alone.

Prior to the 1991 Act, the employer could avoid liability in mixed motive cases by proving that she would have made the same decision for exclusively legitimate reasons, even though the plaintiff's protected status played a "motivating part" in the employment decision. This part of the Supreme Court's decision in Price Waterhouse was one

66. Thurston, 469 U.S. at 121; Lee v. Russell County Bd. of Educ., 684 F.2d 769, 774 (11th Cir. 1982). Thurston was an age discrimination case, but the Court noted that Title VII principles were applicable. Thurston, 469 U.S. at 121.


69. 490 U.S. 228 (1989).

70. Id. at 235 (plurality opinion). Several partners made comments to the effect that the plaintiff, a woman, was too masculine. See id. (plurality opinion).

71. See id. at 236 (plurality opinion).

72. See id. at 232-58 (plurality opinion).

73. Id. at 250 (plurality opinion).

74. Id. at 258 (plurality opinion). The plurality directed the lower court to use a preponderance of the evidence standard rather than the clear and convincing evidence standard previously used by the lower courts. Id. at 252-53, 258 (plurality opinion). On remand, the defendant was unable to prove it would have made the same decision without considering the plaintiff's gender. Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1207 (D.D.C.), aff'd, 920 F.2d 967 (D.C. Cir. 1990).

75. See Price Waterhouse, 490 U.S. at 258 (plurality opinion). The prohibited factor plays a motivating part in the employment decision when, for instance, the plaintiff's gender was one of the potentially many reasons for the decision. See id. at 250 (plurality opinion).
impetus for the 1991 Civil Rights Act. Now, if the employee can simply show that his protected status was a motivating factor in the employer's decision, the employer has violated Title VII. Although the employer may no longer avoid liability by showing that she would have made the same decision without considering the prohibited factor, such a showing may allow the employer to avoid damages and certain equitable relief.

A case in which intentional discrimination is a pattern or practice requires a fourth type of proof. In this case, the plaintiff must prove widespread discrimination, usually by using statistics and testimony regarding specific instances of discriminatory treatment. Even if the court finds a pattern or practice of discrimination, it can deny relief to individual class members against whom the defendant can prove it did not discriminate. The object in all of these types of cases is to decide

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76. See Cathcart & Snyderman, supra note 35, at 849.
77. 42 U.S.C. § 2000e-2(m) (Supp. V 1993). This section provides:

(m) Impermisible consideration of race, color, religion, sex, or national origin in employment practices.

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

Id. Some commentators have noted that this provision may make affirmative action plans illegal altogether. See Cathcart & Snyderman, supra note 35, at 876-80.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 200e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

Id. For a good discussion of causation in this regard, see Brodin, supra note 68.
80. See International Bhd. of Teamsters, 431 U.S. at 357-62.
81. See, e.g., id. at 336-39.
82. See id. at 362.
whether the employer intentionally discriminated against the plaintiff or plaintiffs; that is, whether she intentionally treated them differently because of their race, sex, religion, color, or national origin.\footnote{This article proposes the creation of another layer of proof, so that if the defendant intentionally discriminated, then he must also prove that he acted in reasonable good faith to avoid the imposition of punitive damages. See infra text accompanying notes 227-82.}

2. Intent to Discriminate Under Title VII

The meaning of intentional discrimination under the Constitution and under Title VII is generally the same.\footnote{The "intent to discriminate" requirement of Title VII is akin to the purposeful or intentional state of mind in criminal law. If the defendant intends to do the act that brings about the statutorily proscribed result, for example, he intends to treat people of different races differently because of their race, then the defendant. See infra text accompanying notes 227-82.} The "intent to discriminate" requirement of Title VII is akin to the purposeful or intentional state of mind in criminal law.\footnote{This article proposes the creation of another layer of proof, so that if the defendant intentionally discriminated, then he must also prove that he acted in reasonable good faith to avoid the imposition of punitive damages. See infra text accompanying notes 227-82.} If the defendant intends to do the act that brings about the statutorily proscribed result, for example, he intends to treat people of different races differently because of their race, then the defendant.

The notion of intent as "motive" and "purpose" represents a rejection of the traditional view of intent that prevails in the tort area, in which the term generally is defined without regard to the actor's motive or underlying purpose, but is used merely to distinguish conduct that is deliberate and volitional from conduct that is accidental. \footnote{The Restatement view and Prosser state that the intent required for intentional torts is not objective but subjective. See RESTATEMENT (SECOND) OF TORTS § 8A (1963); KEETON ET AL., supra note 49, § 8. There appears, however, to be a problem in defining these states of mind in torts, and this led to the definitional problems with punitive damages the Supreme Court encountered in Smith. See infra part III.C.1 (discussing Smith v. Wade, 461 U.S. 30, 37-48 (1983)).} [T]ort intent encompasses not only those consequences that the actor actually desired, but also those which a reasonable person would believe are substantially certain to follow from the act. Thus tort law has objectified the requisite state of mind for its intentional wrongs, permitting it to be inferred from the circumstances of the act and thus avoiding the subjective question of actual state of mind.

\textit{Id.} at 978-79 (footnotes omitted).

The Restatement view and Prosser state that the intent required for intentional torts is not objective but subjective. See RESTATEMENT (SECOND) OF TORTS § 8A (1963); KEETON ET AL., supra note 49, § 8. There appears, however, to be a problem in defining these states of mind in torts, and this led to the definitional problems with punitive damages the Supreme Court encountered in Smith. See infra part III.C.1 (discussing Smith v. Wade, 461 U.S. 30, 37-48 (1983)).

Professor Brodin uses the terms "motive" and "purpose" interchangeably to define intent. Brodin, supra note 21, at 978. I prefer to view intent as purposefulness and motive as the explanation for defendant's act.

\footnote{Professor Brodin uses the terms "motive" and "purpose" interchangeably to define intent. Brodin, supra note 21, at 978. I prefer to view intent as purposefulness and motive as the explanation for defendant's act.}

\footnote{See Brodin, supra note 21, at 983 (discussing the intent requirement applied by courts in litigation challenging seniority systems and seniority-based layoffs brought under Title VII).}
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defendant has acted with specific intent comparable to purposefulness in criminal law.\textsuperscript{86} Intent to commit murder does not require that the defendant have a personal antipathy, just that the defendant intend to kill without justification, excuse or mitigation.\textsuperscript{87} Similarly, discrimination does not require a malevolent motive, just the intent to treat a member of a protected class differently, because of his membership in the protected class. On this point, then, examining the best source of words of intent, the criminal law, will be helpful.

\textbf{B. Criminal Law}

The states of mind relevant to Title VII, "intent to discriminate," "malice" and "reckless indifference," have close analogies to significant states of mind for criminal culpability. The purpose of punitive damages in an employment discrimination case is to " 'punish a wrongdoer for his outrageous conduct and to deter others from engaging in similar conduct.'"\textsuperscript{88} The purpose is penal, therefore, not remedial.\textsuperscript{89}

Criminal law is the source of the idea that a person’s culpability should be determined depending on his state of mind with regard to the criminally proscribed act.\textsuperscript{90} The advantage of interpreting states of mind with reference to the criminal law is that such states of mind are susceptible to concrete articulation. This would be useful, because vague ideas, such as "ill will," obscure the issue of punitive damages and inhibit uniform imposition of a standard.

As an example, criminal homicide encompasses all of the states of mind now found in Title VII. The common law definition of murder is a killing with malice.\textsuperscript{91} Although malice in the popular sense means

\textsuperscript{86} Professor Blumrosen posited a model identifying three concepts concerning the nature of discrimination: one motivated by personal antipathy and requiring an act and harm, which he correlates with malice or willful and wanton misconduct; a second which requires that the defendant treat members of minority groups differently, which comports with negligence in tort and constitutional equal protection cases; and a third which consists of conduct having an adverse impact on minority group members. Blumrosen, \textit{supra} note 21, at 67.

\textsuperscript{87} See infra text accompanying notes 91-94.


\textsuperscript{89} See \textit{RESTATEMENT (SECOND) OF TORTS} \S 908 (1977); \textit{KEETON ET AL.}, supra note 49, \S 2.

\textsuperscript{90} See Francis B. Sayre, \textit{Mens Rea}, 45 HARV. L. REV. 974, 989-91 (1932) (comparing evolution of tort law mens rea to that in criminal law).

\textsuperscript{91} See ROLLIN M. PERKINS & RONALD N. BOYCE, C\textit{RIMINAL LAW} 57 (3d ed. 1982). The trend is away from the using the term "malice aforethought" to define murder. \textit{Id.} Aforethought was added "in the ancient cases to indicate a design thought out well in advance of the fatal act." \textit{Id.}
personal ill will, in the criminal sense it has a more particular meaning.\textsuperscript{92} It means that the defendant, without excuse, justification, or recognized mitigation, specifically intended to bring about the criminally proscribed result, or was extremely reckless with regard to such result.\textsuperscript{93} In the context of murder, then, malice means that the defendant intended to kill, intended to inflict serious bodily injury, or was acting with a depraved heart, and that the defendant had no excuse, justification or mitigation.\textsuperscript{94}

The "depraved heart" state of mind has been codified in the provision on murder in the Model Penal Code as criminal homicide committed "recklessly under circumstances manifesting extreme indifference to the value of human life.\textsuperscript{95}" Earlier formulations of the depraved heart state of mind included "'wanton and wilful disregard of an unreasonable human risk,'\textsuperscript{96}" and stated in a more poetic but less concrete fashion, "'wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty.'\textsuperscript{97}

The vague idea of ill will, which has obscured the idea of malice, may have originated in the criminal law;\textsuperscript{98} but the version of malice recognized in more enlightened analyses of the criminal law substantially rectifies this lapse in rigor. It is the criminal law that should serve as a model for a discussion of the term "malice" in Title VII. Malice should mean specific intent to bring about the proscribed result or extremely reckless disregard of the result.\textsuperscript{99} Malice, then, in Title VII cases, should comprehend the intent to discriminate, as well as the extremely reckless disregard of bringing about the discrimination.\textsuperscript{100}

\textsuperscript{92} Rollin M. Perkins, A Re-Examination of Malice Aforethought, 43 YALE L.J. 537, 537 (1934).
\textsuperscript{93} See PERKINS & BOYCE, supra note 91, at 856-61.
\textsuperscript{94} LAFAVE & SCOTT, supra note 21, at 605; Perkins, supra note 92, at 552, 555-57.
\textsuperscript{95} MODEL PENAL CODE § 210.2 (1980).
\textsuperscript{96} Id. § 210.2 cmt. 1 (1980) (quoting ROLLIN M. PERKINS, CRIMINAL LAW 36 (2d ed. 1969)).
\textsuperscript{97} Id. (quoting Commonwealth v. Malone, 47 A.2d 445, 447 (Pa. 1946) (quoting Commonwealth v. Drum, 58 Pa. 9, 15 (1868))).
\textsuperscript{98} LAFAVE & SCOTT, supra note 21, at 605.
\textsuperscript{99} The defendant also must be acting without excuse, justification or mitigation. See supra text accompanying notes 92-94.
\textsuperscript{100} Intent to inflict serious bodily harm does not have a counterpart here, as is usual with
There is a difference, however, between acting with mere recklessness\textsuperscript{101} and with a depraved heart.\textsuperscript{102} The recklessness necessary for murder is such a high degree of recklessness that it evinces an extreme indifference to the value of human life.\textsuperscript{103} Malice with reference to punitive damages under Title VII also should comprehend a high degree of recklessness which indicates indifference to bringing about the statutorily proscribed result, the discrimination, as well as the specific intent to discriminate. This would seem to be unnecessary, however, because the statute itself allows mere recklessness with regard to the proscribed result to be a sufficiently bad state of mind for the imposition of punitive damages.\textsuperscript{104} Indeed, the defendant satisfies the standard for punitive damages if he is merely reckless, even though recklessness is an insufficiently culpable state of mind for liability under Title VII, which requires purposeful intent to discriminate.\textsuperscript{105}

Recklessness in criminal law is the subjective awareness of a high degree of risk that the criminally proscribed result will occur.\textsuperscript{106} Applying this standard to the discrimination context, a defendant would be acting recklessly if he was subjectively aware of a high degree of risk that if he did the act he intended, he would be discriminating. While this would be insufficient for intentional discrimination, the clear meaning of the 1991 Act would allow the imposition of punitive damages upon such a showing of recklessness. This comports with \textit{Smith v. Wade},\textsuperscript{107} discussed below,\textsuperscript{108} in which the Supreme Court

\footnotesize{other situations involving malice, other than murder. \textit{See} PERKINS & BOYCE, \textit{supra} note 91, at 856-61.\textsuperscript{101}

Under the better view, recklessness is a conscious awareness of a substantial and unjustifiable risk of bringing about the proscribed result.

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

\textsc{Model Penal Code} § 2.02(2)(c) (1985).\textsuperscript{102}

\textsc{LaFave & Scott, supra} note 21, at 617-18.\textsuperscript{103}

\textsc{Model Penal Code} § 210.2 (1980). It should be noted that the Model Penal Code does not use the term malice, as such, although the concepts are essentially the same.\textsuperscript{104} \textit{See} 42 U.S.C. § 1981a(b)(1) (Supp. V 1993).\textsuperscript{105}

\textit{See supra} text accompanying notes 84-87.\textsuperscript{106}

\textit{See Model Penal Code} § 2.02(2)(c) (1985).\textsuperscript{107}

461 U.S. 30 (1983).\textsuperscript{108}}
determined that the standard for punitive damages in section 1983 cases can be the same or lower than the standard for liability. Setting a standard for punitive damages at a similar or lower level than for liability, however, has caused problems for the courts in section 1981 and section 1983 cases.

Sections 1981 and 1983 are part of the Civil Rights Acts enacted after the Civil War to protect the newly freed slaves. Section 1983 affords a remedy for intentional discrimination when there is "state action," and section 1981 provides a remedy for private intentional discrimination. The caselaw which developed under sections 1981 and 1983 applies to employment discrimination as does Title VII. Furthermore, since the substantive law of discrimination in Title VII cases overlaps with discrimination law under sections 1981 and 1983, a discussion of this area is appropriate at this point.

C. The Standard for Punitive Damages Under Section 1981 and Section 1983

To reiterate, because the 1991 Act was enacted relatively recently, the courts could not have had much opportunity to interpret the new state of mind elements added to Title VII in the punitive damages provision. Since these states of mind, "malice" and "reckless indifference," are new to Title VII, many of the courts which have interpreted Title VII's punitive damages provision have drawn on analogous law under section 1981 and section 1983. These cases are not generally helpful to the development of a workable standard, however, the status of the law derived from these cases illustrates the need to formulate a more focused standard under Title VII for awarding

108. See infra text accompanying notes 125-48.
109. See Smith, 461 U.S. at 56.
110. See infra part III.C.2.
111. See BARBARA L. SCHLE& PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 668 (2d ed. 1983).
112. See id. at 678.
114. See, e.g., Wilson v. Legal Assistance, 669 F.2d 562, 563-64 (8th Cir. 1982) (likening employment discrimination claims under § 1981 to Title VII); Whiting v. Jackson State Univ., 616 F.2d 116, 121 (5th Cir. 1980) (likening § 1983 to § 1981 and Title VII as federal remedies for employment discrimination by state actors).
117. See infra text accompanying notes 178-208.
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Section 1981 was enacted after the Civil War as section one of the Civil Rights Act of 1866. Although "on its face [it] relates primarily to racial discrimination in the making and enforcement of contracts," the Supreme Court has held that it "affords a federal remedy against discrimination in private employment on the basis of race." Furthermore, "Congress noted 'that the remedies available to the individual under Title VII are co-extensive with the indiv[i]dual’s right to sue under . . . 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive.'" The remedies under Title VII and section 1981 were quite different before the Civil Rights Act of 1991, since section 1981 has always allowed the plaintiff to recover compensatory and punitive damages, and Title VII only afforded equitable relief. Since section 1981 and Title VII are often considered together because they provide different remedies for the same wrong, section 1981 jurisprudence relating to punitive damages is the most natural source for a standard under Title VII.

1. Smith v. Wade

The starting point for punitive damages under section 1981 is the Supreme Court's decision in Smith v. Wade. Although it is a decision interpreting section 1983, the courts generally refer to the standard announced in Smith as applicable to section 1981 as well. In Smith, the defendant contended that the proper test for punitive damages was "actual malicious intent—'ill will, spite, or intent to injure.'" The Court recognized that this area of law was in confusion and noted that the source of confusion was the varying

118. SCHLEI & GROSSMAN, supra note 111, at 668. It was re-enacted as the Civil Rights Act of 1870 after the ratification of the Fourteenth Amendment. Id.
120. Id. at 460.
122. Id. at 460.
124. See Johnson, 421 U.S. at 459-60; supra note 114 and accompanying text.
125. 461 U.S. at 30.
126. See id. at 31.
128. Smith, 461 U.S. at 37.
meanings ascribed to terms such as "malice" and "gross negligence." In tort law, the Court said, malice was sometimes used to denote reckless indifference to the rights of others, while in criminal law it was sometimes used to mean actual ill will, spite, or intent to injure. The Court observed that the rule in the majority of jurisdictions was that punitive damages could be awarded without a showing of actual ill will, spite, or intent to injure; rather, a showing of recklessness, serious indifference to or disregard for the rights of others, or even gross negligence would suffice. The Court determined that it would, therefore, adopt the standard of the common law: "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law, should be sufficient to trigger a jury's consideration of the appropriateness of punitive damages."

The defendant argued that the standard for punitive damages should be higher than the standard for liability in the first place. The Court responded that a higher standard was unnecessary, noting that the parties agreed that there was no substantial difference between the showing required for compensatory damages and that required for punitive damages. The Court observed that the difference is not the standard

129. See id. at 39 & n.8.
130. Id. at 39 n.8.
131. See id. at 45-48. The Court also indicated that the same rule prevailed at the time of the enactment of § 1983. See id. at 45 & n.12. The reason the Smith Court looked to the common law of torts was because there was little in § 1983's legislative history concerning the recovery of damages. See id. at 34. The defendant argued that a primary purpose of § 1983 was to determine future egregious misconduct. Id. at 49. A standard of reckless or callous indifference, the defendant contended, would not serve a deterrent purpose because people would not know if they were being reckless or callously indifferent. See id. They would know, however, if they were acting with actual ill will or intent to injure. See id. The Court responded by suggesting that those who were not deterred by compensatory damages would not be deterred by defendant's proposed actual intent standard for punitive damages. See id. at 50. The Court also noted that it had declined to apply such a standard in both ordinary tort cases and in the First Amendment context, and it did not see the need to do so in a § 1983 case. See id. at 49-50.
132. Id. at 51.
133. Id. at 38. The Court noted later that the standard for punitive damages is the same or lower for some torts. See id. at 53.
134. Id. at 51. The defendant was claiming qualified immunity to which the lower court applied a standard of reckless or callous indifference. See id. at 50-51. This issue was not appealed, and the Supreme Court did not disapprove the standard. See id. at 51. The Court has made it clear in other cases that purposeful discrimination is required for initial liability in § 1981 and § 1983 cases. See General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 389 (1982) (analyzing § 1981); cf., e.g., Personnel Adm'r v. Feeney, 442 U.S. 256, 274 (1979) (interpreting equal protection constitutional law); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (interpreting equal protection law under federal constitution).
for awarding punitive damages, but rather that punitive damages "are
never awarded as of right, no matter how egregious the defendant's
conduct. 'If the plaintiff proves sufficiently serious misconduct on the
defendant’s part, the question whether to award punitive damages is left
to the jury. . . .' "135 The Court explained that the focus is on the
character of the defendant’s conduct.136

The opinion does not enlighten us, however, as to precisely what
character of conduct warrants the imposition of punitive damages. It
indicates only that punitive damages should be awarded "‘to punish [the
defendant] for his outrageous conduct and to deter him and others like
him from similar conduct in the future.’ ”137 The majority’s resolution
of the case is not helpful to the trial judge preparing to instruct the jury,
and it has resulted in much confusion.138

The view of Justice Rehnquist’s dissent139 would have led to more
uniform results. His dissent opined that punitive damages under section
1983 should require actual malice,140 that is, “some degree of bad faith
or improper motive.”141 This dissent was based in part on the purpose
of punitive damages, which is to punish: “It is a fundamental principle
of American law that penal consequences generally ought to be imposed
only where there has been some sort of wrongful animus creating the
type of culpability warranting this treatment.”142

The courts have had great difficulty in applying Smith. After Smith,
the jury may award punitive damages with no additional evidence than
that adduced for liability.143 The basis for the award must be rooted,
then, in the purposes for punitive damages: punishment and
deterrence.144 The problem is this: How does the judge instruct the
jury? The Court noted that the defendant’s conduct should be outrageous
before the jury should be able to assess punitive damages,145 but it did

135. Smith, 461 U.S. at 52 (quoting DAN B. DOBBS, LAW OF REMEDIES 204 (1973)).
136. Id. at 54.
137. Id. (quoting RESTATEMENT (SECOND) OF TORTS § 908(1) (1979) (alteration in
original)).
138. See infra part III.C.2.
139. See id. at 56-92 (Rehnquist, J., dissenting).
140. Id. at 87 (Rehnquist, J., dissenting).
141. Id. at 56 (Rehnquist, J., dissenting).
142. Id. at 86-87 (Rehnquist, J., dissenting). Justice O'Connor's dissent points out that both
Justice Rehnquist and the majority were trying to divine Congress' intent in enacting § 1983 by
referring to the law prevailing at the time. Id. at 92 (O'Connor, J., dissenting). Since there was
a significant split of authority in that law, it made more sense to Justice O'Connor to interpret
§ 1983 with reference to the policies underlying § 1983. Id. at 93 (O'Connor, J., dissenting).
143. See id. at 56.
144. E.g., id. at 54.
145. Id.
not say it had to be more outrageous than intentionally discriminating.\textsuperscript{146}

The language of the 1991 Civil Rights Act is somewhat different, but has essentially the same purport. \textit{Smith} shunned the term “malice” because of its vagueness,\textsuperscript{147} but both Title VII and section 1983 have as their minimum standard for punitive damages the reckless disregard of protected rights.\textsuperscript{148} Since the cases under section 1981 interpreting \textit{Smith} are the most authoritative sources for the courts to use in interpreting provisions of the Civil Rights Act of 1991, it is appropriate to consider those cases at this point.

\subsection*{2. Section 1981 Cases After \textit{Smith} v. \textit{Wade}}

Many courts, although purporting to follow \textit{Smith}, have been unable to apply the standard announced in that case to section 1981 cases. They have instead tended to make the standard for punitive damages higher than the standard for liability, in direct contravention of the rule announced in \textit{Smith}. In \textit{Beauford v. Sisters of Mercy-Province, Inc.},\textsuperscript{149} for example, the Sixth Circuit said: “The imposition of punitive damages in civil rights actions has generally been limited to cases involving egregious conduct or a showing of willfulness or malice on the part of the defendant.”\textsuperscript{150} The court decided that there was sufficient evidence for the jury to pass on intentional discrimination \textit{vel non}, but that there was no evidence of “malice or reckless or callous indifference of an egregious character on the part of either defendant.”\textsuperscript{151} As in the cases discussed later under the 1991 Act,\textsuperscript{152} the courts in many instances

\textsuperscript{146} See \textit{id.} at 54-55 (“[S]ociety has an interest in deterring and punishing all intentional or reckless invasions of the rights of others . . . .”). In fact, the Court intimated that the defendant’s conduct need not be more outrageous than intentionally discriminating. \textit{See id.}

\textsuperscript{147} \textit{Id.} at 39 & n.8. Congress did use the term “malice,” despite the fact that \textit{Smith} had rejected this standard and that courts followed \textit{Smith} in cases involving Title VII’s most analogous provision, § 1981. So it is possible that Congress intended something different. Because the minimum standard, “reckless indifference,” is the same for § 1981 and Title VII, see 42 U.S.C. § 1981a(b)(1) (Supp. V 1993), what Congress meant in using the term “malice” is fairly irrelevant.


\textsuperscript{149} 816 F.2d 1104 (6th Cir.), \textit{cert. denied}, 484 U.S. 913 (1987).

\textsuperscript{150} \textit{Id.} at 1109 (emphasis added) (citing Wolfel v. Bates, 707 F.2d 932, 934 (6th Cir. 1983)).

\textsuperscript{151} \textit{Id}. The court affirmed the district judge’s J.N.O.V. on the jury’s award of punitive damages. \textit{Id.}

\textsuperscript{152} \textit{See infra} notes 179-205 and accompanying text.
simply cite the standard for punitive damages and make a conclusory statement that there is insufficient evidence to support a punitive damages award, without enlightening us with analysis, despite a finding that the defendant intentionally discriminated.\textsuperscript{153}

The cases which have allowed the award of punitive damages to stand are more helpful, although again they often set a higher standard, such as personal ill will, found unnecessary by the Court in \textit{Smith}.\textsuperscript{154} In \textit{Yarbrough v. Tower Oldsmobile, Inc.},\textsuperscript{155} the Seventh Circuit held that the record disclosed evidence of ill will because the plaintiff, inter alia, was transferred to an inferior work area by the defendant supervisor for the stated reason that he did not want a black person in the front of the shop.\textsuperscript{156} Because the owners of the company refused to remedy the situation, the court said that the jury could have reasonably inferred that the owners were callously indifferent to the plaintiff's protected rights.\textsuperscript{157} The court emphasized that this was a "close case for an award of punitive damages."\textsuperscript{158}

The Eighth Circuit in \textit{Block v. R.H. Macy & Co.}\textsuperscript{159} decided that purposeful discrimination, required to find a violation of section


\textsuperscript{154} See \textit{Smith}, 461 U.S. at 39 n.8, 51; \textit{supra} notes 128-32 and accompanying text.

\textsuperscript{155} 789 F.2d 508 (7th Cir. 1986).

\textsuperscript{156} Id. at 514.

\textsuperscript{157} Id.

\textsuperscript{158} Id. In \textit{Erebia v. Chrysler Plastic Prods. Corp.}, 772 F.2d 1250 (6th Cir. 1985), cert. denied, 475 U.S. 1015 (1986), the Sixth Circuit affirmed an award of punitive damages in a case in which the plaintiff continuously had complained about racial harassment, and the defendant had failed to rectify the situation. \textit{Id.} at 1260. Furthermore, one management person had threatened to hurt the plaintiff economically if he continued to complain. \textit{Id.} at 1252, 1260. The court stated that a jury could find malice based on these circumstances. \textit{Id.} at 1260. It approved jury instructions stating that punitive damages were appropriate when the defendant acted wantonly or oppressively, \textit{see id.}, defining wantonness as reckless or callous indifference to the plaintiff's rights. \textit{Id.}

In a district court case, the court decided that the defendant had intentionally discriminated against the plaintiff by discharging him because he was black. \textit{Marsh v. Digital Equip. Corp.}, 675 F. Supp. 1186, 1195 (D. Ariz. 1987). The plaintiff was discharged after a complaint of sexual harassment was lodged against him. \textit{See id.} The court concluded that the plaintiff was discharged on account of his race, because the defendant had treated more favorably white men accused of similar or perhaps more serious sexual misconduct. \textit{See id.} The court also decided that punitive damages were appropriate, because the defendant acted with reckless indifference to the plaintiff's rights. \textit{Id.} at 1197. The defendant's official neither reconsidered his decision to discharge the plaintiff, even after being told that the complaints against the plaintiff were racially motivated, nor did he make any investigation other than interviewing the complaining woman. \textit{Id.}

\textsuperscript{159} 712 F.2d 1241 (8th Cir. 1983).
1981, and reckless indifference to the rights of the plaintiff could reasonably be inferred from the same evidence. The defendant’s personnel managers knew that the plaintiff’s co-worker was racially biased, but acceded to her request to discharge the plaintiff without making any further inquiry. Also, two white employees had engaged in similar conduct for which the plaintiff was discharged, but they had not been disciplined. Furthermore, the defendant replaced the plaintiff with a white person.

Some courts have been able to apply the standard in accord with Smith by looking at the purposes for punitive damages. For example, a district court said that because punitive damages are designed to punish the defendant for outrageous conduct and to deter such future conduct by the defendant and others similarly situated, “[a] jury (or other fact-

160. Id. at 1245 (quoting General Bldg. Contractors Ass’n v. Pennsylvania, 458 U.S. 375, 391 (1982)).
161. See id. at 1243, 1247-48.
162. Id. at 1247.
163. Id.
164. Id. In another Eighth Circuit case, the court decided that the jury could have found that the defendant acted recklessly or with callous indifference to the plaintiff’s rights by discharging him after 34 years because of his race by ignoring its policy of basing employment decisions on seniority. Hicks v. Brown Group, Inc., 902 F.2d 630, 654 (8th Cir. 1990), vacated and remanded on other grounds, 499 U.S. 914 (1991). The jury also could have concluded that the defendant acted callously and was recklessly indifferent when the plaintiff’s supervisor gave “evasive, teasing responses” to the plaintiff when he asked whether he was being discharged because he was white rather than black. Id. After several appeals, the plaintiff lost when the Eighth Circuit Court of Appeals held that the 1991 Act does not apply retroactively to cases pending at the time of its enactment. Hicks v. Brown Group, Inc., 982 F.2d 295, 299 (8th Cir. 1992), cert. denied, 114 S. Ct. 1642 (1994).

In an Eleventh Circuit case, the court affirmed an award of punitive damages, citing the Smith standards but basing its decision on the district court’s finding that the defendant’s actions were “deliberate and knowing.” Stallworth v. Shuler, 777 F.2d 1431, 1435 (11th Cir. 1985). In that case, the plaintiff alleged that the defendants, for racial reasons, consistently appointed less qualified white persons to positions plaintiff sought. Id. at 1432. On one occasion, the defendant had pre-selected a white applicant, then set up a sham application procedure. Id. at 1434. On another occasion, the defendant lowered job requirements that the plaintiff met in order to hire “three otherwise unqualified whites.” Id.

In another Eleventh Circuit case, the court decided that, although the jury had found that all four of the defendants were responsible for the discrimination against the plaintiff, the record did not support the conclusion that they all acted with the requisite ill will or callous disregard of the plaintiff’s rights. Walters v. City of Atlanta, 803 F.2d 1135, 1146-47 (11th Cir. 1986). The plaintiff testified that all of the defendants were courteous to him, but the court said that “[c]ourteous behavior may mask a cynical disregard of federal rights; such, however, is not the case here.” Id. at 1147. With regard to one of the defendants, the court found the requisite reckless disregard for the plaintiff’s rights in the fact that this defendant had been the one who refused to hire the plaintiff, because she was concerned about his race. This defendant also ultimately hired less qualified applicants. Id. at 1147-48.
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finder) must make a discretionary moral judgment that the policies of punishment and deterrence would be served by an award of punitive damages.” 165 The problem is, however, that the court cannot instruct the jury with regard to when those conditions exist.

In another district court case, the court denied punitive damages on the basis that they would not serve as a deterrent, because the events that led to the discrimination were unique and not likely to be repeated. 166 In a Fifth Circuit case, the court, without citing Smith, said that punitive damages may be awarded when the defendant has acted willfully and with gross disregard for the plaintiff’s rights. 167 The court noted that it had previously characterized the requisite behavior as malicious and made no further comment about the standard. 168 The court then directed the district court to evaluate “the nature of the conduct in question, the wisdom of some form of pecuniary punishment, and the advisability of a deterrent.” 169 In analyzing the case under this standard, the court recognized that discrimination is an “abhorrent practice,” but “that the company was taking steps to eliminate [it]” and that the evidence was not clear on whether the defendant acted “maliciously.” 170

In Wulf v. City of Wichita, 171 the Tenth Circuit provided a better reasoned distinction between the state of mind necessary to prove intentional discrimination and the state of mind necessary for an award of punitive damages. The court said that not every intentional violation subjects the defendant to punitive damages. 172 The defendant may have unreasonably thought it was legitimate for him to discharge the plaintiff for inefficiency; 173 however, the court said that punitive damages


167. Jones v. Western Geophysical Co., 761 F.2d 1158, 1162 (5th Cir. 1985) (citing Gore v. Turner, 563 F.2d 159, 164 (5th Cir. 1977)).

168. Id. (citing Claiborne v. Illinois Cent. R.R., 583 F.2d 143, 154 (5th Cir. 1978), cert. denied, 442 U.S. 934 (1979)).

169. Id. (quoting Gore, 563 F.2d at 164 (quoting Lee v. Southern Home Sites Corp., 429 F.2d 290, 294 (5th Cir. 1970))).

170. Id.

171. 883 F.2d 842 (10th Cir. 1989).

172. Id. at 867.

173. Id.
require an assessment of the defendant's subjective state of mind.\textsuperscript{174}

A review of these cases indicates that courts which try to distinguish the standard for punitive damages from the standard for liability are having a difficult time applying \textit{Smith} in a rational way. Conversely, the courts making the distinction based on the purposes of punitive damages are faring better, but still suffer from a lack of uniformity in result because the standard for punishment and deterence is left to the unguided imagination of the jury. As with section 1981 cases after \textit{Smith}, the lower court cases under Title VII are not uniform in their interpretation of the standard for punitive damages.

\textbf{D. The Present Standard for Punitive Damages Under Title VII}

The standard required for punitive damages, "malice or reckless indifference to the federally protected rights,"\textsuperscript{175} introduces terms which were not present in Title VII before the 1991 Act. In addition, most courts have held that the damages provisions of Title VII do not apply retroactively,\textsuperscript{176} and the Supreme Court recently agreed.\textsuperscript{177} For these reasons the courts have had little opportunity to examine the meanings of these words. Some courts, however, have interpreted the standard for punitive damages under the 1991 Act. These cases indicate that the courts are in need of guidance in this area.

As with the cases under section 1981 interpreting the \textit{Smith} standard,\textsuperscript{178} some of the courts addressing the standard have failed even to refer to the words of the Act or the facts of the case. In \textit{Koppman v. South Central Bell Telephone Co.},\textsuperscript{179} for example, a district court in Louisiana identified three sources as providing guidance on the issue of the standard for punitive damages under Title VII.\textsuperscript{180} The sources were section 1981, for which the court said the standard is that the defendant act "willfully and with a 'gross disregard' for the plaintiff's rights;"\textsuperscript{181} the Air Carrier Access Act, in which the court

\begin{footnotesize}
\textsuperscript{174} \textit{Id.} The court in \textit{Wulf} is on the right track. I would go a step further and require that the defendant's good faith belief not only be honest but reasonable.
\textsuperscript{177} \textit{Landgraf v. USI Film Prods.}, 114 S. Ct. 1483, 1508 (1994).
\textsuperscript{178} \textit{See supra} notes 148-74 and accompanying text.
\textsuperscript{180} \textit{See id.} at 358.
\textsuperscript{181} \textit{Id.} (quoting Creamer v. Porter, 754 F.2d 1311, 1319 (5th Cir. 1985) (error in
would require a showing of "'wanton and malicious conduct';" and general maritime law, which the court said requires "'callous indifference' to the [seaman]'s plight." Having articulated the possible standards, the court dismissed the punitive damages claim, because defendants, "at the very worst, intentionally discriminated against the plaintiffs," but had not "engaged in conduct that could be described as 'callous' or 'malicious.' " This particular court had no appreciation for the fact that intent to discriminate is the most culpable state of mind and, having found such, the defendant was necessarily acting maliciously.

In *Dombeck v. Milwaukee Valve Co.*, the court, responding to the defendant's motion for a new trial, reiterated its punitive damages jury instruction, to which neither party had objected. The instruction stated, without authority, that punitive damages are appropriate when the act is "maliciously or wantonly done." The court defined malice as "ill will, or spite, or grudge" toward the plaintiff or the protected class. Although the defendant knew or should have known of the sexual harassment and failed to take remedial action, the court concluded that there was no showing of ill will, spite, or grudge by the defendant. The basis for this conclusion was that the defendant eventually transferred the plaintiff to a department in which she was happy and that the plaintiff generally had no problems with any management person (other, apparently, than the harasser). As evidence that the defendant did not act maliciously toward the protected class generally, the court noted that the defendant had previously "disciplined" this supervisor for sexual harassment.

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182. *Id.* (quoting Shinault v. American Airlines, 936 F.2d 796, 805 (5th Cir. 1991)).
183. *Id.* (quoting Complaint of Merry Shipping, Inc., 650 F.2d 622, 625-26 (5th Cir. 1981)).
184. *Id.*
185. 823 F. Supp. 1475 (W.D. Wis. 1993), vacated on other grounds, 40 F.3d 230 (7th Cir. 1994).
186. *Id.* at 1479.
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 1480.
191. *See id.* at 1479-80.
192. *See id.* at 1480. The disciplinary action consisted of a written warning that further acts of harassment would result in termination. *See id.* at 1478. The court also said that there was no evidence that the act was wantonly done, which it defined in a jury instruction as "reckless or callous disregard of, or indifference to, the rights of one or more persons, including the injured person." *Id.* at 1479. The court said that although the defendant should have known of the hostile working environment, its failure to conduct a more extensive investigation was not
The most common problem in analyzing these states of mind is that
the courts are not clear on what the states of mind mean. Many courts
simply assume that Congress intended the standard for recovering
punitive damages to require a more culpable state of mind than intent
to discriminate. For example, in a recent case, the Fourth Circuit stated
in dicta that "[w]hile 'intentional discrimination' suffices to recover
compensatory damages, Congress requires a heightened showing of
discriminatory action . . . to recover punitive damages." The courts
in such cases did not attempt to analyze the meanings of the words of
the statute in arriving at their conclusions.

In addition to failing to ascribe a clear meaning to the words of the
statute, these courts also fail to explain why the law applies to the facts.
For example, the court in *Canada v. Boyd Group, Inc.* determined
that the plaintiff established a prima facie case of hostile environment
sexual harassment. Because a reasonable woman might have found
the defendants' conduct sufficiently severe or pervasive, the court made
an inference of intentional discrimination by the defendants. Since
the defendants neither offered factual evidence to defeat the prima facie
case nor took prompt and appropriate action to remedy the situation, the
court denied one of the defendants' motions for summary judgment on
the issue of compensatory damages. The court, however, then

reckless or callous, but was merely negligent. Id. at 1480.

The court in *Dombeck* then bolstered its conclusion by quoting from a § 1983 case which
adhered to the *Smith* standard for punitive damages, id. (quoting *Soderbeck v. Burnett County*,
752 F.2d 285, 290 (7th Cir.) (quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983)), cert. denied, 471
U.S. 1117 (1985)), and from a portion of a Seventh Circuit judge's opinion which indicated that
the relevant inquiry was whether the defendant's conduct showed "'malice, evil motive, reckless
behavior, or callous indifference.' " Id. at 1481 (quoting *Mojica v. Gannett Co.*, 986 F.2d 1158,
1161 (7th Cir.) (Cummings, J., dissenting from per curiam decision to rehear en banc) (internal
quotations omitted), aff'd in part, rev'd in part, 7 F.3d 552 (7th Cir. 1993) (en banc), cert.
denied, 114 S. Ct. 1643 (1994)). At the end of this recitation, the court repeated that there was
no evidence to support the conclusion that the defendant acted in reckless or callous disregard
or indifference to the rights of the plaintiff. Id. The court also determined that the punitive
damages provision of the 1991 Act should not be retroactive in the instant case. See id. at 1482-
83; *supra* note 164 (discussing retroactivity of § 1981 as amended by 1991 Act). See generally
McGinley & Stempel, *supra* note 5, at 212 n.126.

194. See, e.g., *Mojica v. Gannett Co.*, 57 Fair Empl. Prac. Cas. (BNA) 1107, 1108-09 (N.D. Ill. 1991) (stating that there was no evidence of malice or evidence of reckless behavior but failing to discuss what these terms mean), aff'd in part, rev'd in part, 7 F.3d 552, 561 (7th Cir. 1993) (en banc), cert. denied, 114 S. Ct. 1643 (1994).
196. See id. at 780.
197. Id.
198. Id.
granted defendants’ motion for summary judgment on the issue of punitive damages because the “[p]laintiff’s allegation of outrageous conduct on the part of [the] [d]efendants does not provide sufficient facts to find maliciousness or reckless indifference. Without evidence that [the] [d]efendants acted maliciously, with an intent to harm, or recklessly, with serious disregard for the consequences of their actions, [the] [p]laintiff’s claim for punitive damages fails.”

Similarly, in *Mojica v. Gannett Co.*, the district court noted that the evidence supported the jury’s verdict that the defendant, owner of a radio station, discriminated against the plaintiff and that the jury’s award of compensatory damages was reasonable. With regard to punitive damages, however, the court granted the defendant’s motion for J.N.O.V., holding: “[T]he defendant’s conduct would have to show ‘malice,’ ‘evil motive,’ ‘reckless’ behavior, or ‘callous indifference,’ ” and that “[u]ndisputed evidence” negated such. The evidence consisted of the fact that the station manager remained friends with the plaintiff, that the plaintiff had attended the station manager’s wedding, and that the station manager had interceded on the plaintiff’s behalf on two occasions. Nevertheless, the court’s basis for determining whether the jury could have found discrimination was the plaintiff’s testimony that the station manager had told her that her failure to receive pay increases and favorable shift assignments was due to the fact that “she was [a] Hispanic working for a black-oriented radio station.”

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199. *Id.* at 781. The court recounted that about six incidents of arguably abusive conduct occurred, the most severe of which involved plaintiff’s supervisor “leaning or rubbing himself against” her. *Id.* at 776.


201. *Id.* at 1107.

202. *Id.* at 1108.

203. *Id.*

204. *Id.* at 1108-09.

205. *Id.* at 1108. One other court at least had an opportunity to analyze the facts with reference to the underlying basis for punitive damages but did not do so. The district court, in entering judgment on the jury’s verdict, said that the jury could have found that the defendant’s conduct was outrageous. United States EEOC v. *AIC Sec. Investigations*, Ltd., 823 F. Supp. 571, 579 (N.D. Ill. 1993), aff’d in part, rev’d in part, 55 F.3d 1276 (7th Cir. 1995). The court found support in the fact that the defendants abruptly discharged the plaintiff in violation of the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 29 U.S.C., 42 U.S.C., and 47 U.S.C.), forcing him to find other employment for the final months of his life, despite the fact that evidence showed he could perform his job on the date he was fired. *AIC Sec. Investigations*, 823 F. Supp. at 578. Further, the jury could have properly found that the defendants had no remorse and were unlikely to act differently in the future. *Id.* The court said that the jury could have properly concluded that the
Under any reasoned interpretation of the standard, punitive damages were appropriate in all of the cases discussed above, and the courts were simply wrong in their recitation and/or application of the law. Part of the problem is that the courts have carried over the problems they have in interpreting the availability of punitive damages under Title VII's most related predecessor, section 1981 into the Title VII area. As discussed earlier, punitive damages under Title VII and section 1981 should be determined under the same standard. Furthermore, the statutory words which trigger an award of punitive damages under Title

discharge of "such a fiercely loyal employee reflected a reckless indifference to his rights and a callous insensitivity to his human condition." Id. The court was aware that the purpose of punitive damages is to deter and punish, see id. at 579, but did not analyze the facts with reference to the purpose of punitive damages. The issue of imposition of punitive damages was affirmed by the Seventh Circuit. AIC Sec. Investigations, 1995 WL 309832 at *11.

206. At least one court has decided that the standard under Title VII is lower than the standard under § 1981. Stender v. Lucky Stores, Inc., 803 F. Supp. 259, 324 (N.D. Cal. 1993). The court indicated that the proof for punitive damages under Title VII only requires a preponderance of the evidence, id. at 324 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 253 (1989)), as opposed to § 1981, which requires proof by clear and convincing evidence. Id. at 324 n.24. The court correctly noted that,

There appears to be no distinction between the standard for establishing a right to punitive damages and the standard for establishing liability for disparate treatment. . . . [I]f a plaintiff were able to establish the intentional discriminatory conduct required to prove disparate treatment, s/he would by definition have satisfied the requirement of showing the "reckless indifference" required for an award of punitive damages.

Id. at 324. The court then noted that the Supreme Court had "equated reckless or callous disregard with intentional discrimination and held that either was 'sufficient to trigger a jury's consideration of the appropriateness of punitive damages.' " Id. at 325 (quoting Smith v. Wade, 461 U.S. 30, 51 (1983)). The court ended its discussion by stating that the Court had recognized in Smith that the threshold for punitive damages need not be higher than that for compensatory liability. Id.

The EEOC uses the following guidelines in deciding whether to seek punitive damages:

(1) the degree of egregiousness and nature of the conduct; (2) the nature, extent and severity of the harm; (3) the duration of the conduct; (4) the existence and frequency of past discriminatory conduct; (5) whether the employer attempted to conceal discriminatory practices; (6) the employer's actions after informed of discrimination; and (7) whether the employer made threats or engaged in deliberate retaliatory action.


207. See supra text accompanying notes 116-24.
VII are close to the standard used for section 1981 cases, so it is both logical and desirable for the standards to have a common interpretation.\footnote{208} Although neither section 1981 nor Title VII cases serve as a useful guideline for creating a standard for punitive damages, a workable standard can be formulated by drawing on another related area, the Age Discrimination in Employment Act.

E. States of Mind Under the Age Discrimination in Employment Act

The Age Discrimination in Employment Act of 1967 (ADEA)\footnote{209} affords the same protection from discrimination based on age for people forty and above that Title VII provides for discrimination based on race, sex, religion, color, and national origin.\footnote{210} The prohibitions of age discrimination mirror the prohibitions of Title VII,\footnote{211} and the courts often interpret the ADEA and Title VII in para materia.\footnote{212} The remedial provisions of the ADEA are based on the Fair Labor Standards Act,\footnote{213} and liquidated damages are available for willful violations.\footnote{214} The relief available under the ADEA is otherwise the same as that available under Title VII before the 1991 Act: backpay and reinstatement.\footnote{215} The 1991 Civil Rights Act did not include the ADEA in section 1981a,\footnote{216} the amendment allowing compensatory and

\begin{footnotesize}
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\item \footnote{208} See supra text accompanying notes 116-24.
\item \footnote{210} See 29 U.S.C. § 623(a) (1988).
\item \footnote{211} See Lorillard v. Pons, 434 U.S. 575, 584 n.12 (1978).
\item \footnote{212} See, e.g., Monce v. City of San Diego, 895 F.2d 560, 561 (9th Cir. 1990) (construing complementary provisions of Title VII and ADEA consistently). But see Lorillard, 434 U.S. at 584 (determining that “significant differences” in the remedial and procedural provisions of the two laws foreclosed petitioner’s argument by analogy). It should be noted that because of changes in the law brought about by the Civil Rights Act of 1991, the ADEA is probably now governed, in aspects not pertinent to this article, by law which was superseded for Title VII but left intact for the ADEA. See Howard Eglit, The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog That Didn’t Bark, 39 WAYNE L. REV. 1093, 1103-04 (1993).
\item \footnote{215} 29 U.S.C. § 626(b) (1988).
\item \footnote{216} See 42 U.S.C. § 1981a (Supp. V 1993). The Act did change the time limitation for filing a charge under the ADEA to conform with Title VII. See 29 U.S.C. § 626(e) (Supp. V
\end{itemize}
\end{footnotesize}
punitive damages. The courts are uniform in holding that liquidated damages are the only true damages available under the ADEA.\(^\text{217}\)

The Supreme Court indicated in *Trans World Airlines v. Thurston*\(^\text{218}\) that liquidated damages are punitive.\(^\text{219}\) The Court recently has reiterated the rule that liquidated damages can be assessed only if the employer acted willfully,\(^\text{220}\) and the Court reaffirmed that this means "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by . . . the ADEA."\(^\text{221}\) This is comparable to the minimum standard for punitive damages under Title VII, "reckless indifference to . . . federally protected rights."\(^\text{222}\)

In *Thurston*, the Court concluded that the defendant acted reasonably and in good faith in attempting to determine whether its policy violated the ADEA.\(^\text{223}\) The evidence of reasonable good faith was that the defendant had consulted with legal counsel and negotiated with the union.\(^\text{224}\) As a result, the Court reversed the award of liquidated damages.\(^\text{225}\) It appears that the Court still adheres to its position in *Thurston*, recently stating that liquidated damages should not be imposed when "an employer incorrectly but in good faith and nonrecklessly believes that the [ADEA] permits a particular age-based decision."\(^\text{226}\) This comports with the solution proposed by this article for Title VII. Now that this article has related states of mind under Title VII to states of mind under the criminal law, the ADEA, and section 1981, the question of formulating a standard for punitive damages under Title VII remains.

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1993); Cathcart & Snyderman, *supra* note 35, at 917. Plaintiffs may be treated more favorably under the ADEA because jury trials are available for any ADEA action in which legal relief is sought and damages are not capped under the ADEA.  See Lewis, *supra* note 22, at 18-19.


219.  *See id.* at 125.


221.  *Id.* at 1710.


224.  *See id.* at 129-30.

225.  *Id.* at 130.

226.  *Hazen Paper*, 113 S. Ct. at 1709 (citing McLaughlin v. Richland Shoe Co., 486 U.S. 128, 135 n.13). Recklessness in criminal law, as we have seen, is the subjective awareness of a high degree of risk that the criminally proscribed result will occur.  See *supra* text accompanying notes 106-09. One wonders if this is what the Court had in mind, or whether it meant to impose some objective measure of the defendant's state of mind more akin to criminal negligence, which generally measures the defendant's state of mind objectively.
IV. PROPOSED STANDARD FOR PUNITIVE DAMAGES UNDER TITLE VII

In developing a standard for punitive damages under Title VII, three possible solutions present themselves. One solution is that the malice requirement be treated as surplusage and the standard for punitive damages be recklessness. This would mean that punitive damages would be presumptively appropriate in all Title VII cases of intentional discrimination. The problem with this solution is that the jury would have to make the determination with no guidance as to when punitive damages should be awarded. The Supreme Court did not seem to be bothered by this possibility in Smith v. Wade, in which the Court indicated that the standard for punitive damages does not have to be higher in section 1983 cases than the standard for finding liability.227 In reality, however, this is not a desirable outcome. In fact, since the Supreme Court chose that interpretation, the courts have had difficulty applying the standard in cases arising under section 1981 and Title VII.228

The second solution is that the courts simply interpret the recklessness requirement as surplusage and rely instead on the popular sense of, or one of the dictionary definitions of malice—personal ill will.229 In this situation the defendant who has discriminated intentionally, but not because of personal ill will, would not be subject to punitive damages. This is similarly unworkable, since the clear language of the statute allows recovery of punitive damages if the defendant was reckless.230 Furthermore, the Court in Smith specifically rejected this solution for section 1983,231 and courts have subsequently applied this decision in section 1981 cases.232 To reiterate, a solution which requires the standards for section 1981 and Title VII to be irreconcilable is not the most desirable.233

Since neither of the foregoing solutions is viable for the reasons set forth, the point of this article is to offer yet another solution. This third

227. Smith, 461 U.S. at 51-56; see supra text accompanying notes 125-36.
228. See supra parts III.C.2. and III.D.
231. See Smith, 461 U.S. at 51.
232. See supra note 127 and accompanying text.
233. It should be noted again, however, that since Smith, which rejected malice as a standard, was decided before the 1991 Act, Congress could have meant for the standard to be different.
solution is related somewhat to the second, but is more in the nature of a clarification of the occasion for awarding punitive damages than an interpretation of the words of the statute. Punitive damages should be awarded when the defendant deserves to be punished and the award would deter her and others from such conduct in the future. The defendant clearly deserves punishment in most cases of intentional discrimination because she has done a great social and moral wrong proscribed by federal law. If, however, she was acting reasonably and in good faith, punitive damages should not be assessed. The most obvious example involves the situation in which intentional discrimination does not violate Title VII: the defendant interposing a defense to Title VII liability, such as acting pursuant to a valid affirmative action plan or a bona fide occupational qualification (BFOQ). Logic requires, then, that if the defendant believed, incorrectly but reasonably and in good faith, that she was acting legally, she should not be punished by an award of punitive damages, even though her defense to liability would fail.

A further analogy to criminal law is useful here. The defense of justification applies when the defendant is commanded or authorized by law to do that which otherwise would be criminally proscribed. For example, the defendant is justified in killing in self-defense if he is correct in his belief that he is about to be killed. Similarly, under Title VII, the defendant acting pursuant to a valid affirmative action plan is justified in intentionally discriminating.

If the criminal defendant reasonably believes she must kill in self-defense, then, even if her belief is incorrect, she is excused. Excuse

234. Accord Smith, 461 U.S. at 52.
235. See Restatement (Second) of Torts § 908(1) (1977).
238. See Perkins & Boyce, supra note 91, at 56.
239. Id. But see Model Penal Code § 3.04 & explanatory note (1985) (indicating that the defendant is justified even if his belief is incorrect but may be prosecuted for an offense requiring recklessness or negligence).
240. See Perkins & Boyce, supra note 91, at 56. Other authorities classify reasonable but incorrect belief self-defense as justifiable homicide. See LaFave & Scott, supra note 21, at 457 & n.25; Model Penal Code § 3.04 & explanatory note (1985) (indicating that the defendant’s belief need not be reasonable for the defendant’s use of self-defense to be justified). Classifying reasonable but mistaken belief self-defense as excusable, rather than justifiable, however, is
in criminal law applies when the defendant has done a blameworthy act, but for some reason should not be held accountable.\textsuperscript{241} The outcome is, as with justification, that the defendant has a complete defense to the crime.\textsuperscript{242} One who kills unnecessarily has done a blameworthy act, however, which is the difference between justifiable and excusable homicide.\textsuperscript{243} Because the defendant’s good faith belief is reasonable, the defendant should not be punished criminally even though her belief that she must kill in self-defense was incorrect.

The criminal law analogy to Title VII is obviously not perfect at this level of analysis: under the criminal law, if the defendant believes incorrectly, but reasonably, that she must kill in self-defense, she is excused.\textsuperscript{244} Under Title VII, the defendant’s reasonable belief that the affirmative action plan is valid is not a defense to liability for compensatory damages and equitable relief.\textsuperscript{245} That is, a defendant who has acted pursuant to an affirmative action plan which is not valid has done a blameworthy act, and she will be liable under Title VII.\textsuperscript{246} She should not be punished, however, with punitive damages. When dealing with criminal intent and possible loss of liberty, the criminal defendant similarly should not be punished if she has done a blameworthy act but has acted reasonably. The civil defendant, on the other hand, should be held accountable for a loss she caused by a blameworthy act, even if that act was reasonable. However, she should not be subjected to punitive damages, which are penal in nature, and more analogous to punishment imposed by the criminal law.

This applies to a case of intentional discrimination as follows: The


\textsuperscript{242} \textit{Id.} at 676-77; see LAFAVE \& SCOTT, \textit{supra} note 21, at 454-55 (justification); PERKINS \& BOYCE, \textit{supra} note 91, at 1044 (excuse). Perkins and Boyce explain this as based on reasonable mistake of fact. \textit{See id.} Whether the defendant is justified or excused in killing in self-defense often involves issues relating to the rule of retreat and whether the defendant was at fault in bringing about the altercation; these issues are beyond the scope of this article. \textit{See id.} at 1121-37.

\textsuperscript{243} \textit{See Dressler, supra} note 241, at 675-76.

\textsuperscript{244} \textit{See PERKINS \& BOYCE, supra} note 91, at 56.


\textsuperscript{246} \textit{See supra} note 245 and accompanying text.
inquiry looks first at whether the defendant intended to treat the plaintiff differently based, for instance, on her sex. Next, did any justification exist? That is, for example, was sex a bona fide occupational qualification for the job? If there was no justification, then the defendant is guilty of intentional discrimination and should be assessed punitive damages. If there was a justification, such as BFOQ, then the question is, is it a valid defense? If it is, the defendant is not liable under Title VII. If the defendant's purported justification is not valid, the defendant is liable under Title VII. The inquiry then shifts to whether the defendant should be assessed punitive damages. The answer to this question should depend on whether the defendant believed reasonably and in good faith that he had a justification. If the employer's motivation was benign, then imposing punitive damages would not be appropriate.

It is clear that intent to discriminate simply requires that the defendant treat people differently because of their race, sex, religion, color, or national origin. Why the employer treated the person differently is irrelevant, unless the employer was acting pursuant to a valid affirmative action plan, a bona fide occupational qualification or some other defense. So, other than those situations, the employer's motivation is irrelevant, although the courts frequently assume that intent and motive are synonymous.

In substantive criminal law, motive often is said to be irrelevant. Although some motives, such as self-defense and necessity, are defenses, good motives generally are irrelevant as long as the defendant has the necessary criminal intent. Professor Welch pointed out the distinction between motive and intent in an excellent article in which he proposed that motive, not intent, should be the basis for a finding of intentional discrimination in disparate treatment cases.

247. See, e.g., supra note 57 and accompanying text.

249. See Belton, supra note 4, at 1253 n.210; Welch, supra note 84, at 763-72.
250. LAFAYE & SCOTT, supra note 21, at 227.
251. See id. at 227-29.
252. Welch, supra note 84, at 935. Professors Zimmer and Sullivan also discuss the distinction between motive and intent in the Title VII context. See Zimmer & Sullivan, supra note 57, at 31-34. Not only do I agree that the distinction is helpful for the purpose of liability,
Professor Welch proposed to broaden the reach of Title VII by redefining the threshold requirement for disparate treatment, asserting that "[m]otive addresses the factors that lead into a decision: the reasons upon which a decision is based, the realities that motivate the decisionmaker. Intent is synonymous with purpose." Professor Welch's analysis posits that motive can be conscious or unconscious, while intent is always conscious. Professor Welch explains the phenomenon of sex stereotyping in terms of unconscious motivation, which is a more helpful explanation than intentional discrimination. The defendants in Price Waterhouse v. Hopkins, as Professor Welch points out, were not acting with consciously discriminatory intent; that is, they did not realize that they were treating the plaintiff differently because of her sex. At least some of them even had a benign motive and really thought they were helping the plaintiff.

I also think it is a useful distinction for the purposes of the award of punitive damages. Additionally, I agree with Professor Welch and others who point out that requiring proof of discriminatory intent does not cure the problem of workplace discrimination, which is a by-product of societal discrimination, largely brought about by unconscious discrimination. See, e.g., Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317, 319-24 (1987); Welch, supra note 84, at 762. Professor Oppenheimer suggests that since most discrimination is unintentional, a better theory of discrimination would be based on negligence rather than intent. Oppenheimer, supra note 16, at 900. This being the case, the disparate impact theory or Professor Welch's motivation theory could more effectively eradicate societal discrimination. See generally Barbara J. Flagg, "Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent, 91 MICH. L. REV. 953, 960-61 (1993) (proposing a reformed disparate impact rule); D. Marvin Jones, The Death of the Employer: Image, Text, and Title VII, 45 VAND. L. REV. 349, 351-52 (1992) (buttressing statement that Title VII has "little, if any, significance as a means of helping blacks" with statistics that showed that less than one percent of claims filed with the EEOC in 1990 resulted in any formal relief through the administrative process). "The broad purposes of Title VII can be served only when all types of discrimination are addressed." Welch, supra note 84, at 751; cf. Pamela S. Karlan, Note, Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent, 93 YALE L.J. 111, 112 (1983) (arguing for a less stringent intent standard in equal protection cases).

The disparate treatment theory has become an even more impotent tool to effect the purposes of Title VII since the Supreme Court announced that in order to prove pretext, the plaintiff may have to show more than simply that the employer lied. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2754-55 (1993).

253. Welch, supra note 84, at 736.
254. Id.
255. See id. at 742-43.
257. Welch, supra note 84, at 742-43.
258. See Hopkins, 618 F. Supp. at 1117 (reporting stereotype-tainted comments from a supporter of the plaintiff for the partnership position).
In *Price Waterhouse*, the plaintiff had presented evidence that she was not made partner because some of the partners in the firm thought she was too masculine.259 These partners had described her as “macho,” said that she may have “overcompensated for being a woman,” and complained that she used “foul language,” inappropriate for a “lady.”260 In order to improve her chances for partnership, she was told to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry”261 and to go to “charm school.”262 At least some of the partners were unaware that characterizing the plaintiff as too aggressive and masculine was based on impermissible sex stereotyping.263 Because the defendants were guilty of sex stereotyping, however, the Supreme Court ultimately characterized their conduct as intentionally discriminatory, whether it was conscious or unconscious.264

Does unconscious or subconscious motivation make the defendant bad enough to punish? This is the problem for the punitive damages analysis. The defendant obviously cannot interpose a defense under Title VII, such as a BFOQ, if the motivation is subconscious, since a BFOQ must be a conscious motivation to be interposed as a defense.265 As discussed above, if the defendant reasonably and in good faith believes that she is not discriminating, she would still be liable for the discrimination, but she should not be liable for punitive damages. It should be up to the jury to decide whether the defendant has a reasonable basis for believing that she was not discriminating.

The issue that remains unresolved here is the meaning of reasonable belief. Again a criminal law analogy is useful. The belief that the criminal defendant must have to claim excusable self-defense requires not only an honest belief, but also a belief that is based on reasonable grounds.266 If a reasonable person could not have believed that she had to act in self-defense under the circumstances, the defendant cannot claim self-defense, even if she was acting in subjective good faith.267

259. See id. at 1116-18.
260. Id. at 1116-17.
261. Id. at 1117.
262. Id.
263. See id. at 1119.
264. See *Price Waterhouse*, 490 U.S. at 250-51 (plurality opinion).
266. See PERKINS & BOYCE, supra note 91, at 1113-14. “The question is not whether the jury believes the force used was necessary in self-defense, but whether the defendant, acting as a reasonable person had this belief.” Id. at 1114.
267. See MODEL PENAL CODE § 3.04 cmt. 2, at 35 (summarizing prevailing statutory and
If the defendant’s belief is unreasonable then she cannot be excused, but rather she will be guilty of some lesser form of criminal homicide. Honest but unreasonable belief self-defense will reduce murder to manslaughter under the common law and to either manslaughter or negligent homicide under the Model Penal Code. Under the criminal law, then, the defendant who acts honestly but unreasonably is nevertheless punished criminally. Similarly, under Title VII, punishing with punitive damages a defendant who acts with honest but unreasonable belief is appropriate.

What would a jury have thought about the blatant sex stereotyping in Price Waterhouse? A jury surely would not have found that the defendant had a reasonable belief with regard to the motive for the

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268. See PERKINS & BOYCE supra note 91, at 1115-16. Under the Model Penal Code, he may be guilty of manslaughter if his belief was reckless. MODEL PENAL CODE § 3.04 cmt. 2, at 36 (1985). If his belief was criminally negligent, he would be guilty of negligent homicide. Id.


270. Id. at 36.

271. The Model Penal Code, by analogy, supports criminal and punitive sanctions for unreasonable, i.e.; negligent, use of deadly force in self-defense, albeit a lesser sanction than that for murder. Id. As for the definition of negligence:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.


I prefer the common law view of honest and reasonable belief to measure the defendant’s ability to claim a defense for Title VII punitive damages purposes. In Trans World Airlines v. Thurston, 469 U.S. 111 (1985), an age discrimination case, the Court indicated that an award of liquidated damages is proper under the ADEA if the defendant’s belief is reckless. See id. at 126. The Court did not define the term, but it is clear that the use of this standard in an area of law analogous to Title VII adds yet another vague term to the possibilities.

272. See Price Waterhouse, 490 U.S. at 250-51 (plurality opinion); supra notes 256-64 and accompanying text. On remand, the district court ruled that Hopkins was entitled to backpay from the date she should have been made partner but reduced her award due to her failure to mitigate damages. See Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1211-15 (D.D.C.), aff’d, 920 F.2d 967 (D.C. Cir. 1990). The eventual backpay award was more than $370,000. Id. at 1217. Hopkins also recovered attorney’s fees and costs in the amount of $422,460.32. Id. Furthermore, the district court ordered Price Waterhouse to admit Hopkins as a partner. Id. at 1216.
discrimination. Accordingly, the defendant should not be relieved of liability for punitive damages in a case such as *Price Waterhouse*.

In short, if the defendant is found to have intentionally discriminated, then he is liable for compensatory damages. Upon this finding, liability for punitive damages should be presumed, and the defendant should be required to prove a subjective good faith belief based on reasonable grounds that he was not discriminating.

Good faith has not been a defense in the context of a Title VII suit before the 1991 Act. With the advent of punitive damages, however, it should be, as long as the subjective belief is reasonable. This good faith belief comports with the law in analogous areas: Under the Age Discrimination in Employment Act, the defendant must have reasonable, good faith grounds for his belief to avoid liquidated damages. Reasonableness also is the standard under section 1983 for one claiming the defense of qualified immunity. In addition, under the 1991 Act, the defendant may avoid compensatory and punitive damages under the Americans with Disabilities Act if she can show that she made a good faith effort to accommodate the plaintiff’s disability.

This defense, however, should not be limited to situations in which the employer has used an affirmative action plan or BFOQ, but rather to any equivocal situation in which there is an argument that the employer acted reasonably and in good faith.

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273. *See, e.g., supra* text accompanying notes 259-62 (comments by Hopkins’ co-workers and supervisors). There may be other instances of subconscious motivation, however, that would not seem so unreasonable to a jury, depending on its cultural norms. Unfortunately, these same cultural norms may still be tainted with subconscious stereotyping. *See supra* note 252.


275. *See Thurston*, 469 U.S. at 128-30. Liquidated damages are awarded under the ADEA only in cases of willful violations. 29 U.S.C. § 626(b) (1988). A violation is willful if the employer knew or showed reckless disregard for whether its conduct violated the ADEA. *See Thurston*, 469 U.S. at 128-29. The Court indicated that reasonable good faith is the measure for whether the defendant acted in reckless disregard of protected rights under the ADEA. *See id.* at 129.

276. *See Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982). A public official claiming qualified immunity must show only that she acted in an objectively reasonable manner, and not necessarily that she also acted in subjective good faith. *See id.* The Court objectified the standard to “avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.” *Id.* at 818.


V. CONCLUSION

Assuming the Court is not willing to re-evaluate its position in Smith, that the standard for punitive damages need not be higher than for liability, then the only viable solution is to construct an articulable standard for awarding punitive damages which is based on the reasons for the award: deterrence and punishment. Since it is possible to be guilty of discrimination, despite a benign motive, the award of punitive damages should consider the defendant's motive. One who acts in subjective good faith based on reasonable grounds is not the kind of person the law should punish or seek to deter. As the Court of Appeals for the Tenth Circuit said in Wulf v. City of Wichita, "an award of punitive damages requires an assessment of [the defendant's] subjective state of mind."

A court which determines that the defendant intentionally discriminated is simply wrong to find that the facts are insufficient to support an award of punitive damages. The award of punitive damages should be presumptively appropriate in all cases in which the defendant intentionally discriminated. The defendant has acted "maliciously," with "ill will," "recklessly," "purposefully," "callously," "willfully," and "outrageously" in intentionally treating the plaintiff differently because of her race, sex, religion, color, or national origin. Courts should not have to find aggravating circumstances to justify an award of punitive damages. Rather, they should have to find mitigating circumstances in order to avoid approving an award of punitive damages. In other words, the defendant should bear the burden of persuasion to demonstrate that he acted reasonably and in good faith, because the defendant is in the best position to do so.

279. See Smith, 461 U.S. at 51-56.
280. See id. at 54.
281. See supra notes 245-46 and accompanying text.
282. 883 F.2d 842 (10th Cir. 1989).
283. Id. at 867.
284. Once the jury is instructed on intentional discrimination, the court can ensure that the defendant bears the burden of persuasion by instructing the jury as follows: If you find that the defendant intentionally discriminated against the plaintiff in this case, you should award punitive damages against the defendant, unless you find that the defendant acted in the good faith belief based on reasonable grounds that he was not discriminating. Punitive damages are appropriate when the defendant should be punished, so that he and others similarly situated will be deterred from intentionally discriminating in the future.