No. 24-12573

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MALAK KHATABI,
Plaintiff-Appellant,

v.

CAR AUTO HOLDINGS LLC, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida
No. 21-cv-20458

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF APPELLANT

KARLA GILBRIDE
General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

ANNE NOEL OCCHIALINO
Assistant General Counsel

CHELSEA C. SHARON
Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(202) 921-2889
chelsea.sharon@eeoc.gov

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, I hereby certify that, to the best of my knowledge, Plaintiff-Appellant's Certificate of Interested Persons, filed with her brief on November 29, 2024, is a complete list of the persons and entities who may have an interest in the outcome of this case except for the following individuals omitted from that list:

Equal Employment Opportunity Commission (EEOC) (amicus curiae)

Gilbride, Karla (General Counsel, EEOC)

Goldstein, Jennifer S. (Associate General Counsel, EEOC)

Occhialino, Anne Noel (Assistant General Counsel, EEOC)

Sharon, Chelsea C. (Attorney, EEOC)

EEOC is not aware of any publicly traded corporations or companies that have an interest in the outcome of this case or appeal. Pursuant to Federal Rule of Appellate Procedure 26.1, EEOC, as a government agency, is not required to file a corporate disclosure statement.

s/ Chelsea C. Sharon
CHELSEA C. SHARON

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Rules

STATEMENT OF INTEREST

Congress charged the Equal Employment Opportunity Commission (EEOC) with administering and enforcing the prohibitions on discrimination and retaliation contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ("Title VII"). A Title VII plaintiff may recover compensatory and punitive damages for intentional discrimination, but these damages are subject to graduated caps corresponding to the employer's size. 42 U.S.C. § 1981a(b)(3). This appeal raises important questions as to how a party must invoke these caps and which party bears the burden of establishing the requisite number of employees for application of a particular cap. Because EEOC has a strong interest in the proper standards for obtaining relief under the laws it enforces, EEOC offers its views. *See* Fed. R. App. P. 29(a)(2).

STATEMENT OF ISSUES[1]

1. Do section 1981a(b)(3)'s damages caps qualify as an affirmative defense or avoidance subject to waiver?

[1] EEOC takes no position on any other issue.

2. Does the employer bear the burden to prove the factual predicates for application of a particular damages-cap bracket under section 1981a(b)(3)?

PERTINENT STATUTORY PROVISIONS

Pertinent statutory provisions appear in the addendum.

STATEMENT OF THE CASE

A. Statutory Framework

Under the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), a Title VII plaintiff may recover compensatory and punitive damages for intentional discrimination, but such damages are subject to "a sliding scale of limitations … based upon the size of the employer." *EEOC v. W&O, Inc.*, 213 F.3d 600, 612 (11th Cir. 2000); *see* 42 U.S.C. § 1981a(b)(3). Section 1981a(b)(3) specifies that:

> The sum of the amount of compensatory damages awarded under this section … 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[2] and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

[2] Title VII applies only to employers with fifteen or more employees. 42 U.S.C. § 2000e(b).

> (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.

42 U.S.C. § 1981a(b)(3). The term "'current' calendar year … refer[s] to the time period of the discrimination," not the time period of trial or judgment. *Hernández-Miranda v. Empresas Díaz Massó, Inc.*, 651 F.3d 167, 170 (1st Cir. 2011).

B. Statement of the Facts

Malak Khatabi began working as a salesperson for Car Auto Holdings ("CAH"), a luxury car dealership, in September 2020 when she was eighteen years old. Khatabi testified that her supervisors touched her without her consent, including forcibly kissing her forehead and grazing her backside. R.132 at 5.[3] Khatabi also testified that her supervisors and

[3] Record citations take the form R.[docket number] at [CM/ECF-assigned page number]. Because CAH has not cross appealed to challenge liability, we draw factual background from the discussion of trial testimony in the

coworkers made inappropriate comments toward her, including telling her that she was "hot for an 18 year old," that "tienes culo" (which means "you have ass" in Spanish), that she should hand out business cards in a bikini, that test drivers wanted a "piece of her ass," and that she was "a bitch." R.132 at 5-6. Khatabi complained multiple times to her supervisors—who were among those harassing her—but they took no corrective action, instead laughing and telling her "[t]here is no HR, sweetheart," to which she could direct her complaints. R.132 at 10-11. Khatabi ultimately left the dealership in December 2020.

Khatabi brought claims under Title VII and the Florida Civil Rights Act ("FCRA"), asserting that she was constructively discharged, subjected to a hostile work environment, and retaliated against because of her sex.[4] R.27 at 11-21. A jury found in her favor on all claims and awarded her $750,000 in punitive damages, $80,000 in compensatory damages, and $1,028 in back pay for the constructive-discharge claim. R.57. The jury used

---

court's decision on CAH's renewed motion for judgment as a matter of law. R.132.

[4] Khatabi also brought a Fair Labor Standards Act (FLSA) claim, which is not at issue on appeal.

a single verdict form that did not distinguish or apportion damages between the Title VII and FCRA claims. R.57. The verdict form appeared to award the compensatory and punitive damages only for the constructive-discharge claim, with no damages for the other two claims. R.57.

C. Post-Trial Proceedings

CAH filed a post-trial motion seeking remittitur of the damages award, among other relief. R.117. In that motion, CAH asserted, *inter alia*, that section 1981a(b)(3)(A) required non-economic damages to be capped at $50,000 because CAH has fewer than 101 employees. R.117 at 39-40. CAH had not previously invoked section 1981a(b)(3)'s caps in its answer or pre-trial stipulation. R.28, R.37. Khatabi responded that Title VII's damages caps must be pled as an affirmative defense or avoidance under Federal Rule of Civil Procedure 8(c) and that CAH waived[5] reliance on the caps by failing to invoke them in its answer or pre-trial stipulation. R.128 at 42-45. Khatabi thus asserted that no damages cap—even the maximum $300,000 cap for the largest employers—should apply. R.128 at 42-45. Khatabi also

[5] The court and parties use the term "waived." We use this term for consistency but note that "forfeited" may be more accurate. *See Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. 17, 20 n.1 (2017).

argued that, even if CAH did not waive the damages caps, CAH retained the burden to establish the requisite number of employees for the $50,000 cap and failed to meet that burden. R.128 at 46-47.

The court[6] granted the motion for remittitur and found the $50,000 damages cap to be applicable. R.132 at 23-30. The court first rejected Khatabi's argument that section 1981a(b)(3)'s damages caps qualify as an affirmative defense or avoidance. R.132 at 23-29. These caps did not meet the definition of either an affirmative defense or avoidance, the court said, because "if applied, they would not require judgment for the defendant," as would an affirmative defense, "nor would they result in Title VII … not having [its] ordinary legal effect," as would an avoidance. R.132 at 25 (internal quotation marks omitted). And no unfair surprise or prejudice could result from application of the caps, the court reasoned, because Khatabi "should have known from the start that the statute[] under which

[6] Following trial, the parties consented to have a magistrate judge handle post-judgment proceedings. For simplicity, we use "the court" when referring to the magistrate judge.

she was bringing her claims expressly limited recovery of punitive damages."[7] R.132 at 27 (cleaned up).

The court also rejected Khatabi's argument that the burden fell on CAH to show the requisite number of employees for application of the $50,000 cap. R.132 at 29. Khatabi "cited to no binding authority" for that proposition, the court said, and "[t]he cap is merely a component of the damages element of the prima facie claim, thus one which Plaintiff is dutybound to support with evidence." R.132 at 29. And even if the burden did fall on CAH, the court reasoned, CAH had sustained that burden through trial testimony from the dealership's owner, Carlos Rios, indicating that CAH had "around 20, 22" employees at the time of trial and that this number was "consistent with the time around September of 2020," "[g]ive or take two to three people." R.132 at 29-30.

The court thus found the $50,000 damages cap under section 1981a(b)(3)(A) to be applicable. R.132 at 29-30. Noting that the FCRA has

[7] The court applied this same logic to conclude that the FCRA's cap on punitive damages was not an affirmative defense or avoidance. R.132 at 23-29; *see* Fla. Stat. Ann. 760.11(5) ("The judgment for the total amount of punitive damages awarded under this section to an aggrieved person shall not exceed $100,000."). EEOC takes no position on this issue.

no cap on compensatory damages and a $100,000 cap on punitive damages, *see* Fla. Stat. Ann. 760.11(5), the court gave Khatabi the full $80,000 in compensatory damages and $100,000 in punitive damages under the FCRA, along with her backpay award of $1,028,[8] for a total award of $181,028.[9] R.132 at 31-32.

SUMMARY OF ARGUMENT

A jury determined that Khatabi, a teenager forced to leave her job because of pervasive sexual harassment, should receive $80,000 in compensatory damages and $750,000 in punitive damages. After judgment was entered, CAH moved to remit the damages award, invoking for the

[8] The court suggested incorrectly that the $1,028 backpay award was part of Khatabi's compensatory-damages award but in any event recognized that this backpay award was "undisturbed" by any cap. R.132 at 31 & 32 n.7.

[9] The court did not allocate the capped $50,000 to Khatabi's Title VII award before allocating $100,000 in punitive damages and $80,000 in compensatory damages under the FCRA. R.132 at 31-33. Although we take no position on allocation issues, we understand this Court's precedent to suggest that the proper procedure is to allocate the full capped amount under Title VII and then "throw[]" the "remaining" portion of the damages award "into a judgment under the [FCRA]" to the extent permitted by that statute. *Bradshaw v. Sch. Bd. of Broward Cnty.*, 486 F.3d 1205, 1208 (11th Cir. 2007) (allocating $300,000 capped amount under Title VII and then turning to the FCRA to see whether it permitted further recovery).

first time section 1981a(b)(3)(A)'s $50,000 cap on non-economic damages for employers with more than fourteen but fewer than 101 employees.

CAH, however, waived reliance on section 1981a(b)(3)'s caps because it failed to assert them as an affirmative defense or avoidance in its answer or pre-trial stipulation. While this Court has not addressed this issue, other courts have treated these caps as waivable in certain instances. And multiple circuits have held that statutory damages limitations more generally are affirmative defenses or avoidances, reasoning that they operate to limit recovery even where liability is uncontested and threaten to give rise to unfair surprise or prejudice if not invoked earlier in the litigation. Section 1981a(b)(3)'s caps share these same hallmarks because they raise matters extraneous to liability—operating only to reduce a successful plaintiff's recovery—and because their belated invocation can, as here, deprive a plaintiff of the opportunity to discover and present evidence of the employer's size relevant to determining the caps' applicability.

In any event, even if CAH did not waive reliance on the caps, it failed to meet its burden to show that it had fewer than 101 employees such that section 1981a(b)(3)(A)'s $50,000 cap should apply. Because the applicability

of the caps is not an element of a Title VII claim and because the employer is better positioned to establish the number of people it employs, traditional burden-of-proof principles and due process concerns favor requiring the employer rather than the plaintiff to prove the factual predicates underlying a particular damages-cap bracket. The court's conclusion that CAH sustained this burden was erroneous because the court relied on only a snippet of vague testimony and improperly focused on the number of employees CAH had at the time of trial rather than at the time the discrimination occurred.

ARGUMENT

I. Section 1981a(b)(3)'s damages caps are an affirmative defense or avoidance subject to waiver.

Federal Rule of Civil Procedure 8(c) requires a party responding to a pleading to "affirmatively state any avoidance or affirmative defense," including certain enumerated defenses. Fed. R. Civ. P. 8(c)(1). Section 1981a(b)(3)'s damages caps are not one of the enumerated defenses, but the list is nonexhaustive, such that the caps could fall into what has been termed the Rule's "residuary clause." *See Jones v. Bock*, 549 U.S. 199, 212 (2007) (Rule 8(c)'s list of affirmative defenses is "nonexhaustive"); *Ingraham*

v. United States, 808 F.2d 1075, 1078 (5th Cir. 1987) ("In the years since adoption of [Rule 8(c)], the residuary clause has provided the authority for a substantial number of additional defenses ….").

While this Court has not addressed whether section 1981a(b)(3)'s damages caps qualify as an affirmative defense or avoidance, other courts have treated these caps as waivable in certain instances, including two district courts in this circuit. *See Sheriff v. Midwest Health Partners, P.C.*, 619 F.3d 923, 932-33 (8th Cir. 2010) (district court did not abuse its discretion in sustaining damages that exceeded section 1981a(b)(3)(A)'s $50,000 cap where employer failed to invoke the cap in its answer or press the issue during litigation); *Jordan v. BBF No. 1, L.L.C.*, No. 2:22-cv-00100, 2023 WL 2563720, at *2 (N.D. Ala. Mar. 17, 2023) (employer "waive[d] … the opportunity to assert that anything other than the maximum cap applies" by failing to defend the action); *Whitford v. Sub-Line Assocs., Inc.*, No. CV-15-BE-1678, 2017 WL 3118810, at *12 (N.D. Ala. July 21, 2017) (employer waived even the maximum $300,000 cap by disclaiming reliance on the caps in pre-trial order); *Tourangeau v. Nappi Distribs.*, No. 2:20-cv-12, 2022 WL 2132303, at *5 (D. Me. June 14, 2022) ("[U]nder clear and longstanding First Circuit law, [the employer] was required to plead Title VII's cap as an

affirmative defense and … waived the right to assert the statutory cap … by failing to assert it in its answer ….”); *Bell v. O’Reilly Auto Enters., LLC*, No. 1:16-cv-501, 2022 WL 782784, at *4 (D. Me. Mar. 15, 2022) (concluding that employer “forfeited the statutory damage caps” under the Americans with Disabilities Act (ADA)[10] “by failing to plead the same as affirmative defenses” and thus refusing to reduce jury award to $300,000 cap). *But see Oliver v. Cole Gift Ctrs., Inc.*, 85 F. Supp. 2d 109, 112 (D. Conn. 2000) (section 1981a(b)(3)(D)’s $300,000 cap “is not an affirmative defense and is not waivable”); *McClinton v. Cogency Glob., Inc.*, No. 2:20-cv-543, 2024 WL 1329777, at *13-14 (N.D. Ala. Mar. 27, 2024) (similar), *appeal filed on other grounds*, No. 24-11261 (11th Cir.); *Glowacki v. O’Reilly Auto Enters., LLC*, No. 1:21-cv-868, 2023 WL 8642549, at *8 (W.D. Mich. Dec. 14, 2023) (similar but noting split of authority on issue).[11]

---

[10] Section 1981a(b)(3)’s caps also apply to the ADA. 42 U.S.C. § 1981a(a)(2).

[11] The court here stated that “multiple district courts in this Circuit have persuasively viewed invocation of the damage caps not as affirmative defenses, but merely as binding and unconditional statements of law.” R.132 at 26 (citing cases). But this mischaracterizes those decisions. Only one of the cited decisions addressed a damages-cap defense (under the FCRA), and the court there did not “view” invocation of the cap as a statement of law rather than an affirmative defense. It simply used those words in describing the parties’ positions on a dispute that became moot

In addition, multiple circuits, although not addressing section 1981a(b)(3) specifically, have held that statutory damages caps more generally are affirmative defenses or avoidances subject to waiver. *Carrasquillo-Serrano v. Mun. of Canovanas*, 991 F.3d 32, 42-43 (1st Cir. 2021) (holding that "a statutory provision limiting damages to a fixed sum constitute[s] an affirmative defense for purposes of [Rule] 8(c)") (citation omitted); *Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 15 F.3d 1222, 1226 (1st Cir. 1994) (holding that limitation-of-remedies provision qualified as affirmative defense subject to waiver); *Bentley v. Cleveland Cnty. Bd. of Cnty. Comm'rs*, 41 F.3d 600, 604-05 (10th Cir. 1994) (treating statutory cap on liability of local governments as affirmative defense subject to waiver); *Simon v. United States*, 891 F.2d 1154, 1157 (5th Cir. 1990) (holding that Louisiana statute limiting recoverable damages in medical malpractice cases was Rule 8(c) avoidance); *Ingraham*, 808 F.2d at 1079 (same as to similar Texas statute); *Jakobsen v. Mass. Port. Auth.*, 520 F.2d 810, 813 (1st Cir. 1975) (concluding that "a statutory limitation on liability" is an

---

when the defense at issue was voluntarily withdrawn. *Adams v. JP Morgan Chase Bank, N.A.*, No. 3:11-cv-337, 2011 WL 2938467, at *5 (M.D. Fla. July 21, 2011).

affirmative defense). *But see Taylor v. United States*, 821 F.2d 1428, 1433 (9th Cir. 1987) (statutory cap on noneconomic damages based on professional negligence "is a limitation of damages rather than an affirmative defense"), *cert. denied*, 485 U.S. 992 (1988); *see id.* at 993 (White, J., dissenting from denial of certiorari) (noting that *Taylor* created a "conflict among the Courts of Appeals").

Although these decisions addressed damages limitations under statutes other than section 1981a(b)(3), their reasoning is readily applicable here. In finding the relevant limitations to be affirmative defenses or avoidances, these courts relied on two main considerations: that these limitations (1) served the function of an affirmative defense or avoidance, namely, operating to bar or limit recovery even where liability is uncontested; and (2) had the potential to unfairly surprise or prejudice the plaintiff if not invoked earlier in the litigation. Both concerns apply to section 1981a(b)(3)'s damages caps.

A. Section 1981a(b)(3)'s damages caps operate to limit recovery even where liability is uncontested.

Courts have reasoned that statutory damages caps qualify as an affirmative defense or avoidance because they "share[] the common

characteristic of a bar to the right of recovery even if the general complaint were more or less admitted to." *Jakobsen*, 520 F.2d at 813; *see Ingraham*, 808 F.2d at 1079 (avoidance raises an issue "extrinsic" to "the plaintiff's cause of action" while "admitting the facts alleged" by the plaintiff). Courts have applied this principle across various statutory schemes. Rather than viewing each statutory damages cap as inherently distinguishable on its own terms, these courts have looked to whether the cap at issue has the core similarity of barring or limiting recovery even where liability is largely uncontested. *See Knapp Shoes*, 15 F.3d at 1226 (*Jakobsen*'s holding that "a statutory provision limiting damages to a fixed sum constituted an affirmative defense" applied with equal force to different statutory provision that "perform[ed] the same damage limitation function"); *Carrasquillo-Serrano*, 991 F.3d at 42-43 (applying *Knapp Shoes*'s holding to different statutory provision that amounted to similar "statutory limitation on liability"); *Ingraham*, 808 F.2d at 1080 (relying on *Jakobsen* in considering different damages limitation).

Section 1981a(b)(3)'s caps "perform[] the same damage limitation function" and thus "there is no reason to reach a contrary result here." *Knapp Shoes*, 15 F.3d at 1226; *see Bell*, 2022 WL 782784, at *1 (relying on

Jakobsen, *Knapp Shoes*, and *Carrasquillo-Serrano* and concluding that section 1981a(b)(3)'s caps are an affirmative defense because they perform this common function); *Tourangeau*, 2022 WL 2132303, at *4-5 (applying "clear and longstanding First Circuit case law" as articulated in *Jakobsen*, *Knapp Shoes*, and *Carrasquillo-Serrano* to section 1981a(b)(3)'s caps). These caps, as with other affirmative defenses, "raise[] matters extraneous to the plaintiff's *prima facie* case," rather than "negat[ing] an element of the plaintiff's *prima facie* case," as an ordinary defense does. *In re Rawson Food Serv., Inc.*, 846 F.2d 1343, 1349 (11th Cir. 1988) (internal quotation marks omitted); *see Hassan v. U.S. Postal Serv.*, 842 F.2d 260, 263 (11th Cir. 1988) (argument was affirmative defense where it "introduced an issue not directly related to … liability"). A Title VII plaintiff need not establish entitlement to damages at all—much less the size of a damages award—as an element of her claim. *See Burke-Fowler v. Orange Cnty.*, 447 F.3d 1319, 1323 (11th Cir. 2006) (per curiam) (excluding any mention of damages when listing elements of Title VII discrimination claim). Rather than negating an element necessary to establish liability, section 1981a(b)(3)'s caps operate to reduce the amount of recovery that a plaintiff *who prevails on liability* can obtain. In this respect, the caps play a similar role to other

defenses that reduce the damages that a successful Title VII litigant can receive—such as a failure-to-mitigate defense or an after-acquired-evidence defense—that courts consider to be affirmative in nature. *See McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 362-63 (1995) (after-acquired-evidence defense is affirmative); *Muñoz v. Oceanside Resorts, Inc.*, 223 F.3d 1340, 1347 (11th Cir. 2000) (failure-to-mitigate defense is affirmative).

The court here reached the opposite conclusion—that section 1981a(b)(3)'s caps did not perform the traditional function of an affirmative defense or avoidance. R.132 at 25. "[I]f applied," the court said, these caps "would not require judgment for the defendant, nor would they result in Title VII … not having [its] ordinary legal effect." R.132 at 25 (internal quotation marks omitted). As to the first premise, it is true that the damages caps do not require judgment for the defendant. But that does not foreclose characterizing them as an affirmative defense. While "[a] cap on damages is only a partial defense, … that is true of any defense that is limited to the amount of damages, and in that respect it is no different from comparative negligence, which clearly is an affirmative defense," *Carter v. United States*, 333 F.3d 791, 796 (7th Cir. 2003), or other affirmative defenses like a failure-to-mitigate defense, *see Frederick v. Kirby Tankships, Inc.*, 205

F.3d 1277, 1287 (11th Cir. 2000) (characterizing as "unsound" the argument that "only defenses that bar recovery, rather than those that diminish the amount of damages, must be pled affirmatively").

As to the second premise, the court reasoned that because the plain text of the statute makes the damages caps "non-negotiable," waiving these caps "would compel a result in which Title VII … ha[s] [its] *unordinary* legal effect." R.132 at 25. But this logic is circular because non-application of any mandatory damages cap will, by definition, deprive that damages cap of its ordinary effect. This has not, however, prevented courts from treating such caps as affirmative defenses or avoidances subject to waiver. *E.g., Ingraham*, 808 F.2d at 1077 n.1, 1079 (sustaining non-economic damages significantly exceeding statutory cap of $500,000); *Carrasquillo-Serrano*, 991 F.3d at 42-43 (sustaining $1.5 million judgment despite statute stating that damages "shall not exceed" $150,000); *Bentley*, 41 F.3d at 602, 604-05 (sustaining damages of $157,000 despite statute limiting damages to $100,000).

B. Section 1981a(b)(3)'s damages caps threaten to unfairly surprise or prejudice the plaintiff if invoked late in the litigation.

Those courts that have characterized statutory damages caps as affirmative defenses or avoidances have emphasized that invoking such caps at a late stage in the litigation could deprive the plaintiff of the opportunity to propound discovery or present relevant evidence related to the caps. *See Knapp Shoes*, 15 F.3d at 1226-27 (finding prejudice because "the limitation of remedies issue was not raised until … after discovery and the submission of all of the evidence on liability," depriving plaintiff of opportunity to present evidence regarding what remedies the parties agreed upon); *Bentley*, 41 F.3d at 605 ("Permitting the [defendant] to raise [the damage cap] issue at this stage of the proceedings would be extremely unfair to [plaintiff], who may have been able to prove some exception to the damage cap at trial if he had notice of the defense.").

Because determining the appropriate damages bracket under section 1981a(b)(3) "may in some instances require resolution of factual issues," plaintiffs "may be prejudiced if defendants do not raise [the issue] prior to judgment." *Taylor*, 821 F.2d at 1433; *see Quinones v. United States*, No. 8:14-cv-164, 2015 WL 3948420, at *3 (M.D. Fla. June 29, 2015) (fact that damages

cap in question "turn[ed] on a number of important factual determinations" and "could not be decided purely as a matter of law" weighed in favor of treating it as affirmative defense). Here, Khatabi contends that she was surprised by CAH's contention—not raised until after trial—that it fell within the $50,000 bracket for the smallest employers. Khatabi asserts that, had CAH raised this argument earlier, she would have "sought discovery regarding [CAH's] employee numerosity across all of its locations" and "presented evidence and arguments in support of … an integrated-enterprise theory." R.128 at 43-44; *see Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1341 (11th Cir. 1999) (en banc) (integrated-enterprise theory presents basis "to aggregate multiple entities for the purposes of counting employees").

Because Khatabi was not on notice of the need to develop the record on this point, the record contained—and the court relied on—only a fragment of vague testimony estimating the number of CAH employees, elicited not even as to the applicability of the caps but in the context of exploring Khatabi's FLSA claim.[12] R.132 at 30. This is precisely the sort of

[12] EEOC takes no position on Khatabi's argument that the jury must decide the factual questions underlying application of section 1981a(b)(3)'s caps.

prejudice with which the decisions above were concerned. *See Knapp Shoes*, 15 F.3d at 1227 (prejudice resulted from defendant's belated invocation of damages limitation because the court's finding that this limitation applied "seems to have derived from a fragment of testimony from one witness" which "in context was not elicited" to show limitation's applicability); *Jakobsen*, 520 F.2d at 813 (prejudice resulted where damages cap was not invoked until after trial, such that "plaintiff had no reason to understand that this issue was in the process of being tried" when relevant evidence was presented); *cf. Taylor*, 821 F.2d at 1433 (reasoning that no prejudice would result from permitting defendant to invoke statutory damages limitation after judgment "because application of [the limitation] here requires no additional factual inquiry" given undisputed facts).

The court reasoned that Khatabi was not unfairly surprised or prejudiced by CAH's belated invocation of the caps because these caps are "part of the same statutory scheme under which [she] … brought … her

---

However, the potential for prejudice arises even where a judge makes these factual determinations after trial, because a plaintiff who lacks advance notice of the defendant's intent to invoke a lower damages-cap bracket may well lose the opportunity to discover or develop evidence of the employer's size for a judge to rely upon in considering a remittitur motion.

claim." R.132 at 28 (citation omitted). The court pointed to *Oliver v. Cole Gift Centers, Inc.*, which distinguished *Ingraham*, *Knapp Shoes*, *Jakobsen*, and *Bentley* because they concerned damages caps that "were part of a statutory scheme distinct from the basis of recovery." 85 F. Supp. 2d at 111-12. However, the decisions *Oliver* distinguished connected their concerns about unfair surprise not to the fact that the damages caps originated from a separate statutory scheme but instead to the late litigation posture at which the defendant invoked the caps. *E.g.*, *Knapp Shoes*, 15 F.3d at 1226-27; *Bentley*, 41 F.3d at 605; *Jakobsen*, 520 F.2d at 813; *Ingraham*, 808 F.2d at 1079. In other words, these decisions did not analyze whether the plaintiff should have foreseen the potential applicability of the caps before concluding that prejudice would result from the caps' application. *See Bell*, 2022 WL 782784, at *2 (disagreeing with *Oliver* that "the obviousness of a statutory limitation on liability" is the relevant touchstone for determining "whether a defense is affirmative").

Moreover, while the *existence* of the caps may be apparent from the face of the statute, the determination of *which bracket* applies to a given employer will often not be obvious. As noted above, a plaintiff—like Khatabi here—may well be aware of the $300,000 cap for the largest

employers but still be surprised by the belated invocation of a lower damages-cap bracket and then deprived of the opportunity to develop and present evidence relevant to the employer's size. This Court should thus hold, at minimum, that these subsidiary caps must be affirmatively asserted by a defendant to avoid waiver. Indeed, the decisions discussed above holding that section 1981a(b)(3)'s caps are not waivable have addressed the $300,000 maximum cap rather than the subsidiary caps. *See Oliver*, 85 F. Supp. 2d at 112; *McClinton*, 2024 WL 1329777, at *13; *Glowacki*, 2023 WL 8642549, at *7.

In sum, this Court should hold that CAH was required to invoke section 1981a(b)(3)'s caps as an affirmative defense or avoidance. Because CAH did not invoke the caps in either its answer or pre-trial stipulation,[13] this Court should find that CAH waived reliance on any of the caps or, at minimum, waived the opportunity to assert that a damages-cap bracket lower than the $300,000 maximum cap applies.

[13] Under this Court's precedent, failure to plead an affirmative defense in an answer can be cured by including the defense in a pre-trial order. *Pulliam v. Tallapoosa Cnty. Jail*, 185 F.3d 1182, 1185 (11th Cir. 1999).

II. CAH bore the burden to prove the factual predicates underlying application of the $50,000 cap and failed to meet that burden here.

A. The employer bears the burden to prove the requisite number of employees for application of a particular damages cap.

If this Court agrees that section 1981a(b)(3)'s caps qualify as an affirmative defense or avoidance, then the burden logically falls on the defendant to prove the caps' applicability. *See Muñoz*, 223 F.3d at 1347 ("The failure to mitigate one's damages is an affirmative defense, and as such, the [employer] bore the burden of demonstrating at trial that the plaintiff did not seek comparable employment following his termination."); *Holland v. Gee*, 677 F.3d 1047, 1065 (11th Cir. 2012) (burden is on employer to prove after-acquired-evidence affirmative defense); *In re Rawson Food Serv., Inc.*, 846 F.2d at 1349 ("[I]t is well established that the party asserting an affirmative defense usually has the burden of proving it.") (cleaned up).

But even if this Court holds that section 1981a(b)(3)'s caps do not qualify as an affirmative defense or avoidance, the burden should still fall on the employer to prove the factual predicates underlying application of a given damages cap. Indeed, multiple courts—without holding that these caps must be pled as an affirmative defense or avoidance—have nonetheless concluded that the employer bears the burden to make this

factual showing. *See Hernández-Miranda*, 651 F.3d at 175-76; *Stelly v. W. Gulf Mar. Ass'n*, 407 F. Supp. 3d 673, 687 (S.D. Tex. 2019); *Jones v. Rent-A-Center, Inc.*, 281 F. Supp. 2d 1277, 1287 (D. Kan. 2003); *Hamlin v. Charter Twp. of Flint*, 965 F. Supp. 984, 988 (E.D. Mich. 1997); *Jordan*, 2023 WL 2563720, at *2; *Whitford*, 2017 WL 3118810, at *12; *Mendez v. Perla Dental*, No. 04-cv-4159, 2008 WL 821882, at *3-4 (N.D. Ill. Mar. 26, 2008), *aff'd on other grounds*, 646 F.3d 420 (7th Cir. 2011). And at least one court has placed this burden on the employer after holding that the caps need not be pled affirmatively. *See Soto v. LCS Corr. Servs., Inc.*, No. 2:12-cv-130, 2013 WL 4012627, at *7 (S.D. Tex. Aug. 5, 2013) (finding "no clear legal requirement to plead Section 1981a(b)(3)'s damages cap as an affirmative defense" but nonetheless placing burden on defendant to prove requisite number of employees).

These courts have reasoned that "the traditional burden of proof dictate[s]" allocating the burden to the defendant because "[t]he applicability of the caps is not an element of the Title VII claim. Instead, the defendant employer must affirmatively move to impose the cap and to present relevant evidence." *Hernández-Miranda*, 651 F.3d at 176. And, typically, it is "the party asserting the affirmative of a proposition [that]

should bear the burden of proving that proposition." *Id.* (citation omitted); *see Jordan*, 2023 WL 2563720, at *2 (agreeing with this principle). Just as a party moving for summary judgment bears the burden of proving that there are no genuine issues of material fact, *see Poer v. Jefferson Cnty. Comm'n*, 100 F.4th 1325, 1335 (11th Cir. 2024), so too does a party moving for remittitur based on section 1981a(b)(3)'s caps have the burden of establishing the requisite number of employees for a given damages cap to apply.

While it is true that a plaintiff bears the burden of establishing "the threshold number of employees for application of Title VII," that is because this qualifies as "an element of a plaintiff's claim for relief." *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006). Indeed, "the existence of [this] particular fact, *i.e.*, [that an entity has] 15 or more employees," is "a prerequisite to … application" of the statute itself. *Id.* at 513. The same is not true of the number of employees underlying application of a given damages-cap bracket under section 1981a(b)(3). Neither entitlement to damages nor the size of a damages award is an element of a plaintiff's claim for relief. *Supra* p. 16.

For this same reason, the court here erred by deeming section 1981a(b)(3)'s caps to be "a component of the damages element of the prima facie claim" that a plaintiff "is dutybound to support with evidence." R.132 at 29. As noted, there is no damages element of a plaintiff's Title VII claim. *Supra* p. 16. It is true that a plaintiff who prevails as to liability ultimately has the burden to establish entitlement to damages in order to receive them. A plaintiff must, for example, "demonstrate[] that the [employer] engaged in a discriminatory practice … with malice or with reckless indifference" to obtain punitive damages. 42 U.S.C. § 1981a(b)(1). But the damages caps under section 1981a(b)(3) do not place any similar burden on the plaintiff or otherwise set out affirmative conditions for entitlement to damages. *Id.* § 1981a(b)(3). To the contrary, the caps serve as a defensive shield "to protect employers, especially smaller employers, from ruinously large awards" after entitlement to damages has already been established. *Hernández-Miranda*, 651 F.3d at 173.

In this respect, they are analogous to evidence of a defendant's financial condition as relates to punitive damages: a plaintiff need not present evidence of a defendant's wealth to establish entitlement to punitive damages, but a defendant may introduce evidence of its limited

net worth defensively in an effort to minimize the amount of damages. *See Mendez*, 2008 WL 821882, at *3 ("Net worth and the number of employees serve the same purposes in the uncapped punitive damage case and the Title VII capped case. They both relate to a defendant's ability or obligation to pay the award based upon a defendant's net worth or number of employees."). It is widely accepted that the defendant bears the burden to show its limited net worth in such circumstances, *e.g.*, *Mason v. Okla. Tpk. Auth.*, 182 F.3d 1212, 1214-15 (10th Cir. 1999); *Kemezy v. Peters*, 79 F.3d 33, 33-34 (7th Cir. 1996), and courts have applied this same reasoning as concerns the number of employees for section 1981a(b)(3)'s caps, *see Mendez*, 2008 WL 821882, at *3 ("[I]f the defendant bears the burden of showing its net worth in hopes of avoiding a large punitive damages award, then logically it is also incumbent upon the defendant to show how many employees it has when attempting to obtain a lower damages cap.") (citation omitted); *Jones*, 281 F. Supp. 2d at 1282, 1283, 1287 (analogizing to *Mason* in concluding that defendant bore burden to show number of employees for section 1981a(b)(3)'s caps).

Further, courts have reasoned that due process concerns favor placing the burden on employers to prove the factual predicates

underlying applicability of a given damages cap. "[E]mployers are in the best position to establish how many employees they have at a given time," and "the ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." *Hernández-Miranda*, 651 F.3d at 176 (cleaned up); *Jordan*, 2023 WL 2563720, at *2 (adopting this reasoning); *Mendez*, 2008 WL 821882, at *4 (employer should bear burden because it "normally … is in a better position to provide information regarding its employees"). Here, CAH was in a better position to establish that it had fewer than 101 employees, and the court erred by refusing to place the burden on CAH to do so.

B. CAH failed to meet its burden to establish the requisite number of employees for application of the $50,000 cap.

The court concluded that, even if CAH bore the burden to establish that it had fewer than 101 employees, it sustained this burden through testimony from its owner, Carlos Rios, indicating that "today" (at the time of trial in April 2022) CAH had "around 20, 22" employees and that this was "consistent with the time around September of 2020," "[g]ive or take two to three people." R.132 at 30.

The cited testimony, however, does not establish that CAH had "fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year," as required for the $50,000 cap. 42 U.S.C. § 1981a(b)(3)(A). "[T]he statutory phrase 'current' calendar year in § 1981a(b)(3) … refer[s] to the time period of the discrimination," not the time period of trial or judgment. *Hernández-Miranda*, 651 F.3d at 170; *see Depaoli v. Vacation Sales Assocs., L.L.C.*, 489 F.3d 615, 622 (4th Cir. 2007); *Vance v. Union Planters Corp.*, 209 F.3d 438, 446 (5th Cir. 2000). Thus, the court should have asked whether CAH had the requisite number of employees in each of 20 or more calendar weeks *during the year of discrimination* (2020) or the preceding calendar year (2019). But the court instead treated the "current" calendar year as the year of trial (2022) and reasoned that CAH had the requisite number of employees during 2022 and the preceding two years (2021 and 2020), which was the incorrect inquiry. R.132 at 30 (concluding that testimony supported a finding that CAH "*has*" the requisite number of employees and "had approximately that number of employees" during prior two years) (emphasis added).

As concerns the relevant timeframe of 2020 and 2019, Rios's testimony did not establish that CAH had the requisite number of

employees for "each of 20 or more calendar weeks" during either year. 42 U.S.C. § 1981a(b)(3)(A). Instead, Rios's testimony simply indicated that "around September of 2020," CAH had "around 20, 22" employees "[g]ive or take two to three people." R.132 at 30. Referring generally to the time "around September of 2020" does not establish that this number of employees was consistent across "each of 20 or more calendar weeks" during 2020 or 2019. Thus, even if CAH did not waive reliance on the caps by neglecting to plead them affirmatively, it nevertheless failed to meet its burden to show the $50,000 cap should apply. Accordingly, this Court should impose the $300,000 cap applicable to the largest employers, *see Burnett v. Ocean Props., Ltd.*, 422 F. Supp. 3d 400, 427 (D. Me. 2019) (applying $300,000 cap where employer did not show it had fewer than 501 employees), *aff'd*, 987 F.3d 57 (1st Cir. 2021); *Jones*, 281 F. Supp. 2d at 1287 (same); *Jordan*, 2023 WL 2563720, at *2 (same), or at minimum remand for the district court to examine how many employees CAH had during the relevant timeframe and obtain further factual development as needed.

CONCLUSION

For the foregoing reasons, the grant of the motion for remittitur should be reversed.

Respectfully submitted,

KARLA GILBRIDE
General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

ANNE NOEL OCCHIALINO
Assistant General Counsel

s/Chelsea C. Sharon
CHELSEA C. SHARON
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(202) 921-2889
chelsea.sharon@eeoc.gov

Dated: December 6, 2024

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6,499 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Eleventh Circuit Rule 32-4.

This brief complies with the typeface requirements and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word in size 14, Book Antiqua font.

s/*Chelsea C. Sharon*
CHELSEA C. SHARON

December 6, 2024

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2024, a copy of the foregoing brief was electronically filed using the Court's CM/ECF system, which will result in service on all counsel of record. I further certify that I caused four (4) paper copies of the foregoing brief to be mailed to the Clerk of Court on today's date.

s/*Chelsea C. Sharon*
CHELSEA C. SHARON

December 6, 2024

ADDENDUM

ADDENDUM: TABLE OF CONTENTS

42 U.S.C. § 1981a – Damages in cases of intentional discrimination in employment

(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 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, 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), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of Title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of Title 29 and the regulations implementing section 791 of Title 29, or who violated the requirements of section 791 of Title 29 or the regulations implementing section 791 of Title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the

Americans with Disabilities Act of 1990 or regulations implementing section 791 of Title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(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.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.

(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.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section—

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3).

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means—

(A) in the case of a person seeking to bring an action under subsection (a)(1), the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2), the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of Title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990.

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a).