Burden of Proof for Employee Numerosity under § 1981a Statutory Damage Caps

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INTRODUCTION

Before 1991, under the Civil Rights Act of 1964,[1] employees who were subject to discrimination could receive reinstatement, an injunction against the discriminatory behavior, damages for backpay, lost benefits, attorneys' fees, and litigation costs.[2] The Civil Rights Act of 1991[3] added the ability to recover nonpecuniary, future pecuniary, and punitive damages. The newer damages are more difficult to quantify, so Congress imposed caps on the size of these additional damages based on the number of people working for the employer.[4]

In a jury trial, the jury is not informed of the existence of the damage caps.[5] The judge takes the jury's verdict and award, thanks the jury and sends them home, and then entertains a post-trial motion by the defendant to reduce the award to one of the statutory limits based on an asserted number of employees.[6] The plaintiff can counter that a higher statutory limit applies because the employer actually has more than the asserted number of employees.

The post-trial nature of the dispute over employee numerosity causes problems. First, permitting one party to fulfill the burden through some types of evidence, particularly affidavits, may—in effect though not in form—shift the burden to the other party.[7] A second problem is

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1 Civil Rights Act of 1964, Pub L No 88-352, 78 Stat 241, codified 42 USC § 2000a et seq (2000).

2 Civil Rights Act of 1964 § 706(g), Pub L No 88-352, 78 Stat at 261, codified at 42 USC § 2000e-5(g) (2000).

3 Civil Rights Act of 1991, Pub L No 102-166, 105 Stat 1071, codified in various sections of titles 2 and 42 (2000).

4 Civil Rights Act of 1991 § 1977a(b)(3), Pub L No 102-166, 105 Stat at 1073, codified at 42 USC § 1981a(b)(3) (2000). For between 14 and 101 employees, the statute mandates a cap of $50,000; for between 100 and 201 employees, $100,000; for between 200 and 501 employees, $200,000; and for more than 500 employees, $300,000. The minimum number of employees must be met for "each of 20 or more weeks in the preceding or current calendar year." Id.

5 42 USC § 1981a(c)(2) (2000).

6 See, for example, *Smith v Norwest Financial Wyoming, Inc*, 964 F Supp 327, 330 (D Wyo 1996).

7 See, for example, id (relying solely on an affidavit produced by the defendant to establish the number of employees and rejecting deposition evidence proffered by the plaintiff to the contrary). While accepting affidavits from interested parties requires reliance on the trustworthi-

document dumping, which occurs when one party responds to a request for information by producing every item even remotely related to the request in order to overwhelm the requesting party with an inordinate amount of work spent sifting through the produced information. A document dump in this context can be overwhelming: the litigation involves two years' worth of documents,[8] and a large number of different documents refer to the number of employees a defendant has.[9] Finally, litigation fatigue gives the judge an incentive to expedite proceedings about employee numerosity on the assumption that the parties have had adequate time for related discovery during an already lengthy litigation process.[10]

Section 1981a does not establish which party has the burden of proof[11] for employee numerosity or what types of evidence suffice to meet that burden. No appellate court has spoken unambiguously to the issue, and district courts have used inconsistent and incomplete methods of analysis. This Comment examines the current case law dealing with these questions and—using statutory analysis, analogy to interpretation of similar laws, and policy arguments—proposes a framework to determine who bears the burden of proving the size of an employer and how that burden should be fulfilled.

I. THE CIVIL RIGHTS ACT OF 1991: PUTTING § 1981A IN CONTEXT

Section 1981a was passed in 1991 as part of a larger set of amendments to the already extensive civil rights laws. The rather convoluted operation of § 1981a is a direct result of the politically contentious arena it emerged from, and understanding these origins sheds light on the reasoning behind the details of its operation. This Part lays out the basic history of the civil rights framework as it relates to the

ness of parties or the professional ethics of their lawyers, a system designer should still strive to create sensible incentives for actors.

8 See 42 USC § 1981a(b)(3)(A)–(D) (limiting damages based on "the current or preceding calendar year").

9 Examples include payroll forms, W-2 and tax forms, SEC 10-K forms, and filings with the Equal Employment Opportunity Commission (EEOC).

10 See, for example, *Clawson v Mountain Coal Co, LLC*, 2007 WL 201253, *13 & n 18 (D Colo).

11 The meaning of "burden of proof" is often debatable. Compare, for example, *Director, Office of Workers' Compensation Programs, Department of Labor v Greenwich*, 512 US 267, 272–76 (1994) (holding that the "ordinary and natural meaning" of "burden of proof" was only the burden of persuasion), with id at 282–85 (Souter dissenting) (finding no consensus as to the "ordinary and natural meaning"). "Burden of proof" will be used in this Comment to encompass both the burden of production and the burden of persuasion. Although these do not always align, the reasoning underlying the placement of one will usually apply to the placement of the other. See Jack H. Friedenthal, et al, *Civil Procedure: Cases and Materials* 956 (West 9th ed 2005) ("The term 'burden of proof' usually refers to both production and persuasion, and these burdens usually fall on same party at trial."). If arguments refer to just one, it will be made clear; otherwise, an argument applies to both.

employment context and describes how the number of employees factors into discrimination litigation.

A. Section 1981a Arises from the Battleground

1. The history of the Civil Rights Act of 1991.

Section 1981a was passed as part of the Civil Rights Act of 1991, adding it to an already extensive civil rights framework.[12] One of the provisions amended in 1991 was Title VII, which provided protection against employment discrimination based on "race, color, religion, sex or national origin."[13] Much of the impetus behind the Act was expanding coverage, but it was essentially a political compromise. Democrats in Congress wanted to undo recent Supreme Court case law limiting the scope and availability of the civil rights statutes,[14] but many Republicans, including the first Bush Administration, were relatively content with the interpretive changes handed down by the Court.[15]

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12 Civil Rights Act of 1991, 105 Stat 1071. Like all hotly contested laws, the Civil Rights Act of 1991 required political maneuvering and compromises. Congress and the White House battled for two years before reaching a compromise, and President George H.W. Bush vetoed a civil rights bill in 1990. See David A. Cathcart, et al, *The Civil Rights Act of 1991* 4, 7 (ALI-ABA 1993).

13 Civil Rights Act of 1964 title VII, 78 Stat at 253, codified at 42 USC § 2000e-2(a) (2000). Other statutes modeled after Title VII have provided protection for other classifications, such as age and disability. See, for example, Age Discrimination in Employment Act of 1967, Pub L No 90-202, 81 Stat 602, codified at 29 USC §§ 621–34 (2000); Americans with Disabilities Act of 1990, Pub L No 101-336, 104 Stat 327, codified as amended in various sections of titles 29, 42, and 47.

14 Civil Rights Act of 1991, 105 Stat 1071. The Act itself expressed some congressional findings related to the need for expansion of civil rights law:

> (1) [A]dditional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace; (2) the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and (3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

Civil Rights Act of 1991 § 2, 105 Stat at 1071. The purposes of the Act show further the congressional intent to expand coverage:

> (1) [T]o provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace; (2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); (3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and (4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

Civil Rights Act of 1991 § 3, 105 Stat at 1071.

15 See William B. Gould, *Agenda for Reform: The Future of Employment Relations and the Law* 235 (MIT 1993) (describing how President Bush vetoed Congress's earlier attempt in 1990 to pass new civil rights legislation "simply because he approved most of the new case law that had been articulated in 1989").

Although the Act comes with little traditional legislative history, two interpretive memoranda were entered into the Congressional Record: the Danforth Memorandum[16] from the Democratic sponsors of the Act and the Dole Memorandum,[17] which the Administration claimed as its interpretation of the Act.[18] Predictably, each side focused on the provisions of § 1981a for which they had negotiated. The Danforth Memorandum cites the inequity between victims of racial discrimination and victims of gender, religious, or disability discrimination.[19] The Dole Memorandum focused on the importance of the statutory caps on damages.[20]

2. The aim of § 1981a.

Claims under § 1981a piggyback on other civil rights claims, but only certain ones. The provision provides additional damages in cases of "unlawful intentional discrimination," including those brought under Title VII[21] and the Americans with Disabilities Act[22] (ADA), but not in cases of disparate impact.[23] If a plaintiff is bringing a claim under

16 137 Cong Rec S 15483, 15483–85 (Oct 30, 1991) ("Danforth Memorandum") (interpretive memorandum introduced into the record by Senator Danforth).

17 137 Cong Rec S 15472, 15472–78 (Oct 30, 1991) ("Dole Memorandum") (interpretive memorandum introduced into the record by Senator Dole).

18 Cathcart, *Civil Rights* at 7 (cited in note 12). See also George Bush, Statement on Signing the Civil Rights Act of 1991, 27 Weekly Comp Pres Doc 1702, 1702 (Nov 21, 1991) (stating that the Dole Memorandum "will be treated as authoritative interpretive guidance by all officials in the executive branch with respect to . . . the matters covered in the documents").

19 The former can recover full compensatory and punitive damages while the latter may only receive injunctive relief, reinstatement or hiring, and up to two years' backpay. 137 Cong Rec S 15483, 15483–85.

20 Dole Memorandum, 137 Cong Rec S 15472, 15472–78.

21 42 USC § 1981a(a)(1) (2000) (requiring a claim brought under 42 USC § 2000e-2 (2000), 42 USC § 2000e-3 (2000), or 42 USC § 2000e-16 (2000)).

22 42 USC § 1981a(a)(2) (2000).

23 42 USC § 1981a(a)(1). Supreme Court case law divides claims under Title VII into two types: disparate treatment and disparate impact. See *Watson v Fort Worth Bank and Trust*, 487 US 977, 986–87 (1988). "A disparate treatment violation is made out when an individual of a protected group is shown to have been singled out and treated less favorably than others similarly situated on the basis of an impermissible criterion under Title VII." *EEOC v Metal Service Co*, 892 F2d 341, 347 (3d Cir 1990). This description gives what is—in the public's mind—the most prototypical occurrence of discrimination. See *International Brotherhood of Teamsters v United States*, 431 US 324, 335 n 15 (1977). "A disparate impact violation is made out when an employer is shown to have used a specific employment practice, neutral on its face but causing a substantial adverse impact on a protected group, and which cannot be justified as serving a legitimate business goal of the employer." *Metal Service*, 892 F2d at 346. See also *Griggs v Duke Power Co*, 401 US 424 (1971) (creating a disparate impact test and striking down a generalized intelligence test and high school diploma requirement despite a lack of discriminatory intent); 42 USC § 1981a(a)(2) (excluding disparate impact cases for ADA claims as well).

Title VII or the ADA, she may also bring a claim under § 1981a, and the elements of the underlying claim are the requirements of § 1981a.[24]

Section 1981a added the ability to receive (1) nonpecuniary damages; (2) future pecuniary damages; and (3) punitive damages to the already-existing ability to win reinstatement and receive certain compensatory damages.[25] Under the previous incarnation of the Civil Rights Act, employees could receive damages only for backpay, lost benefits, attorneys' fees, and litigation costs under Title VII.[26] There are reasons that § 1981a takes the form it does. First, it caps damages because it added damages that are more difficult to quantify nonarbitrarily. Second, damages were added to make the civil rights system more equitable among victims. Victims of racial discrimination could already recover full compensatory and punitive damages under § 1981, but victims of sex discrimination could not.[27] The 1991 changes sought to remedy that inequity between victims.[28] The same rationale applies to intentional discrimination on the basis of disability. Congress found that damages in addition to those already existing were "needed to deter unlawful harassment and intentional discrimination in the workplace."[29]

The additional recovery involved a tradeoff. Section 1981a(b)(3) placed caps on the recovery of the newly awarded damages, and these caps varied with the size of the employer as measured by the number of employees.[30] The size of the employer is a proxy for ability to pay:[31] the purpose of the Act's caps was "to deter frivolous lawsuits and to protect employers from financial ruin as the result of unusually large

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24 The statutory language limiting recovery under § 1981a if the plaintiff could recover under § 1981 only serves to prevent double recovery, so the plaintiff can bring both claims. See *Johnson v Metropolitan Sewer District*, 926 F Supp 874, 876 & n 2 (ED Mo 1996). See also *Bradshaw v University of Maine System*, 870 F Supp 406, 407–08 (D Me 1994) (noting that § 1981a prevents double recovery under § 1981 and § 1981a).

25 See *Means v Shyam Corp*, 44 F Supp 2d 129, 133 (D NH 1999) (holding that a statutory cap on compensatory damages did not violate the Equal Protection Clause). See also 42 USC § 1981a(b)(3) (2000) (listing several synonyms for emotional harms).

26 See Civil Rights Act of 1964 § 706(g), 78 Stat at 261.

27 There is a fair amount of overlap between Title VII, originally from the 1964 Civil Rights Act, and § 1981, originally part of the 1866 Act. Section 1981 gives all citizens the same right to "make and enforce contracts . . . as is enjoyed by white citizens," which "includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 USC § 1981(a)–(b) (2000). Subsection (a) was part of the 1866 Act, and subsection (b) was added in 1991. Civil Rights Act of 1866 § 1, 14 Stat 27; Civil Rights Act of 1991 § 101, 105 Stat at 1072. The standards for racial private employment discrimination under each are the same, see *Wilson v Legal Assistance of North Dakota*, 669 F2d 562, 563–64 (8th Cir 1982), but § 1981 cannot handle gender- or disability-based claims.

28 See *Bradshaw*, 870 F Supp at 408. See also 42 USC § 1981a(a)(1).

29 Civil Rights Act of 1991 § 2(1), 105 Stat at 1071, codified at 42 USC § 1981a (2000).

30 See note 4.

31 See *Hamlin v Charter Township of Flint*, 965 F Supp 984, 988 (ED Mich 1997).

awards."[32] It is unclear from the legislative history why Congress chose this particular proxy as opposed to balance sheet net worth or some other financial measure. One can speculate that the number of employees is more difficult to manipulate than a financial measure or that the number of employees is more directly tied to the likelihood of a discriminatory event. But regardless of which measure is used, the fact that the underlying reason is ability to pay will potentially make this a contentious, important issue at the tail end of litigation, after the trial.

B. The Issue of Employee Numerosity during Litigation

1. When the issue of employee numerosity arises.

Litigants have little incentive to present information during trial about employee numerosity because the § 1981a(b)(3) damage caps are applied by the court after the trial[33] and because no element pertaining to liability depends on employer size other than the fifteen-employee minimum for a defendant to count as an "employer."[34] In fact, neither the litigants nor the court can mention the existence of the § 1981a caps to the jury.[35] The prohibition exists so that "no pressure, upward or downward, will be exerted on the amount of jury awards by the existence of the statutory limitations."[36]

Therefore, courts have found that the appropriate time to consider the applicability of the caps in § 1981a(b)(3) is after the conclusion of the trial.[37] A determination is not needed before that point; al-

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32 *Luciano v Olsten Corp*, 110 F3d 210, 221 (2d Cir 1997) (citing statements of Senator Dole and Senator Bumpers).

33 See, for example, *Jense v Runyon*, 990 F Supp 1320, 1324–25 (D Utah 1998) (holding that application of the damage cap is premature until a jury gives an award in excess of the cap); *Smith v Norwest Financial Wyoming, Inc*, 964 F Supp 327, 330 (D Wyo 1996) (holding that applying the cap "is proper on post trial motion").

34 See 42 USC § 2000e-2 to -3 (2000) (outlining elements pertinent to liability for employment discrimination). In such a case, information about the number of employees might be presented and developed during trial. See, for example, *Hennessy v Penril Datacomm Networks*, 864 F Supp 759, 766–67 (ND Ill 1994) (holding that testimony at trial on employee numerosity outweighed the possibility of taking judicial notice of the defendant's 10-K filing with the SEC), affirmed in part, vacated in part, 69 F3d 1344 (7th Cir 1995); *Norwest Financial*, 964 F Supp at 330 (evaluating and discrediting trial testimony about defendant's number of employees). This incentive is likely greater the closer the number is to fifteen; if the number of employees tallies in the hundreds, both sides will likely accept that the employee numerosity requirement has been fulfilled. The evidence is also unlikely to be developed if a related issue, such as the parent-subsidiary issue discussed in Part I.B.3 below, seems dispositive.

35 See 42 USC § 1981a(c)(2) ("If a complaining party seeks compensatory or punitive damages under this section . . . the court shall not inform the jury of the limitations described in subsection (b)(3) of this section."). See also, for example, *Sasaki v Class*, 92 F3d 232, 236 (4th Cir 1996) (noting that this provision also prohibits counsel from discussing the caps).

36 Danforth Memorandum, 137 Cong Rec S 15483, 15484. See also *Sasaki*, 92 F3d at 236.

37 See note 6.

though a definitive ruling on which level of the cap applies may change the parties' bargaining positions,[38] it will not alter how they develop their cases at trial.[39] Thus, following trial, a motion is made by the defendant, and then the plaintiff responds.

2. Determining employee numerosity.

For any claim on which a § 1981a claim is piggybacking, the plaintiff must show that the defendant has employed at least fifteen employees over a certain period of time.[40] "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."[41] The "current or preceding calendar year" is determined relative to the year in which the claimed discrimination took place.[42]

Once each side presents its evidence about which employees were employed at which times and the court resolves evidentiary disputes under the appropriate burden of proof, the separate issue still remains of how to count those employees. The payroll method counts an employee if she was listed on the payroll "for each working day" in a week regardless of whether she showed up for work all five days.[43] In *Zimmerman v North American Signal Co*,[44] the Seventh Circuit adopted a method that counted employees only on days in which they performed actual work or were compensated (the "*Zimmerman* method"). In *Walters v Metropolitan Educational Enterprises, Inc*,[45] the Supreme Court decided to adopt the payroll method rather than the

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38 Setting the plaintiff's maximum recovery will affect the expected value of her actual recovery, and what settlement amount is acceptable to a party depends on the expected value of following through with the litigation.

39 No other element of the claim depends on the size of the employer. See generally 42 USC §§ 2000e-2 to -3 (2000).

40 See 42 USC §§ 2000e(b), 12111(5)(a) (2000). See also *Arbaugh v Y & H Corp*, 546 US 500, 516 (2006) (holding that the employee numerosity requirement is an element of the claim and not a jurisdictional matter). The elemental/jurisdictional distinction matters because the fact that employee numerosity is an element of the claim means that, if the federal civil rights claim is dismissed, the district court still has discretion to hear pendent state law claims; if it were jurisdictional, the court would have to dismiss all the state claims. See id at 514.

41 42 USC § 2000e(b). For comparison, § 1981a(b)(3) does not contain the phrase "for each working day" but is otherwise identical. See 42 USC § 1981a(b)(3). The ADEA has a similar provision requiring twenty employees. See 29 USC § 630(b) (2000).

42 This fact is true for both the definition of "employer" and the application of the damage caps. See *Depaoli v Vacation Sales Associates, LLC*, 489 F3d 615, 622 (4th Cir 2007) (interpreting § 1981a(b)(3) in light of nearly identical statutory language in § 2000e(b)).

43 See *Walters v Metropolitan Educational Enterprises, Inc*, 519 US 202, 207 (1997) (approving the use of the payroll method to determine number of employees).

44 704 F2d 347 (7th Cir 1983), overruled by *Walters*, 519 US 202.

45 519 US 202 (1997).

Zimmerman method as the appropriate way to count employees under the definition of "employer" above.[46]

3. Issues related to employee numerosity.

Determining the size of the employer at any stage of the trial may involve resolving other issues that bear on whether an entity's employees are included in the tally. One such issue is determining which entity or combination of entities is the true employer—for example, whether a parent company and its subsidiary form a single employer or whether only the subsidiary is the employer. If the two entities do count as a single employer (or "integrated enterprise"), then courts aggregate the total number of employees of each entity.[47] Several circuits have adopted a four-part test to determine whether two entities form a single employer: "(1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control."[48] The second factor, degree of control over labor decisions, is generally the most important.[49] A different approach is to count two entities as a single employer only when one of three conditions exists: circumstances allow for piercing the corporate veil, the company has split itself into a number of subsidiaries specifically to avoid antidiscrimination law, or the parent company directed the discriminatory behavior of the subsidiary.[50]

Even if two potential employers are considered separate entities generally, they may constitute a joint employer in a particular case.[51] One test is "where two or more employers exert significant control over the same employees—where from the evidence it can be shown that they share or co-determine those matters governing essential terms

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46 Id at 207. Despite the name, the payroll method does not mandate a particular type of evidence, and judges accept several types. See Part III.C.

47 See *Armbruster v Quinn*, 711 F2d 1332, 1339 (6th Cir 1983) (holding that a parent and subsidiary company could be considered a "single employer to meet the statutory minimum"). See also *Arculeo v On-Site Sales & Marketing, LLC*, 425 F3d 193, 199 (2d Cir 2005) (quoting but not endorsing the EEOC Manual's aggregation of employees under the single-employer test).

48 *Cook v Arrowsmith Shelburne, Inc*, 69 F3d 1235, 1240 (2d Cir 1995) (quotations omitted), quoting *Garcia v Elf Atochem North America*, 28 F3d 446, 450 (5th Cir 1994). See also *Armbruster*, 711 F2d at 1337; *Baker v Stuart Broadcasting Co*, 560 F2d 389, 392 (8th Cir 1977) (consolidating companies as a single "employer" based on interrelationships of management for jurisdictional purposes). The test was originally formulated by the NLRB, and the Supreme Court approved of the four-factor test in the context of the National Labor Relations Act. See *Radio and Television Broadcast Technicians Local Union 1264 v Broadcast Service of Mobile, Inc*, 380 US 255, 256 (1965).

49 *Cook*, 69 F3d at 1241.

50 See *Papa v Katy Industries, Inc*, 166 F3d 937, 940–42 (7th Cir 1999) (rejecting the four-part test), overruling *Rogers v Sugar Tree Products, Inc*, 7 F3d 577, 582 (7th Cir 1994).

51 See *NLRB v Browning-Ferris Industries of Pennsylvania, Inc*, 691 F2d 1117, 1122 (3d Cir 1982).

and conditions of employment—they constitute 'joint employers' within the meaning of the [National Labor Relations Act]."[52] The fifteen-person employee numerosity requirement is an element of the plaintiff's claim,[53] and the plaintiff has the initial burden of making out a prima facie case as well as the final burden of persuasion.[54] Therefore the burden of proof for size—and for the related issues of single and joint employers—rests on the plaintiff. Because the issue of an employer's status as single or joint bears on liability, the jury may decide this issue, unlike the employee numerosity requirement.[55]

II. APPROACHES TO § 1981A(B)(3)

Courts have given a muddled response when addressing employer size as required for § 1981a(b)(3). Almost all of the cases involve district courts. The parties will only dispute the issue if the employer's size is near a cutoff point in the statute—fifteen, one hundred, two hundred, or five hundred employees. If one side has adequate proof, it is easier simply to bring forth that evidence than to press a burden of proof argument. The burden issue, however, is still latent in all of these cases. Moreover, it is conceivable that both parties will have comparable evidence—most likely, none—and that assignment of burden of proof will determine who prevails. (Having equal but conflicting evidence is within the realm of possibility but very unlikely.) Finally, the perception of the legal rule (or lack thereof) affects settlement negotiations. Although disparate judicial approaches have not arisen, logically, there are three possible approaches: assigning the burden to the plaintiff, assigning it to the defendant, and failing to assign it at all.

A. The Defendant Has the Burden

In some cases, the district courts seemed to consider the burden of proof matter too obvious to merit discussion and placed the burden on the defendant. The courts in these cases strike a dismissive tone and use language such as "clearly" in response to the defendant's claim that the

52 *Browning-Ferris*, 691 F2d at 1124. See also *Rivas v Federacion de Asociaciones Pecuarias de Puerto Rico*, 929 F2d 814, 820 & n 16–17 (1st Cir 1991) (criticizing other courts for using "single employer" and "joint employer" interchangeably in the Title VII context and incorporating the *Browning-Ferris* description of "joint employer" into its Title VII analysis). Regardless of whether a finding that two companies are joint employers counts toward the number of employees, joint employment does not make either employer vicariously liable for the actions of the other. See *Arculeo*, 425 F3d at 199–200 (using but not actually endorsing the EEOC Manual's method of handling each joint employer separately but assigning the joint employees to each employer); *Torres-Negron v Merck & Co, Inc*, 488 F3d 34, 41 n 6 (1st Cir 2007).

53 See *Arbaugh*, 546 US at 516.

54 See *McDonnell-Douglas v Green*, 411 US 792, 802–04 (1973).

55 See, for example, *Norwest Financial*, 964 F Supp at 331.

burden should lie elsewhere.[56] The defendant may also be assigned the burden by conceding that it has the burden.[57] Such concession absolves the judge of any further need to research or discuss the matter.

A few courts have justified assigning the burden to the defendant.[58] The approach takes punitive damages to be an apt analogy to the combination of compensatory and punitive damages conferred by § 1981a.[59] None of the justifications for punitive damages depends on the wealth of the defendant.[60] The only time that the wealth of the defendant enters into consideration is when he "argue[s] that the fine should be waived or lowered because he cannot possibly pay it."[61] The argument is essentially a plea for mercy, and the defendant is the only party who wants such a consideration to be taken into account. Thus, "[i]t ill becomes *defendants* to argue that plaintiffs *must* introduce evidence of the defendant's wealth."[62]

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56 See, for example, *Hamlin v Charter Township of Flint*, 965 F Supp 984, 988 (ED Mich 1997). This case stemmed from a violation of the ADA by the local fire department. Id at 985. The department argued that it had between 14 and 101 employees, but the court ruled that the appropriate employer was the city rather than the fire department, and so the court had no evidence before it about the size of the true employer. Id at 988. As support for placing the burden on the defendant, the *Hamlin* court cited *Young-Gerhard v Sprinkle Masonry, Inc*, 856 F Supp 300 (ED Va 1994). *Hamlin*, 965 F Supp at 988. However, in *Young-Gerhard*, the burden of proof issue was not discussed; rather, both sides had presented calculations of the number of employees based on the same payroll records. 856 F Supp at 301. To compound the error, another district court has cited *Hamlin* for the same proposition, again providing no additional reasoning. See *Dominic v DeVilbliss Air Power Co*, 2006 WL 516847, *4 (WD Ark).

57 See *Clawson v Mountain Coal Co, LLC*, 2007 WL 201253, *13 (D Colo).

58 See, for example, *Jones v Rent-A-Center*, 281 F Supp 2d 1277, 1287 (D Kan 2003).

59 See id at 1290 (noting that sexual harassment cases often involve harms that are hard to quantify and that the jury was entitled to offset a low compensatory damage award with a high punitive damage award). The court applied the reasoning first to an argument against the imposition of punitive damages. See id at 1282. Later on, the court briefly stated that the reasoning also fit § 1981a but did not discuss any of the differences between the justifications of punitive damages and § 1981a damages. See id at 1287.

60 See *Kemezy v Peters*, 79 F3d 33, 34–35 (7th Cir 1996). The standard reasons given for punitive damages are that (1) "[c]ompensatory damages do not always compensate fully"; (2) punitive damages ensure that tortious conduct is not underdeterred if not fully compensatory; (3) punitive damages force parties to channel their transactions through the market rather than having the option of merely compensating someone after an involuntary transaction; (4) punitive damages prevent underdeterrence of concealable actions because, if the probability of detection is lower, then the cost of detection must be higher to maintain the same expected punishment; (5) punitive damages express the community's abhorrence; (6) punitive damages relieve some burden from the criminal justice system by encouraging private citizens to bear some of the cost of enforcement; and (7) if the criminal justice system could not absorb the additional duty from punitive damages being eliminated, then they also prevent vigilante justice. See id at 34–35.

61 Id at 36.

62 Id. See also *Rent-A-Center*, 281 F Supp 2d at 1283.

B. The Plaintiff Has the Burden

No circuit court has considered the burden of proof issue, and no court at any level has assigned the burden to the plaintiff. This result is not surprising because courts rarely deal explicitly with the issue at all. Judicial opinions do, however, find placing the burden on the plaintiff conceivable. The case of *MacGregor v Mallinckrodt, Inc*[63] dealt with a Title VII sex discrimination claim stemming from a dispute over another employee getting a promotion ahead of the plaintiff.[64] The district court had taken judicial notice of the defendant's true size—about 13,000 employees—when the only evidence presented attested to a single plant that had only 300 employees.[65] The appellate court affirmed the judicial notice-taking.[66] One of the defendant's arguments was that "judicial notice of facts on which the plaintiff has the burden of proof is inappropriate," but the Eighth Circuit distinguished the case cited by the defendant based on the wide availability of records in the present case.[67] Interestingly, the court did not address the question of whether the plaintiff bore the burden.[68] This result provides no reasoned support for the allocation of proof; however, it demonstrates the conceivability of placing the burden on either party.

C. The Burden of Proof Issue Is Not Discussed

Both sides may neglect the burden of proof issue, and if so, the trial court may simply ignore the issue. One specific pattern of sidestepping the issue occurs when the court accepts an affidavit by the employer because it is the only evidence before the court. In one case, a court reduced an award based on an affidavit by the president of the defendant company stating that it "employs less than 100 employees . . . at any and all times during the year."[69] In another case, the defendant submitted an affidavit by the "Assistant Vice President and Director of Personnel" stating that the company had fewer than 501 employees for the relevant time period.[70] The plaintiff disputed that affidavit by using the depositions of two employees of what was actually a subsidiary. (The employees erroneously believed they were employed directly by the parent company.[71]) Both of the witnesses

63 373 F3d 923 (8th Cir 2004).
64 See id at 926–27.
65 See id at 933.
66 Id at 934.
67 *MacGregor*, 373 F3d at 934.
68 See id.
69 *Burris v Richards Paving*, 472 F Supp 2d 615, 620 & n 8 (D Del 2007).
70 *Smith*, 964 F Supp at 329.
71 Id at 329–30.

characterized their deposition testimony as guesses during the trial.[72] The district court determined that the only proper evidence before it was the affidavit, so it ruled in favor of the defendant based on that evidence and "the absence of any evidence disputing [the affiant's] figures."[73] In making the ruling, the court noted that the "[d]efendant had no duty to present this evidence at trial" and that applying the ceiling "is proper on post trial motion."[74]

III. SOLUTION: THE BURDEN SHOULD FALL ON THE DEFENDANT

When both parties have no evidence (or possibly equal but conflicting evidence), courts must allocate the burden to one side or the other to break the tie. For each side on which the burden can fall, there is a competing characterization. If the plaintiff ought to shoulder the burden, the natural way to characterize the burden is as an element of the claim for the additional relief provided by § 1981a. On the other hand, if the defendant ought to carry the burden, the characterization that best fits is treating the burden as an affirmative argument the defendant must make to avoid the full brunt of a presumably justified jury award. To evaluate these competing characterizations, this Comment looks to textual interpretation, reasoning by analogy, and policy considerations.

This Part follows a story arc similar to the Supreme Court case *Concrete Pipe and Products of California, Inc v Construction Laborers Pension Trust for Southern California*.[75] The Court there was interpreting what level of burden of proof—"preponderance of the evidence" or "clearly erroneous"—should be assigned to an employer under the Multiemployer Pension Plan Amendments Act when challenging an arbitration decision. Justice Souter, writing for the majority, attempted first to use textual analysis[76] and then legislative history,[77] both to no avail. The Court determined that it would be "entirely sensible" to put the burden on the party with greater access to the information,[78] and that the alternative path would raise due process concerns.[79] Similarly, this Comment finds that the plain text and structural statutory inter-

72 Id at 330 n 2.

73 *Smith*, 964 F Supp at 330.

74 Id.

75 508 US 602 (1993).

76 See id at 621–26.

77 See id at 627–28.

78 Id at 626.

79 See *Concrete* Pipe, 508 US at 628–30 (noting that pursuing the alternative path would risk running afoul of the canon of constitutional avoidance, which requires that courts avoid construing statutes in a way that raises serious constitutional questions unless doing so would be plainly contrary to the intent of Congress).

pretation, and the legislative history fail to yield a clear answer. This Comment therefore relies on analogical reasoning and policy arguments to come to the most "sensible" outcome possible.

A. Statutory Interpretation

The statute itself is not decisive in either direction, which is a major source of the confusion. Part III.A argues that the statute does not support treating employee numerosity as an element of the plaintiff's claim. Although statutory language does not provide dispositive support for placing the burden on the defendant, it does provide such support for not placing it on the plaintiff.[80] Additionally, the legislative history is unhelpful.

1. Statutory structure.

No court relied on statutory interpretation in assigning the burden of proving employee numerosity. The text nowhere explicitly states where the burden should be placed.[81] But several considerations suggest that the burden should not be placed on the plaintiff. First, the structure of § 1981a does not fit the characterization as an element of the plaintiff's claim. Presumably, the legislature arranged the statute in a meaningful way. Subsection (a) defines who has the right to recovery of damages under § 1981a: a person who successfully brought a Title VII or ADA claim and showed that the unlawful conduct was intentional.[82] Subsection (b)(1) states an additional prerequisite to recovery of punitive damages under that section: a party may recover if it "demonstrates that a respondent engaged in a discrimina-

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[80] It is hardly a novel proposition that statutes sometimes fail to provide the answer; they occasionally fail to make sense at all. See, for example, id at 624 (finding that the statute uses terms in assigning the level of the burden of proof that are "inconsistent with each other on any reading").

[81] The statute provides:

> The sum of the amount of compensatory damages provided 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 preceding or current 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 preceding or current 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 preceding or current 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 preceding or current calendar year, $300,000.

42 USC § 1981a(b)(3).

[82] 42 USC § 1981a(a).

tory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[83] The language of that section clearly states that the plaintiff must make that demonstration.[84] The limitations on recovery are given in subsection (b)(3), entitled "Limitations," immediately after a part that excludes certain types of damages from recovery.[85] Essentially, subsection (a) gives the general requirements for recovery under the section, and subsection (b) gives additional, more specific limitations on damages, such as preventing double recovery.[86] This structure would seem to imply that the plaintiff must show what is required in section (a), but the burden shifts to the defendant for subsection (b) unless specifically provided otherwise as in subsection (b)(1).

Second, the structure that the section creates for trial does not support considering employee numerosity as an element. The statute separates the number of employees temporally as well as structurally from the elements of showing § 1981a relief. A standard element of a claim is presented at trial and developed before the jury, but the statute specifically precludes developing the employee numerosity issue at trial. The statute prohibits the trial court from informing the jury of the existence of the caps on this section's relief,[87] and courts have interpreted this section to prohibit the parties from divulging that information as well.[88] Thus, the parties argue over this fact on post-trial motions.[89] Any characterization of the size requirement as a normal element of the plaintiff's case is therefore inapt.

One may counter that this reasoning presupposes a jury trial when it is equally possible that there may be a bench trial. In a bench trial, the fact of employer size no longer needs to be separated from the elements. Before the Civil Rights Act of 1991, there was no statutory right to a jury trial.[90] The Supreme Court never decided if the pre-1991 incarnation of the Civil Rights Act created a constitutional right to a jury trial,[91] but Congress specifically labeled as "equitable" the

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83 42 USC § 1981a(b)(1).

84 See id.

85 See 42 USC § 1981a(b)(2)–(3) (excluding backpay, interest on backpay, and other damages authorized by 42 USC § 2000e-5(g), and then limiting recovery based on the number of employees the employer has).

86 The statute explicitly excludes double recovery of backpay, see 42 USC § 1981a(b)(2), and excludes some other compensatory damages by exempting those who recover under § 2000e-5(g) from recovering under this section. See notes 21–24 and accompanying text.

87 42 USC § 1981a(c)(2).

88 See *Sasaki v Class*, 92 F3d 232, 236 (4th Cir 1996).

89 See note 6.

90 See Civil Rights Act of 1991 § 102, 105 Stat at 1073, codified at 42 USC § 1981a(c)(1).

91 See *Landgraf v USI Film Products*, 511 US 244, 252 n 4 (1994).

relief of backpay granted by Title VII.[92] The Seventh Amendment right to a civil jury trial applies to claims that would have been considered legal rather than equitable at the time the Amendment was considered and passed (the late 1700s), or at least that are analogous to claims that would have been legal then.[93] Thus, it is quite possible that no right to a jury trial exists under Title VII. Furthermore, no jury trial will happen under § 1981a if both parties opt out of it.[94]

However, the current law applicable to the damage-cap context does presuppose a jury trial. Section 1981a grants a statutory right to a jury trial to both parties where compensatory and punitive damages are sought for intentional discrimination.[95] Thus, any case involving the statutory caps potentially can lead to a jury trial. This right was added by the same section as the caps, so the tradeoffs that the statutory caps involved would have been debated by Congress in the explicit context of every case potentially involving a jury trial. Thus, one should contemplate a jury trial when evaluating this section, and so the temporal separation noted above shows that employee numerosity is not an element of the plaintiff's claim.

2. Similarly worded statutes.

An argument against placing the burden on the defendant relies on statutes with similar language. Other statutory provisions have nearly identical phrasing.[96] Thus, the argument goes, § 1981a(b)(3) should be interpreted to have a similar meaning.[97] The argument concludes that because those provisions put the burden on the plaintiff,[98] so should § 1981a.

All of the similar statutes have the following wording: a person "who has [*x* employees] for each working day in each of twenty or more calendar weeks in the current or preceding calendar year," where *x* is some number, either fifteen or twenty.[99] Section 1981a(b)(3) is slightly different. First, *x* is a range rather than a single number, and second, the phrase "for each working day" is omitted. But neither dif-

92 42 USC § 2000e-5(g).

93 *City of Monterey v Del Monte Dunes at Monterey, Ltd*, 526 US 687, 708 (1999).

94 See 42 USC § 1981a(c)(1).

95 Id.

96 See, for example, 42 USC § 2000e(b); 42 USC § 12111(5)(a); 29 USC § 630(b).

97 Consider *Depaoli v Vacation Sales Associates, Inc*, 489 F3d 615, 622 (4th Cir 2007) (interpreting the phrase "current or preceding year" in § 1981a(b)(3) by looking at previous court interpretations of that phrase in § 2000e(b) and referring to the maxim that "identical words used in different parts of the same act are intended to have the same meaning").

98 See *Arbaugh v Y & H Corp*, 546 US 500, 516 (2006).

99 See note 96.

ference affects the assignment of burden of proof,[100] so another explanation must be found.

Nevertheless, there are a few problems with this argument. First, statutory provisions using similar language to § 1981a are all simply definitions of the word "employer";[101] other portions of the statutes besides those provisions make the defendant's status as an employer an element of the claim. Title VII, for example, states, "It shall be unlawful *for an employer* . . . ."[102] This statutory provision incorporates the definition of "employer"—which appears elsewhere—as an element in the cause of action.[103] The other provisions follow this pattern. The ADA outlaws discrimination by a "covered entity,"[104] which is defined to include employers.[105] The ADEA has a parallel structure.[106] Thus, treating § 1981a(b)(3) identically to other provisions containing the same language still does not transform the number of employees into an element of the claim by itself; another provision is needed to make the transformation.

Second, as described above, whether a provision represents an element of a claim may depend on the placement of that provision relative to other provisions. Although the wording of § 1981a(b)(3) is highly similar to that of the other provisions, there is no corresponding parallelism of placement.[107] The provisions simply appear in sections devoted to listing definitions. Thus, one cannot infer that employer size should be an element.

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100 One court used the second distinction to rule that the *Zimmerman* method of counting employees applied to § 2000e(b)—which defines "employer" for Title VII—but not to § 1981a(b)(3). See *Young-Gerhard v Sprinkle Masonry, Inc*, 856 F Supp 300, 302 (ED Va 1994). The Supreme Court subsequently rejected the *Zimmerman* method in favor of the payroll method for § 2000e(b), see *Walters v Metropolitan Educational Enterprises, Inc*, 519 US 202, 207 (1997); however, the phrase "for each working day" may still signify that entries and departures should only be counted from employees' first full week to their last full week, and thus employees under § 1981a(b)(3) would be counted from the very first week to the very last week even if those weeks are partial. See id at 209. That distinction only seems to matter in the realm of counting employees and does not bear on assigning the burden of proof.

101 See note 96.

102 42 USC § 2000e-2(a) (emphasis added).

103 See *Arbaugh*, 546 US at 504.

104 42 USC § 12112(a) (2000) ("No covered entity shall discriminate against a qualified individual with a disability.").

105 42 USC § 12111(2) (2000) ("The term 'covered entity' means an employer, employment agency, labor organization, or joint labor-management committee."). The definition for "employer" contains the phrasing at issue. 42 USC § 12111(5)(A).

106 See 29 USC § 623(a) (2000) ("It shall be unlawful for an employer . . . ."). The term "employer" is defined in a different section using the phrasing under discussion. 29 USC § 630(b).

107 Compare 42 USC § 1981a, with 42 USC §§ 2000e(b), 12111(5); 29 USC § 630(b).

3. The (un)importance of legislative history.

As the Supreme Court has suggested, "Having found the statutory language itself incoherent, we turn, as we would in the usual case of textual ambiguity, to the legislative purpose as revealed by the history of the statute, for such light as it may shed."[108] Unfortunately, in this case, the legislative history gives off more heat than light. In fact, the legislative history related to this provision of the Act supports the common claim that legislative history should not be consulted because Congress does not act with one mind.

The findings and purposes given as a preamble to the 1991 Act do not help: the fact that additional remedies are needed[109] is unhelpful in determining the extent of those remedies. The competing Danforth and Dole understandings agree on the final version of the Act, but they conflict in terms of emphasis. The Danforth Memorandum focuses on the importance of providing additional damages to victims of discrimination, which seems to point toward expanding such damages by placing the burden on the defendant; however, the Dole Memorandum focuses on the importance of the caps as a method of tort reform, which seems to point toward placing the burden on the plaintiff to make the caps as effective as possible.[110] Even under the simplifying assumption that Congress passed the Act with a single mind coalesced around the Danforth understanding,[111] the President still signed the bill into law under the Dole understanding,[112] so it seems that no single understanding animates the Act.

B. Treatment of Punitive Damages

One positive argument in favor of placing the burden of persuasion on the defendant is that the damages provided by § 1981a are similar to punitive damages. Because the defendant has the burden of arguing against awarding or for reducing punitive damages, the burden should lie on the defendant in § 1981a cases as well. Although the analogy between punitive damages and § 1981a damages does not fit perfectly, it fits well enough to cut in favor of placing the burden on the defendant.

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108 *Concrete Pipe*, 508 US at 627.

109 See notes 12–15 and accompanying text.

110 See notes 18–20 and accompanying text.

111 The Danforth Memorandum was authored by Senator Danforth and the other cosponsors of the bill. Cathcart, *Civil Rights* at 7 (cited in note 12).

112 See note 18.

In *Kemezy v Peters*,[113] the court surveyed the standard justifications for the application of punitive damages and concluded that, because the defendant's net worth did not affect any of those reasons, the plaintiff had no obligation to present evidence about the defendant's net worth.[114] The only reason for the introduction of evidence about net worth is that the defendant is pleading for mercy because it cannot pay the punitive damages, a plea that arises only if the defendant chooses to make it.[115] The defendant is the one who wishes to change the state of affairs, so the burden of persuasion ought to lie with that party.[116]

To determine if the reasoning aptly applies to § 1981a damages, two points of similarity must be established. First, § 1981a damages must be motivated by the same concerns as punitive damages. Second, the ability to limit those damages must be motivated by the same concerns in both instances.

In addressing the first point, the key difference is that § 1981a lumps some compensatory damages in with the punitive damages.[117] Specifically, § 1981a provides compensatory damages for harms that are not easily quantified: future pecuniary damages and nonpecuniary

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113 79 F3d 33 (7th Cir 1996).

114 See notes 60–62 and accompanying text. Other circuits have approvingly cited *Kemezy* for the proposition that the defendant has the obligation to introduce evidence about its net worth in order to mitigate punitive damages. See, for example, *Horney v Westfield Gage Co, Inc*, 77 Fed Appx 24, 34–35 (1st Cir 2003); *Avery Dennison Corp v Four Pillars Enterprise Co*, 45 Fed Appx 479, 490 (6th Cir 2002); *Mason v Oklahoma Turnpike Authority*, 182 F3d 1212, 1214 (10th Cir 1999); *Grabinski v Blue Springs Ford Sales, Inc*, 136 F3d 565, 570–71 (8th Cir 1998).

115 *Kemezy*, 79 F3d at 36.

116 See *Schaffer v Weast*, 546 US 49, 56 (2005), quoting John W. Strong, *McCormick on Evidence* § 337 at 510 (5th ed 1999) ("The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion."). For specific situations, the Court has employed more elaborate procedures. In Title VII claims, for example, the procedure involves shifting the burden of production between the plaintiff and the defendant. First, the plaintiff must make out a prima facie case of discrimination, the elements of which will necessarily vary from context to context. See *McDonnell-Douglas Corp v Green*, 411 US 792, 802 & n 13 (1973). The burden then shifts to the defendant to advance a legitimate, nondiscriminatory reason for the action. Id at 802–03. If the defendant advances a prima facie legitimate reason, then the plaintiff finally has an opportunity to show that the reason is in fact pretextual. Id at 804. What shifts is the burden of production; the ultimate burden of persuasion stays with the plaintiff. See *St. Mary's Honor Center v Hicks*, 509 US 502, 506–07 (1993). Furthermore, the procedure only applies when the evidence of discrimination is circumstantial; *McDonnell-Douglas* is inapposite when direct evidence is presented. See *Trans World Airlines v Thurston*, 469 US 111, 121 (1985). Special procedures for specific situations arise when a need exists to organize recurring, complicated information, but these procedures do not extend beyond that need.

117 Although one court made the analogy between punitive damages and § 1981a damages, it did not address this distinction. See *Jones v Rent-A-Center*, 281 F Supp 2d 1277, 1287 (D Kan 2003) (citing Supreme Court precedent dealing with the constitutionality of high punitive damages in its analysis of the size of the § 1981a damage award).

damages such as "emotional pain, suffering, inconvenience, mental anguish, [and] loss of enjoyment of life."[118] But the inclusion of compensatory damages makes the case for putting the burden on the defendant—if anything—stronger. The jury (or judge) has already decided that the plaintiff is the victim and deserves to be made whole in the amount of the compensatory damages. Such a decision is presumptively correct.[119] Thus, the burden for altering the award should rest on the party who wishes to overturn that presumptively correct judgment.

A counterargument is that wide variability in awards is a reason to apply the caps strictly, and one way to apply the caps more strictly is to place the burden on the plaintiff. Although the damages are more difficult to quantify, that fact does not make them nonexistent. By choosing to amend the Civil Rights Act in 1991 to add the possibility of recovering such damages, Congress acknowledged the reality of future monetary damages and mental harms. The question, then, is how to structure the process to get the best results—that is, the results that are the most precise or accurate. It turns out, as explained below, that the better option is to err on the side of accuracy instead of precision.

Precision here means dispersion around the central value of a series of valuations; if the valuations are tightly clustered, then the valuations are precise. Accuracy, on the other hand, measures whether the valuations—tightly clustered or widely dispersed—are centered around the true value. The concepts of accuracy and precision come from the physical sciences.[120] The distinction between them is typically explained using a dartboard. A precise but inaccurate collection of darts would occur when all three darts are clustered tightly together in the upper right corner of the board. An accurate but imprecise collection of darts would occur when one dart was far to the right, one dart hit the bull's-eye, and the third dart is far to the left—the average position would be a bull's-eye. If the goal, then, is to reduce the error rate, it is better to have valuations that are accurate rather than precise. Here, the error rate is for damage awards, and each case is a dart thrown at the board.

And now for the objection that the speculative and thus variable nature of the damages supports placing the burden on the plaintiff. Dif-

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118 42 USC § 1981a(b)(3).

119 Compensatory but not punitive damages are entitled to deference on review. See *Cooper Industries, Inc v Leatherman Tool Group, Inc*, 532 US 424, 437–40 (2001) (holding that punitive damages, unlike compensatory damages, are reviewed de novo because they represent, among other things, moral condemnation rather than a fact tried by the jury); *St. Louis, Iron Mountain, & Southern Railway Co v J.T. Craft*, 237 US 648, 654–55 (1915) (reviewing an award of compensatory damages for pain and suffering based on facts tried by the jury).

120 See, for example, Martin Goldstein, *How We Know: An Exploration of the Scientific Process* 232–34 (Westview 1980) (providing an overview of how the physical sciences distinguish between accuracy and precision in evaluating measurements).

ficulties with valuation, however, do not automatically suggest erring on the side of lower damage awards. Placing a low valuation on the damages mistakenly substitutes precision for accuracy. Precise but inaccurate valuations systematically bias outcomes toward either plaintiffs or defendants. Accurate valuations, even if imprecise, will present defendants with the correct expected value and lead to appropriate levels of care by those defendants. In this context, putting a low valuation on damages because they will be imprecise may create systematic bias against plaintiffs. On the other hand, putting the burden on the defendant may bias the system in favor of plaintiffs.

Quantification difficulty (imprecision) alone does not justify moving the target in either direction. But here, an additional factor points toward moving the target: Congress indicated an intent to provide a path toward compensation for harms caused by unjust denial of employment.[121] Keeping the target—in this case, the burden of proof—on the plaintiff would consistently result in undercompensation: defendants would regularly plead fewer numbers of employees, and plaintiffs would consistently lack resources or information to prove a higher, more accurate number. But shifting the target to the defendant—while not perfectly solving either the precision problem or the accuracy problem—would consistently produce *more* accurate results more often, thereby reducing the error rate of these § 1981a cases.

The second point of similarity also implicates the underlying congressional reasons for adopting § 1981a of the 1991 Civil Rights Act. The concerns are the same as in the punitive damages case, but in the § 1981a case they operate at a higher level of abstraction. In the case of punitive damages, the defendant must "plead hardship" by claiming that it will go bankrupt or otherwise be incapable of paying the award.[122] Essentially, awarding punitive damages in those circumstances is pointless because the only effect will be to clog up the bankruptcy courts.[123] The damage caps are founded on the same premise, but they use the number of employees as a proxy for ability to pay.[124] Because the statute employs a proxy, in any individual case the defendant may or may not really be in danger of bankruptcy. Thus, the important difference is that hardship is not shown in the individual case under § 1981a, but hardship is shown for every individual case of puni-

121 See note 14 and accompanying text.

122 See *Kemezy*, 79 F3d at 36.

123 Id.

124 See *Hamlin v Charter Township of Flint*, 965 F Supp 984, 988 (ED Mich 1997). Although it is unclear why Congress chose employee numerosity as the particular proxy, it needed to choose some proxy for administrability reasons: basing damage caps directly on "ability to pay" would entail a much too detailed inquiry.

tive damages. The question is whether this difference is important for establishing the burden of proof.[125]

The most appropriate answer is that it is not. Essentially, Congress was choosing between a rule and a standard. The punitive damages regime is more standard-like because the inquiry focuses on the individual case and is susceptible to individualized proof of net worth. In the § 1981a context, Congress chose to create a simpler, more rule-like regime by focusing the inquiry on a single fact that would probably but not always give a correct outcome. However, the rule-standard distinction does not bear on which party holds the burden of proof. The similarities between the two cases overwhelm the difference, and the burden should still lie on the defendant.

A counterargument could claim that § 1981a damages do not implicate the same concerns as punitive damages because § 1981a damages are capped at some level in every case while punitive damages are not typically reduced. In other words, not every company is in a situation where it needs to be protected from bankruptcy. But congressional statements to the effect of protecting small businesses belie this point.[126] Preventing punitive damages from causing bankruptcy and protecting businesses from undue hardship are really the same concern. The goal of punitive damages is to drive bad behavior—not businesses—from the marketplace.

C. Policy Considerations

The Supreme Court's "ordinary rule" for determining the burden of proof is that, because of "considerations of fairness," a litigant does not have to establish facts "peculiarly within the knowledge of his adversary."[127] This rule is applicable in the § 1981a context for two reasons: (1) the defendant in these cases almost always has greater access to information on its number of employees; and (2) putting the burden on the defendant forces the information to be presented in its clearest form.

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125 See note 117.

126 See notes 30–32 and accompanying text.

127 *Schaffer*, 546 US at 60. Putting the burden on the party with greater access to information was the rule at common law and continues to be approved by courts. See, for example, *Concrete Pipe*, 508 US at 626; *Kemezy*, 79 F3d at 36. This rule is hardly exception-proof. See, for example, *Gares v Willingboro Township*, 90 F3d 720, 730 (3d Cir 1996) (describing New Jersey state law that "the plaintiff has the burden of producing evidence of the defendant's ability to pay a punitive damages award"). But the majority rule makes more sense in the abstract than the alternative and thus serves as a useful default. The burden of persuasion often aligns with the burden of production. Friedenthal et al, *Civil Procedure* 956 (cited in note 11) ("The term 'burden of proof' usually refers to both production and persuasion, and these burdens usually fall on same party at trial.").

First, the defendant has superior access to information. Such information could be documents listing employees or simply the memory of supervisors if such evidence is acceptable. The only information in the possession of the plaintiff is her memory. Besides the difficulty of remembering all of her coworkers, her memory probably will not include fellow employees with whom she does not work regularly, such as workers at a different plant or facility or city. Even assuming perfect memory, the plaintiff will only be able to produce what could be referred to as a "spot list," that is, a list of who was employed at a given instant in time. Spot lists do not show that any employee was working for long enough to count for more than a single week, and they do not show that the total number of employees was low enough during the rest of the year surrounding the spot to put the defendant below the threshold. Such lists have no real probative value in either direction.[128]

The defendant, on the other hand, is the only party with access to what will be referred to as a "detailed list," that is, a document giving the start and end date for each employee's duration of employment. The primary example is payroll forms.[129] Because the number of employees can be determined for each week, a company can be definitively sized according to the standards § 1981a(b)(3) prescribes. Whether the company is over the threshold can be determined for each week, and then the weeks can be counted. All else equal, the defendant can most easily meet the burden of proof and therefore should have the burden.

Second, putting the burden on the defendant forces the information to be presented in its clearest form. If the information is favorable to the defendant—for example, its size is just below a cutoff point—then the defendant will present the information in its plainest and least refutable form to the judge, presumably in the form of a detailed list. If the information is unfavorable to the defendant—for example, its size is just above a cutoff—then it still does not have an incentive

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[128] One exception occurs when the list has such a large number of employees that the likelihood that the defendant fell below the threshold is small. Since the thresholds for the levels of the statutory cap are close enough together, this possibility only matters for the uppermost threshold of five hundred. If the defendant employed a few thousand people during a point in time in the middle of the two-year measurement period, it probably had at least five hundred for the requisite twenty weeks. See *Rent-A-Center*, 281 F Supp 2d at 1287 (finding additional support for application of a higher statutory cap because 2,500 managers attended a Title VII training session). However, a defendant might be able to rebut this argument by showing that large layoffs occurred or that it spun off a large subsidiary.

[129] See, for example, *Wallace v Smith & Smith Construction, Inc*, 65 F Supp 2d 1121, 1123 (D Or 1999). The adoption of the payroll method of counting employees by the Supreme Court should be considered as an implicit endorsement of payroll records as evidence. See *Walters*, 519 US at 206. ("[T]he employment relationship is most readily demonstrated by the individual's appearance on the employer's payroll."). For an explanation of the payroll method, see text accompanying notes 43–46.

to hide the information because the effect of not producing any information is the same as producing the unfavorable information. Producing no list or an incomplete type of list does not fulfill the defendant's burden. At the same time, producing the information reduces contentiousness, so the defendant still has an incentive to do so. The result of producing the information in an unmanageable form is that the plaintiff will reply with a sternly worded communication, leading to a back and forth and a possible meeting with the trial judge to resolve the issue. This contentiousness is a cost to the defendant (as well as the plaintiff); if the defendant accrues no benefit from producing the information in an unmanageable form, it has an incentive to disclose the information in a manageable form even if the information is unfavorable.

By contrast, if the burden is on the plaintiff, the plaintiff must still ask for the information from the defendant during discovery. Now, if the information is unfavorable, the defendant does not have an incentive to produce the information in a clear form. Less probative documents could include spot lists[130] and "annual lists"—that is, documents listing everyone who worked for an employer during a given year but not showing when each of these employees was employed.[131] Some documents that function as annual lists include W-2 forms[132] and 10-K filings to the SEC.[133] As long as the information is just relevant enough to avoid sanctions—for example, a document dump[134]—the cost of any deficiencies will be borne by the plaintiff if the plaintiff has the burden, so the defendant has an incentive to produce a bundle of information as close to the sanction line as possible. Because sanctions under Federal Rules of Civil Procedure 26(g)[135] and 37[136] are handed out

130 An example of an employer-side spot list is a list of all the attendees of a conference. See, for example, *Rent-A-Center*, 281 F Supp 2d at 1287.

131 Annual lists have more value than spot lists but less than detailed lists because annual lists operate in only one direction. An annual list gives an upper limit on the number of employees that could have worked each week of the year, but the number of employees is most likely an overcount. Compare *Norman v Levy*, 756 F Supp 1060, 1064 (ND Ill 1990) (stating that W-2 forms alone are overinclusive), with *DeShiro v Branch*, 1 F Supp 2d 1357, 1359 (MD Fla 1998) (finding that W-2 forms, corporate records, and an independent auditor report, along with affidavits from the defendant's president, the custodian of record, and the independent auditor, were sufficient to show that the defendant did not have more than fifteen employees at any time in a two-year period). Although documents referring to a year-long time period are most common, documents could refer to other lengths of time. If the time period is at least thirty-three weeks in length in the same calendar year—that is, it leaves less than twenty weeks unaccounted for—it should be treated the same as an annual list. Shorter time periods are more akin to spot lists.

132 See, for example, *DeShiro*, 1 F Supp 2d at 1359.

133 See, for example, *Hennessy v Penril Datacomm Networks*, 864 F Supp 759, 766 (ND Ill 1994), affirmed in part, vacated in part, 69 F3d 1344 (7th Cir 1995).

134 See text accompanying notes 8–9.

135 FRCP 26(g).

somewhat sparingly, the defendant has a fair amount of leeway in which to operate.[137] Producing a prodigious amount of such documents will probably avoid actual sanction. If the plaintiff is unable to sort through the disclosure properly or efficiently when the defendant can plausibly claim it has surrendered appropriate documentation, the adverse effects will fall on the plaintiff.

Although these two arguments do not by themselves necessarily show that the burden must lie with the defendant, in the face of statutory ambiguity policy arguments can become conclusive.[138] Policy considerations can sometimes even override the traditional placement of pleading burdens; for example, in a contract case, proving payment by showing a receipt is the burden of the defendant even though nonpayment is part of the plaintiff's prima facie case.[139] But here, where textual exegesis does not lead to a definitive result, policy arguments have the most importance.

CONCLUSION

Section 1981a is ambiguous on the issue of which party has the burden of proving employee numerosity. The statute itself separates the section listing employer size limitations from sections setting forth actual elements of a § 1981a case (having a Title VII or ADA claim, showing the discrimination was intentional and, for punitive damages, also with "malice or [ ] reckless indifference"), and temporally separates proving employee numerosity from showing these other elements. And because structural elements matter for assigning the burden of proof, other statutes with parallel language but different structures do not shed light on the matter.

Reasoning by analogy and policy considerations provide the answer. For punitive damages, the party arguing that the award must be lowered has the burden of presenting information on net worth; essentially, the defendant must argue that the award is pointless because it will be unable to pay. Damages from § 1981a are like punitive damages, so the same rule should apply. In fact, the inclusion of some compensatory damages along with punitive damages in § 1981a makes the case stronger for putting the burden on the defendant because a jury award of compensatory damages is a factual determination and thus

136 FRCP 37.

137 See Joel Slawotsky, *Rule 37 Discovery Sanctions—The Need for Supreme Court Ordered National Uniformity*, 104 Dickinson L Rev 471, 471–72 (2000) ("[I]t is generally acknowledged that discovery abuse is alive and well.").

138 See *Concrete Pipe*, 508 US at 626 (applying the most "sensible" rule where the text and legislative history provided no clear answer).

139 See, for example, *Escalante v Luckie*, 77 SW3d 410, 420 (Tex App 2002).

presumptively correct. Finally, the underlying congressional purpose of enacting that provision of the Civil Rights Act of 1991 was to authorize these additional damages while still protecting smaller businesses from bankruptcy resulting from large awards. Allowing the defendant to prove that a statutory cap applies amply fulfills that purpose.

On policy grounds, the Supreme Court's ordinary rule is that the party who has the information is the party who should be forced to present it. The burden of production usually lies with the party that has access to the information, and the burden of persuasion typically aligns with the burden of production. Furthermore, if the defendant has the burden, it will have much better incentives to present the information to the court clearly because it will then bear the costs of failing to make the presentation. If the plaintiff has the burden, then the defendant has an incentive to present the information to the plaintiff as unclearly as courts would allow. Such policy arguments, alongside analogical reasoning, decide the issue when statutory interpretation fails to yield a clear answer.