

UNDER WHAT CIRCUMSTANCES DID CONGRESS INTEND TO AWARD PUNITIVE DAMAGES FOR VICTIMS OF UNLAWFUL INTENTIONAL DISCRIMINATION UNDER TITLE VII?

INTRODUCTION

Mary Ann Luciano had a bright future at Olsten Corporation ("Olsten").¹ She began working at the company in 1987 as Director of Field Marketing and received commendable performance appraisals.² Despite Luciano's excellent evaluations, Olsten's senior male executives were displeased with her rapid rise in the company.³ They opposed Luciano's promotion to vice president and even cajoled her to accept a lower position in the company by promising her a future promotion.⁴ In response to Luciano's success, the company's executives drew up an impossible job description for her new position that was designed to ensure an unsatisfactory performance.⁵ In June of 1992, Luciano was fired because her position was being eliminated as part of a corporate reorganization.⁶ She neither received her promised promotion, nor was she considered for the two new executive positions created by the reorganization.⁷

In November of 1993, Luciano filed suit in a New York federal court against Olsten and its executive officers for sex discrimination.⁸ Luciano alleged that Olsten violated Title VII of the Civil Rights Act of 1964 ("Title VII" or "1964 Act") by failing to grant her a promised promotion and by subsequently terminating her, as well as other female managers and officers, because of her sex.⁹ Following a month-

¹ See *Luciano v. Olsten Corp.*, 110 F.3d 210, 213-14 (2d Cir. 1997).

² See *id.* at 213.

³ See *id.*

⁴ See *id.*

⁵ See *id.*

⁶ See *Luciano*, 110 F.3d at 214.

⁷ See *id.*

⁸ See *Luciano v. Olsten Corp.*, 912 F. Supp. 663, 666 (E.D.N.Y. 1996), *aff'd*, 110 F.3d 210, 221-22 (2d Cir. 1997). Luciano also filed suit under the New York State Human Rights Law for gender-based discrimination. See *Luciano*, 110 F.3d at 213; see also N.Y. EXEC. LAW § 290 *et seq.* (McKinney 1993).

⁹ See *Luciano*, 912 F. Supp. at 666. The 1964 Act makes it illegal for an employer to discriminate against an individual in the employment setting because of the individual's race, color,

long trial, the jury returned a verdict in Luciano's favor.¹⁰ In addition to compensatory, back pay and emotional distress damages, Luciano was awarded \$300,000 in punitive damages.¹¹

Like Luciano, Carole Kolstad was a rising star at the American Dental Association (the "Association").¹² Kolstad began working for the Association in 1988 as a staff attorney in its Washington, D.C. office.¹³ She received numerous distinguished performance evaluations and became an integral part of the Association's lobbying efforts.¹⁴ In 1992, when Kolstad's supervisor announced his retirement, Kolstad was one of two candidates considered for the position.¹⁵ Despite her qualifications, she was not promoted, and the position was given to the male applicant.¹⁶

In July of 1994, Kolstad filed suit against the Association alleging Title VII sex discrimination.¹⁷ Although Kolstad brought her action in a District of Columbia federal court, she made allegations similar to those made by Luciano.¹⁸ Kolstad claimed that the Association failed to promote her to a senior director position because of her sex, and moreover, that the Association altered the directorship's job descrip-

religion, sex or national origin. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a), 78 Stat. 241, 255 (codified in scattered sections of 42 U.S.C. § 2000a-2000h (1994)). Section 703(a) of the 1964 Act provides that:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a), 78 Stat. 241, 255 (codified in 42 U.S.C. § 2000e-2(a) (1994)).

¹⁰ See *Luciano*, 912 F. Supp. at 666.

¹¹ See *Luciano*, 110 F.3d at 214. The jury awarded Luciano \$5,000,002 in punitive damages, but the district court judge ordered that the punitive damages award be reduced to \$300,000 pursuant to 42 U.S.C. § 1981a(b)(3)(D). See 42 U.S.C. § 1981a(b)(3) (1994) (limiting the sum of Title VII compensatory and punitive damages); *Luciano*, 110 F.3d at 214.

¹² See *Kolstad v. American Dental Ass'n*, 139 F.3d 958, 961 (D.C. Cir. 1998), *vacated*, 119 S. Ct. 2118, 2130 (1999) ("*Kolstad I*").

¹³ See *id.* at 960.

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ See *Kolstad I*, 139 F.3d at 961.

¹⁸ See *Kolstad v. American Dental Ass'n*, 912 F. Supp. 13, 13-14 (D.D.C. 1996), *aff'd en banc*, 139 F.3d 958, 970 (D.C. Cir. 1998), *vacated*, 119 S. Ct. 2118, 2130 (1999).

tion and responsibilities to tailor the position to the male applicant.¹⁹ Although the jury found in favor of Kolstad and awarded her back pay, Kolstad did not receive any punitive damages.²⁰ In fact, the district court judge dismissed Kolstad's punitive damages claim before it even reached the jury, because the Association's conduct was not egregious enough to support a punitive damages award.²¹

Despite the similar discriminatory treatment of Carole Kolstad and Mary Ann Luciano by their employers, the United States Circuit Courts of Appeals came to starkly different conclusions regarding the appropriate circumstances to award punitive damages under Title VII.²² Whereas the Second Circuit Court of Appeals in *Luciano v. Olsten Corp.* determined that proof of unlawful intentional discrimination was enough to support an award of punitive damages, the D.C. Circuit Court of Appeals in *Kolstad v. American Dental Ass'n* ("*Kolstad I*") held that Title VII punitive damages may be imposed only upon a showing of egregious conduct, above proof of unlawful intentional discrimination.²³ This circuit court disagreement exemplified the confusion and uncertainty that permeated federal courtrooms regarding the appropriate circumstances for awarding Title VII punitive damages.²⁴

In June 1999, in *Kolstad v. American Dental Ass'n* ("*Kolstad II*"), the Supreme Court of the United States considered the circumstances

¹⁹ See *Kolstad I*, 139 F.3d at 960-61.

²⁰ See *id.* at 961.

²¹ See *id.*

²² Compare *Luciano*, 110 F.3d at 213-14, 220, with *Kolstad I*, 139 F.3d at 960-62.

²³ See *Kolstad I*, 139 F.3d at 960; *Luciano*, 110 F.3d at 220.

²⁴ See *Ngo v. Reno Hilton Resort Corp.*, 140 F.3d 1299, 1304 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 2015 (1999) (interpreting § 1981a to require plaintiffs seeking punitive damages to make a showing beyond the threshold level of intent required for compensatory damages); *Kolstad I*, 139 F.3d at 960 (requiring heightened showing of egregious conduct for Title VII punitive damages); *Harris v. L & L Wings, Inc.*, 132 F.3d 978, 983 (4th Cir. 1997) (requiring a higher standard above mere proof of intentional discrimination for the award of punitive damages); *Enniss v. Coca-Cola Bottling Co.*, 95 F.3d 627, 636 (7th Cir. 1996) (stating that punitive damages require proof of more than intentional unlawful discrimination); *Karcher v. Emerson Elec. Co.*, 94 F.3d 502, 509 (8th Cir. 1996) (awarding of punitive damages requires a showing of more than intentional discrimination); *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1216 (6th Cir. 1996) (stating that employer's conduct did not rise to the level necessary to support a Title VII punitive damages award); *but see Adakai v. Front Row Seat*, No. 96-2249, 1997 WL 603458, at *2 (10th Cir. Oct. 1, 1997) (stating that extraordinarily egregious conduct not necessary to support a punitive damages award), and *Luciano*, 110 F.3d at 219-220 (complaining party not required to make an additional showing beyond proof of intentional unlawful discrimination to obtain a punitive damages award); see also Jeffrey Scot Fowler, Annotation, *Punitive Damages in Actions for Violations of Title VII of the Civil Rights Act of 1964* (42 U.S.C.A. § 1981a; 42 U.S.C.A. §§ 2000e et seq.), 150 A.L.R. FED. 601, 618-19 (1998) (noting division among circuit courts regarding the appropriate circumstances under which Title VII punitive damages may be awarded).

under which punitive damages may be awarded in a Title VII action.²⁵ The Court held that an employer's conduct does not have to be egregious to satisfy § 1981a's requirements for punitive damages.²⁶ Rather, punitive damages may be awarded when the employer acted in the face of a perceived risk that its actions would violate Title VII.²⁷ Thus, under the *Kolstad II* Court's rationale, the determining factor in awarding Title VII punitive damages is the employer's state of mind, and not the egregiousness of its misconduct.²⁸

Originally, under the 1964 Act, punitive damages were not available to complaining parties for unlawful intentional discrimination.²⁹ In 1991, however, Congress enacted the Civil Rights Act of 1991 ("1991 Act") which amended the 1964 Act and added compensatory and punitive damages as a Title VII remedy for unlawful intentional discrimination.³⁰ The 1991 Act, as codified in 42 U.S.C. § 1981a ("§ 1981a") greatly altered the landscape of employment discrimination law by creating additional remedies to deter unlawful intentional discrimination and by providing greater protection to discrimination victims.³¹

²⁵ See 119 S. Ct. 2118, 2121 (1999) ("*Kolstad II*").

²⁶ See *id.* at 2124, 2126.

²⁷ See *id.* at 2125.

²⁸ See *id.* at 2124.

²⁹ See Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(g), 78 Stat. 241, 261 (authorizing courts to enjoin respondents from engaging in unlawful employment practices and to order such affirmative action as may be appropriate); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764-65, 770 (1976) (finding instatement, prohibitory injunction and retroactive seniority to be appropriate remedies under § 706(g)); see also Fowler, *supra* note 24, at 616-17.

³⁰ See Civil Rights Act of 1991, Pub. L. No. 102-166, § 102(a), 105 Stat. 1071, 1072 (1991) (codified as amended in scattered sections of 2 U.S.C., 16 U.S.C., 29 U.S.C. and 42 U.S.C. §§ 1981, 1981a, 2000e (1994)); Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921, 924 (1993); see also Statement of President George Bush Upon Signing S. 1745, 27 WEEKLY COMP. PRES. DOC. 1701 (Nov. 25, 1991), reprinted in 1991 U.S.C.C.A.N. 768, 768-69. Section 102(a)(1) of the 1991 Act states that: "the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 . . ." Civil Rights Act of 1991, Pub. L. No. 102-166, § 102(a)(1), 105 Stat. 1071, 1072 (codified as 42 U.S.C. § 1981a(a)(1) (1994)); see *Landgraf v. USI Film Prods.*, 511 U.S. 244, 253-54 (1994) (noting that § 102(a)(1) of the 1991 Act significantly expands the monetary relief potentially available to plaintiffs to include compensatory and punitive damages).

³¹ See Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071, 1071 (purposes of 1991 Act include providing appropriate remedies for intentional discrimination and unlawful harassment in the workplace and expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination); see also Belton, *supra* note 29, at 924. Forty-two U.S.C. § 1981a(a)(1) (1994) states:

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under 706 or 717 of the Civil Rights

Forty-two U.S.C. § 1981a(a)(1) ("§ 1981a(a)(1)") allows a complaining party to recover compensatory and punitive damages for Title VII unlawful intentional discrimination.³² Compensatory damages make discrimination victims whole for the injuries to their careers, health and self respect caused by their employers' unlawful conduct.³³ Punitive damages, on the other hand, punish employers for their unlawful conduct, reinforce the public policy against discrimination and add to the deterrent value of a damages award.³⁴ Forty-two U.S.C. § 1981a(b)(1) ("§ 1981a(b)(1)") permits complaining parties to recover punitive damages where the complaining party has shown 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 party."³⁵ Whereas § 1981a(a)(1) creates additional Title VII remedies in order to deter unlawful intentional discrimination in the workplace, 42 U.S.C. § 1981a(b)(3) ("§ 1981a(b)(3)") places limits on the amount of compensatory and

Act of 1964 . . . against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) . . . and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 . . . from the respondent.

Id.

It is important to note that the 1991 Act allows for compensatory and punitive damages for unlawful, *intentional* discrimination. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 102(a)(1), 105 Stat. 1071, 1072 (codified in 42 U.S.C. § 1981a(a)(1) (1994)). The Supreme Court has recognized two theories of discrimination under Title VII: disparate treatment and disparate impact. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609-11 (1993); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432-34 (1971); see also Judith J. Johnson, *A Standard for Punitive Damages under Title VII*, 46 FLA. L. REV. 521, 524-26 (1994). While the "disparate treatment" theory describes actions of an employer that intentionally discriminated against an employee based on the individual's race, sex, religion, color, or national origin, the "disparate impact" theory applies to facially neutral employment practices that nevertheless have a disproportionate impact on one group protected by Title VII. See *Biggins*, 507 U.S. at 609-11; *Teamsters*, 431 U.S. at 335 n.15; *Griggs*, 401 U.S. at 432-34. Because "disparate treatment" cases involve intentional discrimination, and "disparate impact" cases do not, compensatory and punitive damages under the 1991 Act are only available in "disparate treatment" cases. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 102(a)(1), 105 Stat. 1071, 1072 (codified in 42 U.S.C. § 1981a(a)(1) (1994)).

³² See 42 U.S.C. § 1981a(a)(1) (1994). Section 1981a(a)(1) enables complaining parties to recover compensatory and punitive damages for Title VII unlawful intentional discrimination provided that they cannot recover compensatory and punitive damages under 42 U.S.C. § 1981. See 42 U.S.C. § 1981a(a)(1).

³³ See H.R. REP. NO. 102-40(I), at 64-65 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 603.

³⁴ See 137 CONG. REC. H9526 (Nov. 7, 1991) (statement of Rep. Edwards).

³⁵ See 42 U.S.C. § 1981a(b)(1) (1994); see also Civil Rights Act of 1991, Pub. L. No. 102-166, § 102(b)(1), 105 Stat. 1071, 1073.

punitive damages awarded to a complaining party, and 42 U.S.C. § 1981a(b)(2) ("§ 1981a(b)(2)") excludes backpay and interest on backpay from compensatory damages awards.³⁶ Finally, 42 U.S.C. § 1981a(c) ("§ 1981a(c)") provides that, in cases where the complaining party is seeking compensatory or punitive damages, either party may demand a jury trial.³⁷

Although the Supreme Court's decision in *Kolstad II* clarifies Title VII punitive damages, a larger question looms in the aftermath of the decision: Did Congress intend to award punitive damages based on the employer's state of mind?³⁸ Despite the *Kolstad II* decision, this Note

³⁶ See 42 U.S.C. § 1981a(b)(2), (3) (1994); see also Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 2, 3, 105 Stat. 1071, 1073 (1991). 42 U.S.C. § 1981a(b)(3) provides:

(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 of 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 of preceding calendar year, \$100,000;

(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 of preceding calendar year, \$200,000;

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

Civil Rights Act of 1991, Pub. L. No. 102-166, § 102(b)(3), 105 Stat. 1071, 1073 (1991) (codified in 42 U.S.C. § 1981a(b)(3) (1994)).

³⁷ See 42 U.S.C. § 1981a(c) (1994).

³⁸ Before the *Kolstad II* opinion, the circuit courts were split on the appropriate standard for Title VII punitive damages. See *Kolstad II*, 119 S. Ct. at 2123. Some circuit courts have interpreted § 1981a(b)(1) to require a heightened showing of discriminatory action, above intentional discrimination, to recover punitive damages. Other circuit courts have held, however, that punitive damages may be awarded only upon a showing of unlawful intentional discrimination. See *Ngo*, 140 F.3d at 1304 (interpreting the language of § 1981a to require plaintiffs seeking punitive damages to make a showing beyond the threshold level of intent required for compensatory damages); *Kolstad I*, 139 F.3d at 960 (requiring heightened showing of egregious conduct for punitive damages to be awarded under Title VII); *Harris*, 132 F.3d at 983 (requiring a higher standard above mere proof of intentional discrimination for the award of punitive damages); *Emmel*, 95 F.3d at 636 (stating that punitive damages require proof of more than intentional unlawful discrimination); *Karcher*, 94 F.3d at 509 (awarding of punitive damages requires a showing of more than intentional discrimination); *Turic*, 85 F.3d at 1216 (holding that employers conduct did not rise to the level to support a punitive damages award under Title VII); but see *Adakai*, 1997 WL 603458, at *2 (extraordinarily egregious conduct not needed to support a finding of punitive damages); *Luciano*, 110 F.3d at 219-20 (complaining party not required to make an additional showing beyond proof of intentional unlawful discrimination to obtain an award of punitive damages under § 1981a); see generally Fowler, *supra* note 24, at 631-52; Michael

argues in favor of an egregious conduct requirement for Title VII punitive damages.³⁹ The structure of § 1981a, as well as the legislative materials and the circumstances surrounding the statute's enactment, all point to the conclusion that Congress intended to award punitive damages only for egregious conduct.⁴⁰

Part I examines the punitive damages standards of other civil rights statutes, and analyzes the circumstances under which courts have awarded punitive damages under 42 U.S.C. §§ 1981 and 1983 ("§ 1981" or "§ 1983").⁴¹ Part II reviews the 1991 Act's legislative history pertaining to the punitive damages provision.⁴² Part III discusses how courts interpreted § 1981a(b)(1) before the Supreme Court's decision in *Kolstad II*, focusing on the different circumstances under which Title VII punitive damages were awarded.⁴³ Part IV discusses the Supreme Court's decision in *Kolstad II* and its resolution of the split among the circuits.⁴⁴ Part V contrasts the *Kolstad II* decision with an alternative resolution of the circuit split that focuses on Congress's intent in enacting § 1981a(b)(1).⁴⁵ In particular, Part V argues that, although § 1981a(b)(1)'s plain language provides little guidance in discerning Congress's intent, the statute's legislative history, its structure, the circumstances surrounding its enactment and its purpose demonstrate a congressional intent to impose Title VII punitive damages only under egregious circumstances.⁴⁶ Thus, whereas complaining parties may always expect to be fully compensated for injuries resulting from an employer's unlawful intentional practices, Congress intended to reserve punitive damages for only the worst cases of intentional discrimination.⁴⁷

I. PUNITIVE DAMAGES UNDER OTHER CIVIL RIGHTS STATUTES

Although § 1981a enables discrimination victims to recover punitive and compensatory damages, punitive damages, in general, serve

J. Wise, Note, *Court Disregards Legislative History of the Civil Rights Act of 1991 and Buck's Current Trends Regarding Punitive Damages: Kolstad v. American Dental Ass'n*, 108 F.3d 1431 (D.C. Cir. 1996), 23 U. DAYTON L. REV. 643, 649-58 (1998); Johnson, *supra* note 31, at 546-61.

³⁹ See *infra* notes 216-96 and accompanying text.

⁴⁰ See *infra* notes 216-96 and accompanying text.

⁴¹ See *infra* notes 48-104 and accompanying text.

⁴² See *infra* notes 105-37 and accompanying text.

⁴³ See *infra* notes 138-99 and accompanying text.

⁴⁴ See *infra* notes 200-15 and accompanying text.

⁴⁵ See *infra* notes 216-96 and accompanying text.

⁴⁶ See *infra* notes 216-96 and accompanying text.

⁴⁷ See *infra* notes 216-96 and accompanying text.

different purposes than other damage awards.⁴⁸ In tort law, compensatory damages make victims whole for their injuries. Punitive damages, on the other hand, punish past conduct, teach defendants not to commit these acts again and deter others from similar behavior.⁴⁹ Something more than a mere commission of a tort is required for punitive damages.⁵⁰

Similar to the monetary damages available in tort law, compensatory damages under § 1981a are necessary to make discrimination victims whole for injuries to their careers, health, self respect and dignity.⁵¹ Section 1981a punitive damages, on the other hand, punish employers' past discriminatory conduct and deter future civil rights violations in the workplace.⁵² Moreover, § 1981a punitive damages raise the cost of employers' discrimination, thereby providing employers with additional incentives to prevent workplace discrimination.⁵³ Like § 1981a, other federal civil rights statutes award punitive damages for discriminatory conduct.⁵⁴ Many circuit courts have examined §§ 1981 and 1983 for guidance in interpreting § 1981a's punitive damages provision.⁵⁵

⁴⁸ See *Landgraf v. USI Film Prod.*, 511 U.S. 244, 252-53 (1994); *Smith v. Wade*, 461 U.S. 30, 36 n.5 (1983); *Carey v. Piphus*, 435 U.S. 247, 254-59 (1978); *Milwaukee & St. Paul Ry. Co. v. Aphis*, 91 U.S. 489, 492 (1875); RESTATEMENT (SECOND) OF TORTS §§ 901 cmt. a, 903, 908 (1965); W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 2, at 9 (5th ed. 1984) [hereinafter PROSSER & KEETON]; David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, VILL. L. REV. 363, 373-82 (1994).

⁴⁹ See PROSSER & KEETON, *supra* note 48, § 2.

⁵⁰ See RESTATEMENT (SECOND) OF TORTS § 908 cmt. b (1965); PROSSER & KEETON, *supra* note 48, § 2.

⁵¹ See H.R. REP. NO. 102-40(I), at 64-65 (1991), *reprinted in* 1991 U.S.S.C.A.N. 549, 602-03.
⁵² See *id.*
⁵³ See 137 CONG. REC. H9526 (Nov. 7, 1991) (Interpretive Memo of Rep. Edwards); H.R. REP. NO. 102-40(I), at 64-65, 69, 79 (1991), *reprinted in* 1991 U.S.S.C.A.N. 549, 602-03, 607, 608.

⁵⁴ See 42 U.S.C. §§ 1981, 1983 (1994); see also *Smith v. Wade*, 461 U.S. 30, 34-35 (1983); *Barbour v. Merrill*, 48 F.3d 1270, 1277-78 (D.C. Cir. 1995); *Stephens v. South Atlantic Cannery, Inc.*, 848 F.2d 484, 489-90 (4th Cir. 1988); *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 205-07 (1st Cir. 1987); *Williamson v. Handy Button Mach. Co.*, 817 F.2d 1290, 1295-97 (7th Cir. 1987); *Beauford v. Sisters of Mercy-Province of Detroit, Inc.*, 816 F.2d 1104, 1108-09 (6th Cir. 1987); *Walters v. City of Atlanta*, 803 F.2d 1135, 1146-48 (11th Cir. 1986).

⁵⁵ See *Ngo v. Reno Hilton Resort Corp.*, 140 F.3d 1299, 1301-04 (9th Cir. 1998), *cert. dismissed*, 119 S. Ct. 2015 (1999); *Kolstad v. American Dental Ass'n*, 139 F.3d 958, 965 (D.C. Cir. 1998), *vacated*, 119 S. Ct. 2118, 2130 (1999) ("*Kolstad I*"); *Luciano v. Olsten Corp.*, 110 F.3d 210, 220 (2d Cir. 1997); see also 137 CONG. REC. H9526 (Nov. 7, 1991) (Interpretive Memo of Rep. Edwards); H.R. REP. NO. 102-40(I), at 70 (1991), *reprinted in* 1991 U.S.S.C.A.N. 549, 608; H.R. REP. NO. 102-40(II), at 29 (1991), *reprinted in* 1991 U.S.S.C.A.N. 694, 722-23; Johnson, *supra* note 31, at 538.

Section 1981 bans intentional racial discrimination in the creation and enforcement of contracts.⁵⁶ Initially, it was enacted by Congress to give meaning to the Thirteenth Amendment of the United States Constitution.⁵⁷ Within the last thirty years, § 1981 has also been applied in the private employment context because courts have determined that the right to contract for employment falls within the ambit of the statute.⁵⁸

Section 1983, on the other hand, establishes a tort-like remedy for individuals deprived of federally protected rights "under color of law."⁵⁹ The law was intended to override discriminatory or otherwise unconstitutional state laws and to provide a remedy for civil rights violations where state law was inadequate or unavailable in practice.⁶⁰ Although the language of § 1983 does not set out a punitive damages standard, the United States Supreme Court has provided guidance on this issue in the seminal case of *Smith v. Wade*.⁶¹

⁵⁶ See 42 U.S.C. § 1981; see ABIGAIL COOLEY MODJESKA, *EMPLOYMENT DISCRIMINATION LAW* § 10:06 (3d ed. 1998). Section 1981 provides:

(a) Statement of equal rights

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

42 U.S.C. § 1981.

⁵⁷ See MODJESKA, *supra* note 56, § 10:06. The Thirteenth Amendment of the Constitution states that "[n]either slavery nor involuntary servitude . . . shall exist within the United States" U.S. CONST. amend. XIII, § 1.

⁵⁸ See MODJESKA, *supra* note 56, § 10:06; see also *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 387-88 (1982); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968).

⁵⁹ See 42 U.S.C. § 1983; see also Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 51 (1989); Johnson, *supra* note 31, at 538; MODJESKA, *supra* note 56, § 10:03; CHARLES R. RICHIE, *MANUAL ON EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS* §§ 4:35, 4:36 (2d ed. 1998). Forty-two U.S.C. § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subject, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. § 1983 (1994).

⁶⁰ See *Mitchum v. Foster*, 407 U.S. 225, 238-39 (1972); see also MODJESKA, *supra* note 56, § 10:03; RICHIE, *supra* note 59, §§ 4:35, 4:36. Section 1983 was derived from the Ku Klux Klan Act of 1871. See *Smith*, 461 U.S. at 34; see also *Ku Klux Klan Act of 1871*, ch. 22, § 1, 17 Stat. 13, 13.

⁶¹ See *Smith*, 461 U.S. at 56; *Carey*, 435 U.S. at 254-59; see also Beermann, *supra* note 59, at 51; Johnson, *supra* note 31, at 539.

In 1983, the Supreme Court laid out the appropriate standard for § 1983 punitive damages in *Smith*.⁶² The Court held that a jury may be permitted to assess § 1983 punitive damages when the defendant's conduct is shown "to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others."⁶³ In *Smith*, an inmate at a reformatory brought suit under § 1983 against three correctional officers for violation of his Eighth Amendment rights under the United States Constitution.⁶⁴ The inmate alleged that the officers confined him with other inmates who harassed, beat and sexually assaulted him.⁶⁵ The district judge entered a directed verdict for two of the officers and the jury found in the inmate's favor against the third officer and awarded punitive damages.⁶⁶ The officer appealed the punitive damages award and argued that the trial judge's punitive damages standard was incorrect.⁶⁷

Although the officer in *Smith* argued that the proper punitive damages standard is one of actual malicious intent, the Court reasoned that a large majority of state and lower federal courts agreed that punitive damages awards did not require a malicious or intentional state of mind.⁶⁸ The Court observed that these lower courts have permitted punitive awards on various standards of negligence, recklessness or other culpable conduct short of actual malicious intent.⁶⁹ The Court stated, moreover, that most state common law cases follow the rule, as articulated in the *Restatement (Second) of Torts* § 908(2), that punitive

⁶² See *Smith*, 461 U.S. at 56; see also Johnson, *supra* note 31, at 539.

⁶³ See *Smith*, 461 U.S. at 56.

⁶⁴ See *id.* at 32; see also U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments be inflicted.").

⁶⁵ See *Smith*, 461 U.S. at 32.

⁶⁶ See *id.* at 33.

⁶⁷ See *id.* at 32. Because the officer had qualified immunity as a prison official, the judge instructed the jury that the inmate could recover only if the defendants were guilty of gross negligence—defined as "a callous indifference or a thoughtless disregard for the consequences of one's act or failure to act"—or "egregious failure to protect" that inmate. See *id.* at 33. The judge defined "egregious failure to protect" as "a flagrantly or remarkably bad failure to protect." See *id.* In addition, the judge charged that the jury could award punitive damages in order to punish the wrongdoer for some extraordinary misconduct and to serve as an example or warning to others if:

[The jury] find[s] the issue in favor of the plaintiff, and if the conduct of one or more of the defendants is shown to be a reckless or callous disregard of, or indifference to, the rights or safety of others, then [the jury] may assess punitive or exemplary damages in addition to any award of actual damages . . .

See *Smith*, 461 U.S. at 32.

⁶⁸ *Id.* at 37–38, 45. In particular, the officer argued that punitive damages should be awarded only when the defendant acts with ill will, spite or intent to injure. See *id.*

⁶⁹ See *id.* at 45.

damages may be awarded because of the defendant's evil motive or his reckless indifference to the rights of others.⁷⁰ In addition, the Court rejected use of the term "malice" in formulating a § 1983 punitive damages standard to avoid its confusion and ambiguity.⁷¹ The Court stated that "malice" was a hopelessly versatile and ambiguous term that carried a broad spectrum of meanings.⁷²

The Court also addressed the officer's argument that the threshold for punitive damages should always be higher than the threshold for liability.⁷³ The prison official argued that, because the jury instructions specified the same threshold for an award of punitive and compensatory damages, the two forms of damages would be equally available to the plaintiff.⁷⁴ The Court rejected this argument and observed that punitive damages are never awarded as of right, no matter how egregious the defendant's conduct.⁷⁵ The Court noted that there has never been any general common law rule that the threshold for punitive damages must always be higher than the threshold for compensatory damages.⁷⁶ Therefore, the Court held that a jury may be permitted to assess § 1983 punitive damages when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.⁷⁷ In situations where the standard for compensatory liability is as high as or higher than the usual threshold for punitive damages, no extra showing of unlawful conduct is required for a punitive damages award.⁷⁸

Although the Court in *Smith* only addressed § 1983 punitive damages, lower courts have used the Supreme Court's rationale for guidance in awarding punitive damages for cases brought under other civil rights statutes.⁷⁹ In particular, courts have relied on *Smith* in formulating a § 1981 punitive damages standard, but have reached different

⁷⁰ See *id.* at 46-48; see also RESTATEMENT (SECOND) OF TORTS § 908(2) (1965).

⁷¹ See *Smith*, 461 U.S. at 37 n.6. The Court recognized that "malice" has different meanings in different contexts. See *id.* For example, in the defamation context, "actual malice" refers to a recklessness standard. See *id.* On the other hand, "actual malice" may also refer to ill will, spite or an intent to injure. See *id.* at 38.

⁷² See *id.* at 39 n.8.

⁷³ See *Smith*, 461 U.S. at 51-52.

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ See *id.* at 53.

⁷⁷ See *id.* at 56.

⁷⁸ See *Smith*, 461 U.S. at 53, 56.

⁷⁹ See *Barbour*, 48 F.3d at 1277; *Stephens*, 848 F.2d at 489-90; *Roulett*, 832 F.2d at 205; *Williamson*, 817 F.2d at 1296; *Beauford*, 816 F.2d at 1108-09; *Walters*, 803 F.2d at 1147; see also *Johnson*, *supra* note 31, at 541-46; *Wise*, *supra* note 38, at 650-55.

conclusions regarding the appropriate circumstances for this remedy.⁸⁰ This discrepancy regarding the appropriate § 1981 punitive damages standard resulted from the misapplication of the *Smith* standard by several circuit courts.⁸¹

In 1987, in *Rowlett v. Anheuser-Busch, Inc.*, the United States Court of Appeals for the First Circuit held that a finding of unlawful intentional discrimination under § 1981, without more, is enough to award punitive damages.⁸² In *Rowlett*, a black employee brought a § 1981 lawsuit against Anheuser-Busch, Inc. ("Anheuser-Busch") alleging racial discrimination in training, pay raises and discharge.⁸³ After determining that the state's personal injury statute of limitations did not bar the employee's § 1981 action and that there was sufficient evidence to support unlawful intentional discrimination, the court addressed the jury's punitive damages award of three million dollars.⁸⁴

Anheuser-Busch attacked the punitive damages standard used by the jury.⁸⁵ The company argued that something more than intentional discrimination is necessary for punitive damages and that the misconduct must be extraordinary or outrageous.⁸⁶ The court rejected Anheuser-Busch's argument, however, noting that, according to *Smith*, the state of mind necessary for § 1983 liability is at least as culpable as the state of mind necessary for punitive damages.⁸⁷ The court observed that although the threshold for punitive damages under *Smith* need not be higher than that for compensatory liability, the trier of fact still must decide whether punitive damages should be awarded using its "discretionary moral judgment."⁸⁸ Thus, whereas punitive damages may be awarded in every case of a § 1981 intentional wrong, the trier of fact has discretion to determine whether the circumstances warrant the award.⁸⁹ Finally, the court observed that *Smith*'s language does not indicate that the misconduct must be extraordinary or outrageous to support a punitive damages award.⁹⁰ Therefore, the *Rowlett* court held

⁸⁰ See *Barbour*, 48 F.3d at 1277; *Stephens*, 848 F.2d at 489-90; *Rowlett*, 832 F.2d at 205; *Williamson*, 817 F.2d at 1296; *Beauford*, 816 F.2d at 1108-09; *Walters*, 803 F.2d at 1147.

⁸¹ See *infra* notes 82-104 and accompanying text.

⁸² See *Rowlett*, 832 F.2d at 206.

⁸³ See *id.* at 195-96. The employee also brought a Title VII action against Anheuser-Busch, and the jury found in favor of the employee for both the § 1981 and Title VII actions. The jury awarded damages, however, based on the employee's § 1981 claim. See *id.* at 197.

⁸⁴ See *id.* at 198-204.

⁸⁵ See *id.* at 205.

⁸⁶ See *Rowlett*, 832 F.2d at 205-06.

⁸⁷ See *id.* at 205.

⁸⁸ See *id.* at 206; see also *Smith*, 461 U.S. at 52.

⁸⁹ See *Rowlett*, 832 F.2d at 205.

⁹⁰ See *id.* at 206.

that § 1981 punitive damages may be awarded upon proof of intentional discrimination.⁹¹

In 1987, however, the United States Court of Appeals for the Sixth Circuit held, in *Beauford v. Sisters of Mercy-Province of Detroit, Inc.*, that § 1981 punitive damages may be awarded only upon a showing of "egregious conduct, willfulness, or malice on the part of the defendants."⁹² In *Beauford*, a black employee brought a § 1981 suit against his employer, a high school, for race discrimination.⁹³ The employee alleged that he was denied promotions, treated differently and reassigned job responsibilities because of his race.⁹⁴ Whereas the jury found for the employee and awarded him nominal and punitive damages, the district court granted the defendant's motion for judgment notwithstanding the verdict, ordered a new trial and entered judgment for the defendant.⁹⁵ The employee appealed the district court's ruling.⁹⁶

After finding sufficient evidence to support § 1981 intentional discrimination, the Sixth Circuit addressed the defendant's contention that the evidence was insufficient to support a punitive damages award.⁹⁷ The court, applying the *Smith* standard, stated that § 1981 punitive damages should be awarded only in cases involving egregious conduct or a showing of willfulness or malice on the part of the defendant.⁹⁸ In particular, the court noted that punitive damages in civil rights case law "has generally been limited to cases involving egregious conduct or a showing of willfulness or malice"⁹⁹ The court determined that, although there was sufficient evidence to support an intentional discrimination claim, "no testimony was adduced evidencing the requisite malice or reckless or callous indifference of an egregious character" to support a punitive damages award.¹⁰⁰ Thus, the *Beauford* court held that egregious conduct beyond mere intent to discriminate is required for § 1981 punitive damages.¹⁰¹

Therefore, although the circuit courts have relied on the *Smith* standard for guidance in awarding § 1981 punitive damages, they have

⁹¹ See *id.* The court determined, however, that a three million dollar punitive damages award was excessive, and lowered the award to \$300,000. See *id.* at 207.

⁹² See *Beauford*, 816 F.2d at 1109.

⁹³ See *id.* at 1106.

⁹⁴ See *id.* at 1106-07.

⁹⁵ See *id.* at 1107.

⁹⁶ See *id.*

⁹⁷ See *Beauford*, 816 F.2d at 1107-09.

⁹⁸ See *id.* at 1108-09.

⁹⁹ See *id.* at 1109.

¹⁰⁰ See *id.*

¹⁰¹ See *id.* at 1108-09.

come to different conclusions regarding the appropriate circumstances for the remedy.¹⁰² Whereas some circuit courts, like the First Circuit in *Rowlett*, have held that a finding of § 1981 discrimination is enough to support a punitive damages award, other circuit courts, notably the Sixth Circuit in *Beauford*, have held that egregious conduct is required for § 1981 punitive damages.¹⁰³ In 1991, Congress would rely on the courts' varying and inconsistent interpretations of § 1981 punitive damages when formulating the Title VII punitive damages standard.¹⁰⁴

II. LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT OF 1991

After a failed attempt in 1990 to amend Title VII, Congress renewed its efforts to strengthen federal fair employment laws with the introduction of a new civil rights bill in the House of Representatives on January 3, 1991.¹⁰⁵ Although Congress wanted to provide greater protection for employees from invidious workplace discrimination, it did not want to draft a "quota bill" that would create powerful incen-

¹⁰² See *Jackson v. Pool Mortgage Co.*, 868 F.2d 1178, 1182 (10th Cir. 1989) (holding that while evidence supported the award of compensatory damages, the evidence was insufficient to support an award of punitive damages); *Stephens*, 848 F.2d at 489 (evidence sufficient to support a finding of § 1981 intentional discrimination may nonetheless be inadequate to support an awarding of punitive damages); *Walters*, 803 F.2d at 1147 (while there was adequate evidence to support jury's finding of § 1981 intentional discrimination, the defendants did not act with the requisite ill will or callous disregard to support awarding of punitive damages); but see *Barbour*, 48 F.3d at 1277 (evidence sufficient to establish an intentional violation of protected civil rights may suffice to permit the jury to award punitive damages); *Williamson*, 817 F.2d at 1296 (intentional, illegal conduct may support an award of punitive damages); see generally *Kolstad*, 139 F.3d at 963-64 (recognizing split among circuits regarding the standard for punitive damages under § 1981); Wise, *supra* note 38, at 651-52.

¹⁰³ See *Barbour*, 48 F.3d at 1277; *Stephens*, 848 F.2d at 489-90; *Rowlett*, 832 F.2d at 205; *Williamson*, 817 F.2d at 1296; *Beauford*, 816 F.2d at 1108-09; *Walters*, 803 F.2d at 1147.

¹⁰⁴ See *Barbour*, 48 F.3d at 1277; *Stephens*, 848 F.2d at 489-90; *Rowlett*, 832 F.2d at 205; *Williamson*, 817 F.2d at 1296; *Beauford*, 816 F.2d at 1108-09; *Walters*, 803 F.2d at 1147; see also H.R. REP. NO. 102-40 pt. I, at 74 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 612; H.R. REP. NO. 102-40 pt. II, at 29 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 722-23; 137 CONG. REC. H9526 (Nov. 7, 1991) (Interpretive Memo of Sen. Edwards).

¹⁰⁵ See H.R. 1, 102d Cong. § 2(b) (1991); see also 47 CONGRESSIONAL QUARTERLY, INC., 1991 CONGRESSIONAL QUARTERLY ALMANAC 251-52 (1992) [hereinafter 1991 C.Q. ALMANAC]. President Bush vetoed a 1990 version of a civil rights bill entitled the Civil Rights Act of 1990. See 136 CONG. REC. S16,457 (Oct. 22, 1990); 46 CONGRESSIONAL QUARTERLY, INC., 1990 CONGRESSIONAL QUARTERLY ALMANAC 473 (1991) [hereinafter 1990 C.Q. ALMANAC]; Caryn Leslie Lilling, Note, *The Civil Rights Act of 1991: An Examination of the Storm Preceding the Compromise of America's Civil Rights*, 9 HOFSTRA L. REV. 215, 217 (1991). One of the principle reasons for President Bush's veto was the fear that the 1990 civil rights bill would "introduce the destructive forces of quotas into our nation's employment system." See 1991 C.Q. ALMANAC, *supra*, at 251-52; Lilling, *supra*, at 217.

tives for employers to adopt hiring and promotion quotas to avoid Title VII liability.¹⁰⁶ In particular, President Bush viewed the 1990 legislation as "introducing the destructive force of quotas into our nation's employment system," and vowed to veto any new civil rights legislation which had the same effects.¹⁰⁷

A key feature of the new House bill was a provision establishing new monetary remedies for victims of intentional job discrimination.¹⁰⁸ According to the bill, in the case of intentional job discrimination, a complaining party is entitled to receive compensatory damages and,

if the respondent (other than a government, government agency, or a political subdivision) *engaged in the unlawful employment practice with malice, or with reckless or callous indifference to the federally protected rights of others*, punitive damages may be awarded against such respondent; in addition to the relief authorized by the preceding sentences of this subsection, except that compensatory damages shall not include backpay or any interest thereon.¹⁰⁹

This provision was intended to make the remedies available for sex, religious and national origin discrimination the same as the remedies already available under § 1981 for race discrimination.¹¹⁰ After five months of vigorous debate, the House passed the new civil rights bill in June 1991.¹¹¹ In addition to articulating a Title VII punitive damages standard, the final bill stated that the sum of compensatory and punitive damages would not exceed \$150,000.¹¹²

As the House voted on its civil rights bill, the Senate began to consider its own civil rights legislation.¹¹³ The original Senate legislation was divided into three bills to isolate the most difficult topics and

¹⁰⁶ See, e.g., 137 CONG. REC. S15,472 (Oct. 30, 1991) (legislation drafted in a way not to force employers to resort to quotas); Statement of President George Bush upon Signing S. 1745, 27 WEEKLY COMP. PRES. DOC. 1701 (Nov. 25, 1991) (1991 Act will not lead to quotas).

¹⁰⁷ See 136 CONG. REC. S16,457 (Oct. 22, 1990); 1990 C.Q. ALMANAC, *supra* note 105, at 472.

¹⁰⁸ See H.R. 1, 102d Cong. § 8 (introduced in House Jan. 3, 1991); 1991 C.Q. ALMANAC, *supra* note 105, at 253.

¹⁰⁹ H.R. 1, 102d Cong. § 8 (emphasis added).

¹¹⁰ See H.R. REP. NO. 102-40 pt. 1, at 74 (1991), *reprinted in* 1991 U.S.C.A.N. 549, 612 (referring to a version of H.R. 1 that was reviewed by the Committee on the Judiciary and which contained the same language as § 8 of the original bill).

¹¹¹ See H.R. 1, 102d Cong. § 106 (passed by House on June 5, 1991); 137 CONG. REC. H3922-28 (June 5, 1991); 1991 C.Q. ALMANAC, *supra* note 105, at 225.

¹¹² See H.R. 1, 102d Cong. § 106 (passed by House on June 5, 1991); 137 CONG. REC. H3922-28 (June 5, 1991); 1991 C.Q. ALMANAC, *supra* note 105, at 255.

¹¹³ See 1991 C.Q. ALMANAC, *supra* note 105, at 255.

to allow the less controversial proposals to pass.¹¹⁴ The Senate bill that addressed monetary damages in job discrimination limited the amount of compensatory damages available to an individual based on the size of the individual's employer.¹¹⁵ In addition, the bill authorized courts to impose an "equitable civil penalty" on an employer if the courts determine that the employer engaged in discriminatory practice "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."¹¹⁶ The purpose of the equitable civil penalty was to prevent the employer from engaging in future discriminatory practices.¹¹⁷

The Senate eventually agreed on a compromise civil rights bill that could win the support of the Bush administration.¹¹⁸ The compromise bill ("Senate Bill 1745") allowed a complaining party to recover punitive damages if the party demonstrates that the respondent employer engaged in discriminatory practices "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."¹¹⁹ Further, the compromise bill set limits on compensatory and punitive damages for discrimination based on race, color, religion, sex or national origin, depending on the employer's size.¹²⁰

The Senate passed Senate Bill 1745 on October 30, 1991 and failed to take action on the House civil rights bill.¹²¹ The House considered and passed Senate Bill 1745 on November 7, 1991.¹²² During the House debate, Representative Hyde introduced an interpretive memorandum into the record indicating that "[p]unitive damages . . . are to be awarded only in extraordinarily egregious cases."¹²³ In addi-

¹¹⁴ See 1991 C.Q. ALMANAC, *supra* note 105, at 255; see also S. 1207, 102d Cong. (1991); S. 1208, 102d Cong. (1991); S. 1209, 102d Cong. (1991).

¹¹⁵ See S. 1209, 102d Cong. §§ 2, 3(b)(3) (1991). If the employer has more than 100 employees each of 20 or more calendar weeks, then compensatory damages can not exceed \$150,000; if the employer has 100 or fewer employees, each of 20 or more calendar weeks, then compensatory damages can not exceed \$50,000. See S. 1209, 102d Cong. §§ 2, 3(b)(3).

¹¹⁶ See S. 1209, 102d Cong. § 3(c)(1)(A) (1991).

¹¹⁷ See *id.*

¹¹⁸ See 1991 C.Q. ALMANAC, *supra* note 105, at 256.

¹¹⁹ See S. 1745, 102d Cong. § 102(b)(1) (1991) (enacted); see also S. 1209, 102d Cong. § 3(c)(1)(A) (1991).

¹²⁰ See S. 1745, 102d Cong. § 102(3)(A)-(D) (1991) (enacted). Employers with 100 or fewer workers were liable for up to \$50,000; employers with 101 to 200 workers were liable up to \$100,000; employers with 201 to 500 workers were liable up to \$200,000; and employers with more than 500 workers were liable up to \$300,000. Employers of fewer than 15 workers were exempt from damages. See *id.*

¹²¹ See 1 Cong. Index (CCH), at 35,001 (1992); 1991 C.Q. ALMANAC, *supra* note 105, at 257, 260.

¹²² See 137 CONG. REC. H9557-58 (Nov. 7, 1991).

¹²³ See 137 CONG. REC. H9543 (Nov. 7, 1991) (statement by Rep. Hyde).

tion, Representative Edwards introduced an interpretive memorandum into the record indicating that "[p]unitive damages are available . . . to the same extent and under the same standards that they are available to plaintiffs under 42 U.S.C. 1981. No higher standard may be imposed."¹²⁴ In Senate floor debate, Senator Dole also introduced an interpretive memorandum discussing Senate Bill 1745's punitive damages provision.¹²⁵ According to Senator Dole's memorandum, "[p]unitive damages are also capped, and are to be awarded only in extraordinarily egregious cases."¹²⁶ In signing into law Senate Bill 1745, President Bush remarked that Senator Dole's interpretive memorandum would be "treated as authoritative interpretive guidance by all officials in the executive branch with respect to the law of disparate impact as well as the other matters covered in the documents."¹²⁷

No Senate reports were submitted during the consideration or passage of Senate Bill 1745.¹²⁸ Congress submitted reports, however, relating to the House version of the civil rights bill that were authored by the House Committee on Education and Labor and the House Committee on the Judiciary.¹²⁹ In House Report 40(I), the Committee on Education and Labor addressed the concern that allowing punitive damages may lead to vastly disproportionate jury verdicts in relation to the injuries sustained by the complaining party:

[s]trict standards limit the recovery of damages by plaintiffs with meritorious claims. Plaintiffs must first prove intentional discrimination, then must *prove actual injury or loss* arising therefrom to recover compensatory damages, and must meet an even higher standard (establishing that the employer acted with malice or reckless or callous indifference to their rights) to recover punitive damages.¹³⁰

¹²⁴ See 137 CONG. REC. H9526 (Nov. 7, 1991) (interpretive memorandum of Rep. Edwards).

¹²⁵ See 137 CONG. REC. S15,472-78 (Oct. 30, 1991) (statement of Sen. Dole).

¹²⁶ See 137 CONG. REC. S15,473 (Oct. 30, 1991).

¹²⁷ See Statement of President George Bush Upon Signing S. 1745, 27 WEEKLY COMP. PRES. DOC. 1701 (Nov. 25, 1991), reprinted in 1991 U.S.C.C.A.N. 768, 768-69.

¹²⁸ See 1991 U.S.C.C.A.N. 549, 549.

¹²⁹ See Civil Rights Act of 1991, Pub. L. No. 102-106, 105 Stat. 1071, 1071 (1991) (enacted in House and Senate as S. 1745); H.R. REP. NO. 102-40(I) (1991) (Report by the House Committee on Education and Labor); H.R. REP. NO. 102-40(II) (1991) (Report by the House Committee on the Judiciary). The original House bill's punitive damages provision differed from Senate Bill 1745's punitive damages provision. Compare H.R. 1, 102d Cong. § 8(B) (1991), with S. 1745, 102d Cong. § 102(b)(1) (1991). The House bill allowed punitive damages to be awarded when the defendant engaged in discriminatory practices "with malice, or with reckless or callous indifference to the federally protected rights of others." See H.R. 1, 102d Cong. § 8(B).

¹³⁰ H.R. REP. NO. 102-40(I), at 72 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 610.

The Committee also noted that "[p]unitive damages would also be available where the respondent . . . engaged in an unlawful employment practice with malice, or with reckless or callous indifference to the federally protected rights of others."¹³¹ Moreover, the Committee stated that "[t]his language sets the same standard courts have applied under section 1981 [42 U.S.C. § 1981]."¹³² Finally, the Committee recognized that victims of unlawful discrimination under § 1981 "are entitled . . . not only to equitable relief, but also compensatory damages, and in particularly egregious cases, punitive damages as well."¹³³

In House Report 40(II), the House Committee on the Judiciary also briefly examined the punitive damages provision of the House's civil rights bill.¹³⁴ There, the Committee noted that punitive damages would be available in cases of intentional discrimination where the employer acted with "malice, or with reckless or callous indifference to the federally protected rights of others."¹³⁵ The Committee, recognizing that this punitive damages standard is taken directly from civil rights case law, cited to *Smith v. Wade* for support.¹³⁶ In further discussing § 1981 punitive damages, House Report 40(II) stated, "42 U.S.C. § 1981 authorizes courts to award victims of intentional discrimination in contracts not only equitable relief, but also compensatory damages, and in appropriate cases, punitive damages as well."¹³⁷

III. THE LAW BEFORE THE SUPREME COURT DECIDED *KOLSTAD II*— TITLE VII PUNITIVE DAMAGES AND THE EGREGIOUS CONDUCT REQUIREMENT

Since the passage of the 1991 Act, the circuit courts have struggled with interpreting § 1981a(b)(1).¹³⁸ Whereas the First, Fourth, Sixth,

¹³¹ See H.R. REP. NO. 102-40(I), at 74 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 612.

¹³² See *id.*

¹³³ See H.R. REP. NO. 102-40(I), at 65 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 603.

¹³⁴ See H.R. REP. NO. 102-40(II), at 29 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 722-23.

¹³⁵ See *id.*

¹³⁶ See *id.*

¹³⁷ See H.R. REP. NO. 102-40(II), at 25 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 718-19.

¹³⁸ See *EEOC v. Wal-Mart Stores, Inc.*, 156 F.3d 989, 992-94 (9th Cir. 1998); *Ngo v. Reno Hilton Resort Corp.*, 140 F.3d 1299, 1304-05 (9th Cir. 1998), *cert. dismissed*, 119 S. Ct. 2015 (1999); *Kolstad v. American Dental Ass'n*, 139 F.3d 958, 969 (D.C. Cir. 1998), *vacated*, 119 S. Ct. 2118, 2130 (1999) ("*Kolstad II*"); *Browning v. President Riverboat Casino—Mo.*, 139 F.3d 631, 637 (8th Cir. 1998); *Harris v. L & L Wings, Inc.*, 132 F.3d 978, 982-83 (4th Cir. 1997); *Adakai v. Front Row Seat*, No. 96-2249, 1997 WL 603458, at **2 (10th Cir. Oct. 1, 1997); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1065-66 (8th Cir. 1997); *Summit v. S-B Power Tool*, 121 F.3d 416, 422-23 (8th Cir. 1997); *Tincher v. Wal-Mart Stores*, 118 F.3d 1125, 1132-34 (7th Cir. 1997); *Luciano v. Olsten*

Eighth, Ninth and District of Columbia Circuits have held that a heightened showing of discriminatory conduct, above intentional discrimination, is required to recover punitive damages, the Second and Tenth Circuits have held that § 1981a(b)(1) punitive damages may be awarded merely upon proof of unlawful intentional discrimination.¹³⁹ Thus, the main issue that divided the circuits was whether proving intentional discrimination is enough to get the punitive damages issue to the jury.¹⁴⁰

Corp., 110 F.3d 210, 220 (2d Cir. 1997); *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803, 809-10 (5th Cir. 1996); *Merriweather v. Family Dollar Stores of Ind., Inc.*, 103 F.3d 576, 581 (7th Cir. 1996); *Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627, 636 (7th Cir. 1996); *Varner v. National Super Mkts., Inc.*, 94 F.3d 1209, 1214 (8th Cir. 1996); *Karcher v. Emerson Elec. Co.*, 94 F.3d 502, 509 (8th Cir. 1996); *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1216 (6th Cir. 1996); *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 509 (1st Cir. 1996); *Pandazides v. Virginia Bd. of Educ.*, 13 F.3d 823, 830 n.9 (4th Cir. 1994); *Taylor v. Scottpolar Corp.*, 995 F. Supp. 1072, 1080-81 (D. Ariz. 1998).

¹³⁹ See cases cited *supra* note 138. It is unclear whether the Seventh Circuit supported a heightened showing of egregious conduct to warrant punitive damages. Compare *Merriweather*, 103 F.3d at 581 (finding that proof of intentional discrimination may be sufficient to award punitive damages), with *Tincher*, 118 F.3d at 1132-34 (requiring a higher standard for punitive damages as compared to proving intentional discrimination), and *Emmel*, 95 F.3d at 636 (holding that punitive damages requires more than proof of intentional unlawful discrimination in the workplace). Moreover, the Third, Fifth and Eleventh Circuits have not expressly ruled on whether a heightened showing of egregious conduct is necessary to support an award of punitive damages under Title VII. But see *Farpella-Crosby*, 97 F.3d at 809-10 (Fifth Circuit upheld jury's award of compensatory damages for unlawful intentional discrimination, but determined that no reasonable juror could conclude that the employer acted with malice or with reckless indifference).

¹⁴⁰ See *Wal-Mart Stores*, 156 F.3d at 992-94 (requiring plaintiff seeking punitive damages to make a showing beyond the threshold level of intent required for compensatory liability); *Ngo*, 140 F.3d at 1304-05 (requiring plaintiff to make a showing beyond the threshold level of intent needed for compensatory damages to recover punitive damages); *Kolstad I*, 139 F.3d at 969 (requiring plaintiffs seeking punitive damages to make a showing beyond the threshold level of intent required for compensatory liability); *Browning*, 139 F.3d at 637 (requiring a showing of more than intentional discrimination to recover punitive damages); *Harris*, 132 F.3d at 982-83 (punitive damages is an extraordinary remedy not to be awarded automatically in every successful Title VII lawsuit); *Tincher*, 118 F.3d at 1132-34 (requiring a higher standard for punitive damages as compared to proving intentional discrimination); *Farpella-Crosby*, 97 F.3d at 809-10 (court implies that a heightened showing, above that required to prove intentional discrimination, is necessary to warrant a punitive damages award); *Emmel*, 95 F.3d at 636 (holding that punitive damages requires more than proof of intentional unlawful discrimination in the workplace); *Varner*, 94 F.3d at 1214 (requiring a showing of more than intentional discrimination to recover punitive damages under the 1991 Act); *Karcher*, 94 F.3d at 509 (requiring a showing of more than intentional discrimination to recover punitive damages under the 1991 Act); *Turic*, 85 F.3d at 1216 (applying a higher standard for punitive damages above that necessary for compensatory damages); *McKinnon*, 83 F.3d at 509 (holding that the standard for punitive damages requires a heightened showing of reckless conduct as compared to proving intentional discrimination); *Pandazides*, 13 F.3d at 830 n.9 (requiring a heightened showing of discriminatory action, above intentional discrimination, to recover punitive damages); *Taylor*, 995 F. Supp. at 1080-81 (requiring a higher level of "offensive conduct" to award punitive damages); but see *Adakai*, 1997 WL 603458, at *2 (holding that the requisite level of recklessness and outrageousness required to

In 1998, in *Ngo v. Reno Hilton Resort Corp.*, the United States Court of Appeals for the Ninth Circuit held that § 1981a(b)(1) punitive damages require egregious conduct by employers.¹⁴¹ In *Ngo*, a cocktail server alleged that the Reno Hilton Resort ("Hilton") had discriminated against her by denying her a medical leave of absence because of her race, national origin and sex.¹⁴² She subsequently sought relief under Title VII and other civil rights statutes.¹⁴³ *Ngo* appealed the district court's judgment for Hilton on her punitive damages claim and argued that she was entitled to receive a punitive damages award based upon her proof of intentional discrimination.¹⁴⁴

In rejecting plaintiff's arguments, the court noted that the § 1981a punitive damages standard tracks the standard applied under §§ 1981 and 1983.¹⁴⁵ The court recognized that although most courts purport to adopt the *Smith v. Wade* rationale in § 1981 cases, some courts have actually misapplied the *Smith* standard by requiring a heightened evidentiary showing for punitive damages.¹⁴⁶ The court stated that, according to § 1981a's legislative history, Congress adopted the misapplied *Smith* formulation that required egregious conduct for punitive damages awards when drafting § 1981a(b)(1).¹⁴⁷ Giving effect to Congress's expressed intent, the court held that Title VII punitive damages may be awarded only when the discriminatory conduct is "willful or egregious" or displays "reckless indifference to the plaintiff's federal rights."¹⁴⁸

Similarly, in 1998, in *Kolstad v. American Dental Ass'n* ("*Kolstad I*") the United States Court of Appeals for the District of Columbia Circuit, sitting en banc, held that a complaining party must establish egregiousness, in addition to proving intentional employment discrimination,

support punitive damages can be inferred from intentional unlawful discrimination); *Kim*, 123 F.3d at 1065-66 (recovery of punitive damages under Title VII does not require a heightened showing beyond intentional discrimination); *Luciano*, 110 F.3d at 220 (holding that the standard for punitive damages under § 1981a does not require conduct that is "extraordinarily egregious"); *Merriveather*, 103 F.3d at 581 (finding that proof of intentional discrimination may be sufficient to award punitive damages).

¹⁴¹ See *Ngo*, 140 F.3d at 1304.

¹⁴² See *id.* at 1300-01.

¹⁴³ See *id.*

¹⁴⁴ See *id.* at 1301.

¹⁴⁵ See *id.*

¹⁴⁶ See *Ngo*, 140 F.3d at 1302-03; see also *Smith*, 461 U.S. 30, 51-52 (1983); *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 205-07 (1st Cir. 1987); *Beauford v. Sisters of Mercy-Province of Detroit, Inc.*, 816 F.2d 1104, 1109 (6th Cir. 1986).

¹⁴⁷ See *Ngo*, 140 F.3d at 1303-04 (citing to H.R. REP. NO. 91-40 pt. I, at 72 (1991) and 137 CONG. REC. S15,472 (Oct. 30, 1991)).

¹⁴⁸ See *Ngo*, 140 F.3d at 1304.

for § 1981a(b)(1) punitive damages.¹⁴⁹ In *Kolstad I*, a female attorney brought a Title VII action against her employer, the American Dental Association (the "Association"), for unlawful employment discrimination when the Association failed to promote her to a chief lobbying position in its Washington office.¹⁵⁰ The plaintiff contended that the Association picked another male candidate before the formal selection process, and that the artificial quality of the selection process demonstrated an intent to engage in sex discrimination.¹⁵¹ While the jury found that the Association had unlawfully discriminated against the plaintiff on the basis of sex, the district judge declined to allow the jury to consider punitive damages.¹⁵²

In affirming the district judge's finding that punitive damages were not available to the plaintiff, the sharply-divided court explained that allowing aggrieved parties to recover punitive damages after only proving intentional discrimination conflicts with § 1981a's remedial structure, its legislative history and the Supreme Court's holding in *Smith*.¹⁵³ First, the court stated that § 1981a's structure—one standard for liability, another for the remedy of punitive damages—strongly suggests that, before the question of punitive damages can go to the jury, the complaining party must demonstrate that the employer engaged in conduct more egregious than the conduct necessary to prove intentional discrimination.¹⁵⁴ Although the court noted that § 1981a(b)(1)'s plain language is ambiguous and that it is difficult to give content to the words "malice" or "reckless indifference," the inclusion of a separate punitive damages provision indicates that "something more" is required for Title VII punitive damages as compared to compensatory damages.¹⁵⁵

In addition to examining the statute's structure, the court also pointed to legislative history to show that Title VII punitive damages are only available where egregious conduct is demonstrated.¹⁵⁶ Relying on House Report 40(1) and statements in the *Congressional Record*, the court noted that Congress seemed to recognize a higher standard for awarding punitive damages in Title VII cases.¹⁵⁷ The court acknow-

¹⁴⁹ See 139 F.3d at 961.

¹⁵⁰ See *supra* notes 12-21 and accompanying text.

¹⁵¹ See *supra* notes 12-21 and accompanying text.

¹⁵² See *supra* notes 12-21 and accompanying text.

¹⁵³ See *Kolstad I*, 139 F.3d at 962.

¹⁵⁴ See *id.* at 961.

¹⁵⁵ See *id.* at 961-62.

¹⁵⁶ See *id.* at 962.

¹⁵⁷ See *id.*; see also H.R. REP. NO. 102-40 pt. I, at 72 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 610; 137 CONG. REC. S15,473 (Oct. 30, 1991) (statement by Sen. Dole).

ledged, however, that legislative history was not definitive and that some statements in House Report 40 actually supported the view that § 1981a punitive damages do not require a showing of egregious conduct.¹⁵⁸ For example, House Report 40(1) states that punitive damages under § 1981a(b)(1) would be the same as punitive damages under § 1981.¹⁵⁹ The court viewed this language as ambiguous because, whereas some courts have held that egregious conduct is required for § 1981 punitive damages, other courts have held that a finding of intentional discrimination, without more, is enough.¹⁶⁰

The court found determinative, however, the legislative history's references that § 1981a(b)(1)'s punitive damages standard was taken directly from civil rights case law.¹⁶¹ In particular, the court construed *Smith* as establishing an egregious conduct requirement for § 1983 punitive damages.¹⁶² The court noted that, in *Smith*, compensatory damages had been assessed on an extremely demanding standard which incorporated an egregious conduct requirement.¹⁶³ The court observed that the punitive damages criterion adopted by the Supreme Court in *Smith* was not egregious in relation to the compensatory standard *applied in that particular case*.¹⁶⁴ The court reasoned that, under ordinary circumstances where the compensatory standard is not as demanding, the punitive damages standard in *Smith* would require a showing of egregious conduct.¹⁶⁵ Thus, the Court determined that *Smith* supports the idea that Title VII punitive damages awards require egregious conduct.¹⁶⁶ Therefore, based upon § 1981a(b)(1)'s structure, its legislative history and the court's reading of *Smith*, the D.C. Circuit held that Title VII punitive damages may be awarded only on a showing of egregious conduct.¹⁶⁷

¹⁵⁸ See *Kolstad I*, 139 F.3d at 962-63. For example, House Report 40 (1) states that punitive damages under § 1981a(b)(1) would be the same as punitive damages under § 1981. See *id.* at 962; H.R. REP. NO. 102-40 pt. I, at 74 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 612. The court viewed this language as ambiguous because, while some courts have held that egregious conduct is required for § 1981 punitive damages, other courts have held that a finding of intentional discrimination, without more, is enough to award § 1981 punitive damages. See *Kolstad I*, 139 F.3d at 963.

¹⁵⁹ See *id.* at 962; H.R. REP. NO. 102-40 pt. I, at 74 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 612.

¹⁶⁰ See *Kolstad I*, 139 F.3d at 963.

¹⁶¹ See *id.* at 964.

¹⁶² See *id.*

¹⁶³ See *id.*

¹⁶⁴ See *id.*

¹⁶⁵ See *Kolstad I*, 139 F.3d at 964.

¹⁶⁶ See *id.*; but see *Ngo*, 140 F.3d at 1302-03 (noting that *Smith* did not require egregious conduct for § 1983 punitive damages awards).

¹⁶⁷ See *Kolstad I*, 139 F.3d at 960.

In a concurring opinion, Judge Randolph recognized § 1981a's difficult interpretive problems, noting that "malice" and "reckless indifference" have different meanings depending on whether the words are used in the civil or criminal context.¹⁶⁸ The judge reasoned, however, that the structure of § 1981, notably its two provisions that deal with compensatory and punitive damages separately, implies that Congress was establishing a two-tier damages system.¹⁶⁹ The judge concluded that the structure of § 1981a, the historical materials and the purpose of punitive damages indicate that punitive damages should be awarded only under egregious circumstances.¹⁷⁰

Five judges disagreed with the majority's view that the awarding of Title VII punitive damages requires a showing of egregiousness. The dissent argued that the majority's reasoning conflicts with the statute's plain language and contravenes the Supreme Court's decision in *Smith*.¹⁷¹ The dissent noted that the statutory phrase "reckless indifference" refers to the wrongdoer's knowledge that their conduct is wrongful.¹⁷² The dissent reasoned that punitive damages should be awarded where "the employer either knew of Title VII's prohibitions and acted regardless or disregarded a substantial risk of violating the statute."¹⁷³ Therefore, the dissent concluded that the plain language of the statute does not require a showing of egregious conduct for Title VII punitive damages.¹⁷⁴

The dissent also explained that the egregious conduct requirement was inconsistent with the Supreme Court's decision in *Smith*.¹⁷⁵ The dissent viewed *Smith* as rejecting the proposition that the threshold for punitive damages should always be higher than that for liabil-

¹⁶⁸ See *id.* at 970 (Randolph, J., concurring). Terms such as "recklessness," "reckless disregard," and "reckless indifference," are among the most malleable and ambiguous in the law, encompass different meanings and define varying conduct. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 836-37 (1994); *United States v. Krizek*, 111 F.3d 934, 939-41 (D.C. Cir. 1997); *Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 668-69 (D.C. Cir. 1996). In civil law, a person is reckless if he or she acts or fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known. See *Farmer*, 511 U.S. at 836-37; see also PROSSER & KEETON, *supra* note 48, § 34; RESTATEMENT (SECOND) OF TORTS § 500 & cmt. a (1965). In criminal law, a person is reckless only when he or she disregards a risk of harm of which he or she is aware. See *Farmer*, 511 U.S. at 836-37; MODEL PENAL CODE § 2.02(2)(c) & cmt. 3 (1985).

¹⁶⁹ See *Kolstad I*, 139 F.3d at 970 (Randolph, J., concurring).

¹⁷⁰ See *id.*

¹⁷¹ See *id.* at 979 (Tatel, J., dissenting).

¹⁷² See *id.* at 971.

¹⁷³ See *id.*

¹⁷⁴ See *Kolstad I*, 139 F.3d at 971.

¹⁷⁵ See *id.* at 972.

ity.¹⁷⁶ Instead, the dissent stated that the threshold for punitive damages need not be higher than that for compensatory liability.¹⁷⁷

Finally, the dissent recognized that even though juries could consider punitive damages on the basis of nothing more than reckless indifference to the federally-protected rights of the aggrieved party, juries will not necessarily award punitive damages in every Title VII case.¹⁷⁸ Because determining liability and awarding punitive damages require distinct inquiries, juries may find that the circumstances of the case may not warrant punitive damages.¹⁷⁹ Therefore, the dissent would have allowed the jury in *Kolstad I* to determine, based on the standard of malice or reckless indifference to plaintiff's rights, whether punitive damages were appropriate because the plaintiff had proven the threshold requirement of intentional discrimination.¹⁸⁰

Whereas the *Ngo* and *Kolstad I* courts concluded that an aggrieved party must prove egregious conduct for a Title VII punitive damages award, in 1997 the United States Court of Appeals for the Second Circuit held that proof of egregious conduct is not necessary in *Luciano v. Olsten Corp.*¹⁸¹ The court, relying mainly on the statute's plain language, noted that nothing in the statute's text indicated that a heightened standard was meant to apply to Title VII cases.¹⁸² Moreover, the court explained that statements in the *Congressional Record* and by President Bush were inconsistent with the statute's plain language because the statute "tracks the language of existing civil rights laws that do not require such a showing [of egregiousness]."¹⁸³ The House Committee reports also indicate that § 1981a(b)(1) incorporated the punitive damages standard of other civil rights laws (that of mere reckless indifference and malice, as opposed to extraordinarily egregious conduct).¹⁸⁴ Thus, the court held that a plaintiff does not have to make an

¹⁷⁶ See *id.* at 972 (Tatel, J., dissenting).

¹⁷⁷ See *id.* The dissent noted that this view was adopted by the Supreme Court for liquidated damages under the ADEA in *Hazen Paper Co. v. Biggins*, where the Court interpreted the ADEA to provide for liquidated damages where the violation was "willful," and once a willful violation was shown, the employee need not additionally demonstrate that the employer's conduct was outrageous. See *id.* at 972-73 (Tatel, J., dissenting); see also *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 615-16 (1993).

¹⁷⁸ See *Kolstad I*, 139 F.3d at 973 (Tatel, J., dissenting).

¹⁷⁹ See *id.* The dissent provided the example of employers who have done everything possible to comply with the law, and yet, were found to violate Title VII. See *id.* at 970. While these employers were found to have committed unlawful intentional discrimination, they were not recklessly indifferent to their legal obligations. See *id.*

¹⁸⁰ See *id.* at 979 (Tatel, J., dissenting).

¹⁸¹ See *Luciano*, 110 F.3d at 220; *Ngo*, 140 F.3d at 1304-05; *Kolstad I*, 139 F.3d at 969.

¹⁸² See *id.*

¹⁸³ See *id.*

¹⁸⁴ See *id.*

additional showing of egregious conduct, beyond the proof of reckless indifference, to obtain punitive damages under § 1981a(b)(1).¹⁸⁵

Similarly, in 1997, in *Adakai v. Front Row Seat, Inc.*, the United States Court of Appeals for the Tenth Circuit held that a showing of egregious conduct is not necessary in awarding punitive damages under § 1981a(b)(1).¹⁸⁶ In *Adakai*, a video rental store employee sued his employer for discrimination based on his Native American race.¹⁸⁷ The plaintiff alleged that he was fired two-and-one-half weeks after being hired because he was a Native American and, in particular, because he adhered to his heritage of keeping his hair long.¹⁸⁸

The Tenth Circuit affirmed the jury's award for punitive damages under § 1981a(b)(1).¹⁸⁹ The court stated that, in awarding punitive damages, the employer's conduct need not have been "extraordinarily egregious" to support a finding of punitive damages.¹⁹⁰ The court implicitly reasoned that the absence of statutory language indicating that Congress imposed an egregious conduct requirement on Title VII punitive damages demonstrates that the defendant's conduct need not be "extraordinarily egregious" to support a punitive damages award.¹⁹¹ The court asserted that the conduct required to support punitive damages can be inferred from the participation of management in the discriminatory acts.¹⁹² Thus, the court affirmed the punitive damages awarded to plaintiff and held that the plaintiff's evidence supporting his intentional discrimination claim was sufficient to demonstrate malice or reckless indifference to plaintiff's federally protected right to be free of discriminatory practices.¹⁹³

These cases illustrate that the circuit courts were split regarding the appropriate standard for awarding punitive damages under Title VII.¹⁹⁴ Whereas some circuits have held that a complaining party must meet the threshold requirement of egregious conduct to be entitled to punitive damages, other circuits have held that a complaining party

¹⁸⁵ See *id.*

¹⁸⁶ See *Adakai*, 1997 WL 603458, at *2.

¹⁸⁷ See *id.* at *1.

¹⁸⁸ See *id.*

¹⁸⁹ See *id.* at *3.

¹⁹⁰ See *id.* at *2.

¹⁹¹ See *Adakai*, 1997 WL 603458, at *2.

¹⁹² See *id.*

¹⁹³ See *id.* at *3.

¹⁹⁴ See *Ngo*, 140 F.3d at 1304-05; *Kolstad I*, 139 F.3d at 969; *Adakai*, 1997 WL 603458, at *2; *Luciano*, 110 F.3d at 220.

may be awarded punitive damages upon a lesser showing of only intentional discrimination.¹⁹⁵

IV. *KOLSTAD II* AND THE SUPREME COURT'S INTERPRETATION OF § 1981A(B)(1)

In 1999, in *Kolstad v. American Dental Ass'n* ("*Kolstad II*"), the Supreme Court of the United States addressed the circumstances under which Title VII punitive damages may be awarded.¹⁹⁶ The Court held an employer's conduct need not be egregious to satisfy § 1981a's punitive damages requirements, although evidence of egregious misconduct may be used to meet the plaintiff's burden of proof.¹⁹⁷ Rather, the proper inquiry in awarding Title VII punitive damages is the employer's state of mind—whether there was a perceived risk that their actions would violate federal law.¹⁹⁸

In vacating the D.C. Circuit's en banc opinion, the Court first observed that § 1981a established a two-tier structure for awarding Title VII damages.¹⁹⁹ The Court stated that the structure of § 1981a suggests a congressional intent to authorize punitive damages in only a subset of cases involving unlawful intentional discrimination.²⁰⁰ Thus, the Court reasoned that Congress clearly sought to impose two standards for liability: one standard for receiving compensatory damages, and a second, higher standard for receiving punitive damages.²⁰¹

The Court determined that the appropriate inquiry in awarding Title VII punitive damages focuses on the employer's state of mind, not the nature of their conduct.²⁰² The Court noted that the language used in § 1981a(b)(1)—notably the terms "malice" and "reckless indifference"—requires courts to impose Title VII punitive damages based on the actor's subjective mental state.²⁰³ Because "malice" and "reckless indifference" pertain to the employer's knowledge that it may be acting in violation of federal law, the Court observed that proof of egregious conduct independent of the employer's mental state cannot support a punitive damages award.²⁰⁴

¹⁹⁵ See *supra* note 138 and accompanying text.

¹⁹⁶ See 119 S. Ct. 2118, 2121 (1999) ("*Kolstad II*").

¹⁹⁷ See *id.* at 2129.

¹⁹⁸ See *id.* at 2125.

¹⁹⁹ See *id.* at 2124.

²⁰⁰ See *id.*

²⁰¹ See *Kolstad II*, 119 S. Ct. at 2124.

²⁰² See *id.*

²⁰³ See *id.*

²⁰⁴ See *id.*

To give meaning to the terms "malice" and "reckless indifference," the Supreme Court turned to its decision in *Smith*.²⁰⁵ The Court observed that, under *Smith*, punitive damages require "recklessness in its subjective form."²⁰⁶ Moreover, the Court noted that the *Smith* Court referred to a "subjective consciousness" of a risk of injury or illegality and a "criminal indifference to civil obligations" in establishing the § 1983 punitive damages standard.²⁰⁷ Applying this rationale, the Court stated that to obtain Title VII punitive damages, the plaintiff must show that an employer has discriminated in the face of a perceived risk that its actions will violate federal law.²⁰⁸

The Court also noted that, although Title VII punitive damages may be awarded based on the employer's mental state, egregious conduct may serve as evidence supporting an inference of an employer's "malice" or "reckless indifference."²⁰⁹ Because "malice" and "reckless indifference" are associated with egregious misconduct, the Court reasoned that evidence of egregious acts may serve to establish the requisite state of mind to obtain punitive damages.²¹⁰ Therefore, the Supreme Court in *Kolstad II* held that an employer's conduct need not be independently egregious to satisfy § 1981a's punitive damages requirements, although evidence of egregious misconduct may be used to establish the requisite mental state.²¹¹

V. INTERPRETING § 1981A(B)(1): EGREGIOUS CONDUCT AS A REQUIREMENT FOR TITLE VII PUNITIVE DAMAGES

Although the Supreme Court in *Kolstad II* determined that the proper inquiry for awarding Title VII punitive damages is whether the employer discriminated in the face of a perceived risk of violating federal law, the principles of statutory construction reveal a congressional intent to award Title VII punitive damages only where employers

²⁰⁵ See *id.* at 2124-25.

²⁰⁶ See *Kolstad II*, 119 S. Ct. at 2125.

²⁰⁷ *Id.* at 2125 (citing *Smith v. Wade*, 461 U.S. 30, 37 n.6, 41 (1983)).

²⁰⁸ See *id.* at 2125.

²⁰⁹ See *id.* at 2126.

²¹⁰ See *id.*

²¹¹ See *Kolstad II*, 119 S. Ct. at 2129. In *Kolstad II*, the Supreme Court also held that, in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good-faith efforts to comply with Title VII. See *id.* The Court reasoned that giving punitive damages protection to employers who make good-faith efforts to prevent workplace discrimination accomplishes Title VII's objective of motivating employers to detect and deter Title VII violations. See *id.*

engage in egregious misconduct.²¹² Thus, whereas the Supreme Court's decision in *Kolstad II* requires courts to focus on the mental state of the employer in awarding Title VII punitive damages, Congress intended to award punitive damages based upon the severity of the employer's misconduct.²¹³ This egregious conduct requirement would reserve punitive damages only for the worst cases of intentional discrimination.²¹⁴

In determining under what circumstances punitive damages may be awarded under Title VII for unlawful intentional discrimination, courts should operate under the well-established principles of statutory construction designed to assist in ascertaining and giving effect to Congress's intent.²¹⁵ Courts should begin with § 1981a's language, and if the language is plain and unambiguous, courts must give effect to Congress's expressed intent.²¹⁶ If § 1981a's language is ambiguous, however, courts should review the statute's legislative history, its structure, the circumstances surrounding its enactment and its purpose for interpretive guidance.²¹⁷ Thus, in interpreting § 1981a(b)(1), the courts' primary goal should be to determine and give effect to Congress's intent.²¹⁸

Despite the *Kolstad II* Court's rationale, based upon these tenets of statutory interpretation, Congress intended punitive damages to be awarded only in cases of egregious misconduct.²¹⁹ Although the statute's language is ambiguous and provides little guidance in ascertaining Congress's intent, its legislative history, its structure and the circumstances surrounding its enactment establish a congressional intent to impose punitive damages only in egregious circumstances.²²⁰

²¹² See *Kolstad v. American Dental Ass'n*, 119 S. Ct. 2118, 2125 (1999) ("*Kolstad I*"); see also *infra* notes 224-95 and accompanying text.

²¹³ See *infra* notes 225-96 and accompanying text.

²¹⁴ See *Kolstad II*, 119 S. Ct. at 2130 (Rehnquist, C.J., dissenting).

²¹⁵ See *Quinnipiac Council, Boy Scouts of Am., Inc. v. Commission on Human Rights and Opportunities*, 528 A.2d 352, 356-57 (Conn. 1987); see also Beermann, *supra* note 59, at 51-54.

²¹⁶ See *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993); *Norfolk & Western Ry. Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 128 (1991); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982).

²¹⁷ See *Crandon v. United States*, 494 U.S. 152, 158 (1990); *Rector, Etc., of Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892); *Quinnipiac Council*, 528 A.2d at 356-57; see also *Smith v. Wade*, 461 U.S. 30, 34 (1983); *Griffin*, 458 U.S. at 571.

²¹⁸ *Negonsott*, 507 U.S. at 104; *Norfolk & Western Ry. Co.*, 499 U.S. at 128; *Quinnipiac Council*, 528 A.2d at 356-57.

²¹⁹ See 137 CONG. REC. S15,473 (Oct. 30, 1991) (Interpretive Memo of Sen. Dole); see also *Kolstad II*, 119 S. Ct. at 2124-25.

²²⁰ See 42 U.S.C. § 1981a(b)(1) (1994); *Kolstad v. American Dental Ass'n*, 139 F.3d 958, 962-63 (D.C. Cir. 1998), *vacated*, 119 S. Ct. 2118, 2130 (1999) ("*Kolstad I*"); H.R. REP. NO.

A. *The Language of § 1981a(b)(1)*

The language of § 1981a(b)(1) is ambiguous and provides little help in determining the circumstances under which Congress intended Title VII punitive damages to be awarded.²²¹ Because § 1981a(b)(1) uses the terms "malice" and "reckless indifference," which are fraught with ambiguity, it is difficult to ascertain Congress's intent in awarding Title VII punitive damages from the statute's plain language.²²² The D.C. Circuit in *Kolstad I* recognized Congress's imprecise language and observed that § 1981a(b)(1)'s language hardly pinpoints what the content of the punitive damages standard ought to be.²²³

In determining the appropriate standard for Title VII punitive damages, courts have attempted to interpret the statute's plain language and, in particular, the common law meaning of "malice" and "reckless indifference."²²⁴ For example, the Supreme Court in *Kolstad II* implied that the statute's plain language is clear and unambiguous.²²⁵ There, the Court stated that the terms "malice" and "reckless indifference" ultimately focus on the actor's state of mind.²²⁶ Relying on its decision in *Smith*, the Court reasoned that, because these terms historically pertain to an actor's knowledge that it may be violating the law, Congress intended to award Title VII punitive damages under similar circumstances—where an employer discriminates in the face of a perceived risk that its actions will violate Title VII.²²⁷

As Judge Randolph's concurring opinion in *Kolstad I* recognized, however, the difficulty with the language of § 1981a(b)(1) is that the

102-40(I), at 64-65, 72 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 602-03, 610; 137 CONG. REC. S15,483 (Oct. 30, 1991) (Sponsors' Interpretive Memorandum); 137 CONG. REC. S15,473 (Oct. 30, 1991) (Interpretive Memorandum of Sen. Dole); 137 CONG. REC. H9526 (Nov. 7, 1991) (Interpretive Memorandum of Rep. Edwards); 137 CONG. REC. H9543 (Nov. 7, 1991) (statements of Rep. Hyde).

²²¹ See 42 U.S.C. § 1981a(b)(1); see also *Farmer v. Brennan*, 511 U.S. 825, 836-37 (1994); *Smith*, 461 U.S. at 37 n.6, 39 n.8; *Kolstad I*, 139 F.3d at 962; *United States v. Krizek*, 111 F.3d 934, 939-41 (D.C. Cir. 1997); *Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 668-69 (D.C. Cir. 1996); PROSSER & KEETON, *supra* note 48, §§ 2, 8, 31, 34; but see *Luciano*, 110 F.3d at 220 (court noted that nothing in the statute's plain language indicates a heightened standard for Title VII punitive damages).

²²² See *supra* note 220.

²²³ See *Kolstad I*, 139 F.3d at 961.

²²⁴ See *Ngo v. Reno Hilton Resort Corp.*, 140 F.3d 1299, 1301-02 (9th Cir. 1998), cert. dismissed, 119 S. Ct. 2015 (1999); *Kolstad I*, 139 F.3d at 961-62; *id.* at 971-72 (Tatel, J., dissenting); *Luciano*, 110 F.3d at 220.

²²⁵ See *Kolstad II*, 119 S. Ct. at 2124-25.

²²⁶ See *id.*

²²⁷ See *id.* at 2126 (citing to *Morissette v. United States*, 342 U.S. 246, 263 (1952)).

terms "malice" and "reckless indifference" encompass a broad range of meanings, resulting in imprecision and inconsistent application.²²⁸ For example, the *Smith* Court refused to adopt a punitive damages standard under § 1983 that incorporated the term "malice" because it was "a hopelessly versatile and ambiguous term, carrying a broad spectrum of meanings."²²⁹ Moreover, terms like "recklessness," "reckless disregard" and "reckless indifference," are among the most malleable and ambiguous in the law, encompass different meanings and define varying conduct.²³⁰ For example, in civil law, a person is reckless if he or she acts or fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known.²³¹ In criminal law, however, a person is reckless only when he or she disregards a risk of harm of which he or she is aware.²³² Because § 1981a(b)(1)'s plain language does not indicate whether Congress intended to adopt the civil or the criminal law definition of recklessness, the meaning of the term as used in § 1981a(b)(1) is unclear.²³³

Despite this ambiguity, some federal courts have reasoned that the statute's plain language does indicate Congress's intent *not* to impose an egregious conduct requirement on Title VII punitive damages.²³⁴ In *Luciano*, for example, the Second Circuit stated that nothing in the statute's text or plain language indicates that a heightened punitive damages standard was meant to apply in Title VII cases.²³⁵ The court reasoned that, because the statute does not explicitly mention "egregiousness" or "heightened scrutiny," the statute's plain language indicates that nothing more than proof of unlawful intentional discrimination is required for punitive damages.²³⁶ Similarly, in *Adakai*, the Tenth Circuit implicitly reasoned that the absence of language indicat-

²²⁸ See *Kolstad I*, 139 F.3d at 970 (Randolph, J., concurring); see also *Farmer*, 511 U.S. at 836-37; *Smith*, 461 U.S. at 37 n.6, 39 n.8; *Kolstad*, 139 F.3d at 962; *Kirzek*, 111 F.3d at 939-41; *Saba*, 78 F.3d at 668-69; PROSSER & KEETON, *supra* note 48, §§ 2 n.24, 8, 30, 34.

²²⁹ See *Smith*, 461 U.S. at 37 n.6, 39 n.8.

²³⁰ See *Farmer*, 511 U.S. at 836-37; *Kolstad I*, 139 F.3d at 962; *Kirzek*, 111 F.3d at 939-41; *Saba*, 78 F.3d at 668-69.

²³¹ See *Farmer*, 511 U.S. at 836-37; see also PROSSER & KEETON, *supra* note 48, § 34; RESTATEMENT (SECOND) OF TORTS § 500 & cmt. a (1965).

²³² See *Farmer*, 511 U.S. at 836-37; MODEL PENAL CODE § 2.02(2)(c) & cmt. 3 (1985).

²³³ See 42 U.S.C. § 1981a(b)(1) (1994); *Farmer*, 511 U.S. at 836-37; MODEL PENAL CODE § 2.02(2)(c) & cmt. 3 (1985); PROSSER & KEETON, *supra* note 48, § 34; RESTATEMENT (SECOND) OF TORTS § 500 & cmt. a (1965).

²³⁴ See *Luciano*, 110 F.3d at 220; see also *Kolstad I*, 139 F.3d at 971 (Tatel, J., dissenting); *Adakai v. Front Row Seat*, No. 96-2249, 1997 WL 603458, at *2 (10th Cir. Oct. 1, 1997); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1065-66 (8th Cir. 1997).

²³⁵ See 110 F.3d at 220.

²³⁶ See *id.*

ing that Congress imposed an egregious conduct requirement on Title VII punitive damages demonstrates that the defendant's conduct need not be "extraordinarily egregious" to support a punitive damages award.²³⁷

The difficulty with the *Luciano* and *Adakai* courts' reasoning, however, is that the absence of statutory language does not necessarily indicate an absence of congressional intent.²³⁸ For example, while § 1981's and § 1983's plain language is silent on the issue of punitive damages, courts have determined that Congress intended punitive damages to be a remedy for violation of these statutes.²³⁹ Therefore, the absence of language in § 1981a(b)(1) indicating that punitive damages are to be awarded only in egregious circumstances is not determinate on whether Congress intended such a heightened Title VII punitive damages standard.²⁴⁰

Thus, it is difficult to give effect to Congress's intent by examining § 1981a(b)(1)'s plain language.²⁴¹ Because Congress used ambiguous terms—"malice" and "reckless indifference"—to define the conduct warranting Title VII punitive damages, the circumstances under which it intended to award punitive damages are unclear.²⁴² As a result, guidance from the § 1981a's legislative history, the circumstances surrounding its enactment, § 1981a's structure and the statute's purpose are necessary to discern Congress's intent.²⁴³

B. Legislative History of § 1981a(b)(1)

The 1991 Act's legislative history provides strong evidence that Congress intended punitive damages to be awarded only under circum-

²³⁷ See *Adakai*, 1997 WL 603458, at *2.

²³⁸ See, e.g., *Carey v. Piphus*, 435 U.S. 247, 253, 255 (1978) (punitive damages are a remedy under § 1983 even though the statute's plain language and legislative history are silent on the issue).

²³⁹ See 42 U.S.C. §§ 1981, 1983 (1994); *Smith*, 461 U.S. at 34 (recognizing punitive damages as a remedy under § 1983 despite the absence of explicit language in the statute); *Carey*, 435 U.S. at 253, 255 (punitive damages are a remedy under § 1983 even though the statute's plain language and legislative history are silent on the issue); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975) (recognizing punitive damages as a remedy under § 1981 despite the absence of explicit language in the statute); see also *Caperici v. Humton*, 397 F.2d 799, 801 (1st Cir. 1968) (per curiam); *Mansell v. Saunders*, 372 F.2d 573, 576-77 (5th Cir. 1967).

²⁴⁰ See *supra* notes 242-43 and accompanying text.

²⁴¹ See 42 U.S.C. § 1981a(b)(1) (1994); see also *Negonsott*, 507 U.S. at 104; *Griffin*, 458 U.S. at 570; *Quinnipiac Council*, 528 A.2d at 356-57.

²⁴² See *supra* notes 225-37 and accompanying text.

²⁴³ See *Negonsott*, 507 U.S. at 104-05; *Griffin*, 458 U.S. at 570; *Quinnipiac Council*, 528 A.2d at 356-57.

stances of egregious conduct.²⁴⁴ The House reports submitted with the § 1981a and congressional debate indicate that Title VII punitive damages require egregious conduct.²⁴⁵ For example, House Report 40(I) stated that "[p]laintiffs must first prove intentional discrimination, then must *prove actual injury or loss* arising therefrom to recover compensatory damages, and must meet an even higher standard . . . to recover punitive damages."²⁴⁶ In addition, according to the Sponsors' Interpretive Memorandum submitted into the *Congressional Record*, victims of unlawful intentional discrimination "are entitled not only to equitable relief, but also to compensatory damages. Further, in egregious cases, punitive damages may also be awarded."²⁴⁷ Representative Hyde also remarked that punitive damages "are to be awarded only in extraordinarily egregious cases."²⁴⁸ Finally, Senator Dole introduced an interpretive memorandum which stated that "[p]unitive damages are also capped, and are to be awarded only in extraordinarily egregious cases."²⁴⁹ Therefore, statements made in the House reports and congressional debate demonstrate that Congress intended to award Title VII punitive damages only under egregious circumstances.²⁵⁰

Advocates of the contrary opinion—that Congress did not intend an egregious conduct requirement—argue that § 1981a's legislative history support their position.²⁵¹ For example, in *Kolstad II*, the Supreme Court stated that, because § 1981a's legislative history indicates that Congress relied on *Smith* in formulating Title VII's punitive dam-

²⁴⁴ See 42 U.S.C. § 1981a(b)(1) (1994); *Kolstad I*, 139 F.3d at 962-63; H.R. REP. NO. 102-40 pt. I, at 72 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 610; 137 CONG. REC. S15,483 (Oct. 30, 1991) (Sponsors' Interpretive Memorandum); 137 CONG. REC. S15,473 (Oct. 30, 1991) (Interpretive Memorandum of Sen. Dole); 137 CONG. REC. H9543 (Nov. 7, 1991) (statements of Rep. Hyde); *see also* *Ngo*, 140 F.3d at 1303.

²⁴⁵ See H.R. REP. NO. 102-40 pt. I, at 65, 72, 74 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 603, 610, 612; H.R. REP. NO. 102-40 pt. II, at 28-29 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 721-23; 137 CONG. REC. H9543 (Nov. 7, 1991) (statements of Rep. Hyde); 137 CONG. REC. S15,483 (Oct. 30, 1991) (Sponsors' Interpretive Memorandum); 137 CONG. REC. S15,473 (Oct. 30, 1991) (Interpretive Memorandum of Sen. Dole).

²⁴⁶ H.R. REP. NO. 102-40 pt. I, at 72 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 610.

²⁴⁷ 137 CONG. REC. S15,483 (Oct. 30, 1991) (Sponsors' Interpretive Memorandum).

²⁴⁸ 137 CONG. REC. H9543 (Nov. 7, 1991) (statements of Rep. Hyde).

²⁴⁹ 137 CONG. REC. S15,473 (Oct. 30, 1991) (Interpretive Memorandum of Sen. Dole).

²⁵⁰ See H.R. REP. NO. 102-40 pt. I, at 72 (1991); *reprinted in* 1991 U.S.C.C.A.N. 549, 610; 137 CONG. REC. S15,483 (Oct. 30, 1991) (Sponsors' Interpretive Memorandum); 137 CONG. REC. S15,473 (Oct. 30, 1991) (Interpretive Memorandum of Sen. Dole); 137 CONG. REC. H9543 (Nov. 7, 1991) (statements of Rep. Hyde).

²⁵¹ See *Kolstad I*, 139 F.3d at 974 (Tate, J., dissenting); *Luciano*, 110 F.3d at 220; *see also* H.R. REP. NO. 102-40 pt. I, at 74 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 612; H.R. REP. NO. 102-40 pt. II, at 29 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 722; 137 CONG. REC. H9527 (Nov. 7, 1991) (Interpretive Memorandum of Rep. Edwards).

ages standard, Congress intended to award punitive damages only where the employer discriminated in the face of a perceived risk that its actions violated federal law.²⁵² Thus, according to the Supreme Court in *Kolstad II*, the employer's conduct does not have to be "independently egregious" to satisfy § 1981a's punitive damages requirements.²⁵³

Likewise, in *Luciano*, the Second Circuit stated that, because Congress intended to award Title VII punitive damages under the same circumstances as § 1981 punitive damages, Congress did not desire to impose an egregious conduct requirement on Title VII punitive damages.²⁵⁴ Referring to House Report 40(II) and statements made by Representative Edwards in the *Congressional Record*, the *Luciano* court observed that Congress intended Title VII punitive damages to be available to the same extent as they are available under § 1981.²⁵⁵ The *Luciano* court reasoned that any difference between the Title VII punitive damages standard and the § 1981 punitive damages standard "would contravene Congress's express purpose of equalizing the remedies available for race and other forms of discrimination."²⁵⁶

Although § 1981a(b)(1)'s legislative history demonstrates Congress's intent to adopt the § 1981 and § 1983 punitive damages standards, Congress still could have intended complaining parties to recover Title VII punitive damages only under egregious circumstances.²⁵⁷ In *Smith*, the Supreme Court held that the threshold for § 1983 punitive damages need not be higher than that for compensatory liability.²⁵⁸ In short, the *Smith* Court clearly rejected an egregious conduct requirement for § 1983 punitive damages.²⁵⁹ The *Ngo* court correctly observed, however, that many courts have misapplied the *Smith* standard in the years between *Smith* and § 1981a's enactment by requiring egregious conduct for punitive damages in civil rights case law.²⁶⁰ Thus, while

²⁵² See *Kolstad II*, 119 S. Ct. at 2124-25.

²⁵³ See *id.* at 2129.

²⁵⁴ See *Luciano*, 110 F.3d at 220; see also *Kolstad I*, 139 F.3d at 971, 975 (Tatel, J., dissenting).

²⁵⁵ See *Luciano*, 110 F.3d at 220; H.R. REP. NO. 102-40(II), at 24 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 717; 137 CONG. REC. H9527 (Nov. 7, 1991) (Interpretive Memorandum of Rep. Edwards).

²⁵⁶ See *Luciano*, 110 F.3d at 220; see also H.R. REP. NO. 102-40 pt. I, at 65 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 603.

²⁵⁷ See *Ngo*, 140 F.3d at 1301-03; see also H.R. REP. NO. 102-40 pt. I, at 74 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 612.

²⁵⁸ See *Smith*, 462 U.S. at 53.

²⁵⁹ See *id.*

²⁶⁰ See *Ngo*, 140 F.3d at 1302-03; see also *Smith*, 462 U.S. at 53; *Jackson v. Pool Mortgage Co.*, 868 F.2d 1178, 1182 (10th Cir. 1989); *Stephens v. South Atlantic Cannery, Inc.*, 848 F.2d 484,

some courts, like the First Circuit in *Rowlett v. Anheuser-Busch, Inc.*, adopted the correct reading of *Smith* that the threshold for punitive damages need not be higher than that for compensatory liability, other federal courts, such as the Sixth Circuit in *Beauford v. Sisters of Mercy-Province of Detroit, Inc.*, misapplied the *Smith* standard and required egregious conduct for § 1981 punitive damages.²⁶¹ Because courts misapplied the *Smith* standard by imposing an egregious conduct requirement for § 1981 punitive damages, it is unclear what Congress meant when it stated that the Title VII punitive damages standard was the same as the § 1981 punitive damages standard.²⁶² Did Congress intend to incorporate *Rowlett's* rationale that the threshold for punitive damages need not be higher than that for compensatory liability, or did Congress intend to incorporate the heightened "egregious[ness]" standard articulated by the *Beauford* court that misapplied *Smith*?²⁶³ The references in § 1981a's legislative history that Congress intended to award Title VII punitive damages under the same circumstances as §§ 1981 and 1983 punitive damages are, by themselves, ambiguous because, in the years leading up to § 1981a's enactment, federal courts applied different punitive damages standards under § 1981.²⁶⁴

Despite this ambiguity, § 1981a's legislative history indicates that Congress intended to adopt the misapplied *Smith* standard when it incorporated § 1981a's punitive damages standard "directly from civil rights case law."²⁶⁵ While both House Reports 40(I) and 40(II) recognize that the Title VII punitive damages standard would be the same as the § 1981 punitive damages standard, House Report 40(I) observed that: "[v]ictims of intentional race discrimination are entitled under 42 U.S.C. section 1981 not only to equitable relief, but also compensatory damages, and in particular egregious cases, punitive damages as well."²⁶⁶ According to this passage, the House Committee on Education

489-90 (4th Cir. 1988); *Beauford v. Sisters of Mercy-Province of Detroit, Inc.*, 816 F.2d 1104, 1108-09 (6th Cir. 1987); *Walters v. City of Atlanta*, 803 F.2d 1135, 1146-48 (11th Cir. 1986).

²⁶¹ See *supra* notes 82-104 and accompanying text.

²⁶² See *Ngo*, 140 F.3d at 1302-03; *Beauford*, 816 F.2d at 1109; see also H.R. REP. NO. 102-40 pt. I, at 74 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 612; H.R. REP. NO. 102-40 pt. II, at 29 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 722; 137 CONG. REC. H9527 (Nov. 7, 1991) (Interpretive Memorandum of Rep. Edwards).

²⁶³ See *Ngo*, 140 F.3d at 1303.

²⁶⁴ See *supra* note 248-67 and accompanying text.

²⁶⁵ See H.R. REP. NO. 102-40 pt. II, at 29 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 722; see also *Ngo*, 140 F.3d at 1303-04; H.R. REP. NO. 102-40 pt. I, at 65 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 603.

²⁶⁶ H.R. REP. NO. 102-40 pt. I, at 65, 74 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 603, 612; see also H.R. REP. NO. 102-40 pt. II, at 25 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 718.

and Labor *understood* that punitive damages under § 1981 were awarded only in particularly egregious cases—the standard adopted by the *Beauford* court and other courts that misapplied the *Smith* rationale.²⁶⁷ Therefore, according to House Report 40(I), Congress understood existing civil rights case law as requiring egregious conduct for a punitive damages award, even though the circuit courts were split on whether egregious conduct was necessary for § 1981 punitive damages.²⁶⁸

Therefore, the legislative history demonstrates Congress's intent to award Title VII punitive damages only in egregious circumstances.²⁶⁹ Although there are references in the House reports that Congress intended Title VII punitive damages to be awarded under the same circumstances as other civil rights statutes, Congress understood § 1981 as awarding punitive damages only under egregious circumstances.²⁷⁰

C. *Circumstances Surrounding the Enactment of the 1991 Act*

The circumstances surrounding the passage of the 1991 Act provide strong evidence that Congress intended to award punitive damages only under egregious circumstances.²⁷¹ One of Congress's major concerns in enacting § 1981a was that, by expanding the availability of Title VII remedies to include compensatory and punitive damages, employees would have a greater incentive to litigate and pursue frivolous lawsuits.²⁷² Employers feared that the costs of defending Title VII

²⁶⁷ See H.R. REP. NO. 102-40 pt. I, at 65, 74 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 603, 612; H.R. REP. NO. 102-40 pt. II, at 25 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 718; *see also* *Beauford*, 816 F.2d at 1109. In addition, in House Report 40(II), the Committee on the Judiciary stated that "[Section] 1981 authorizes court to award to victims of intentional discrimination in contracts not only equitable relief, but also compensatory damages, and in appropriate circumstances, punitive damages as well." H.R. REP. NO. 102-40 pt. II, at 25 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 718-19.

²⁶⁸ See H.R. REP. NO. 102-40 pt. I, at 65 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 603; *see also* *Ngo*, 140 F.3d at 1302-04.

²⁶⁹ See *supra* notes 248-72 and accompanying text.

²⁷⁰ See *supra* notes 248-72 and accompanying text.

²⁷¹ See H.R. REP. NO. 102-40 pt. I, at 142-43 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 671-72; 137 CONG. REC. H9525 (Nov. 7, 1991) (statement by Rep. Brooks); 137 CONG. REC. H9542 (Nov. 7, 1991) (statements by Rep. Hyde); 137 CONG. REC. H9543 (Nov. 7, 1991) (Interpretive Memorandum of Rep. Hyde); 137 CONG. REC. S15,276 (Oct. 25, 1991) (statement by Sen. Danforth); Statement of President George Bush Upon Signing S. 1745, 27 WEEKLY COMP. OF PRES. DOC. 1701 (Nov. 25, 1991).

²⁷² See H.R. REP. NO. 102-40 pt. I, at 70-73, 142-43 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 608-611, 671-72; *see also* 137 CONG. REC. H9525 (Nov. 7, 1991) (statement by Rep. Brooks); 137 CONG. REC. H9542 (Nov. 7, 1991) (statements by Rep. Hyde); 137 CONG. REC. H9543 (Nov.

lawsuits and the availability of compensatory and punitive damages for unlawful discrimination would pose severe financial burdens.²⁷³ Congress believed that employers would resort to the use of hiring quotas in response to the 1991 Act to avoid increased litigation costs and potential Title VII liability.²⁷⁴

To alleviate the concerns that the 1991 Act would become a "quota bill," Congress limited the scope of compensatory and punitive damage by including provisions in the legislation that would remove incentives for employees to pursue frivolous lawsuits and that would prevent excessive litigation costs.²⁷⁵ For example, the 1991 Act capped the sum of compensatory and punitive damages depending upon the number of employees working for the employer and made punitive damages available only in disparate treatment cases.²⁷⁶ Thus, although Congress expanded Title VII remedies to include compensatory and punitive damages, it limited the scope of these remedies to provide incentives for complaining parties to pursue only meritorious claims and to preclude unnecessary litigation costs incurred by employers.²⁷⁷

With this in mind, interpreting § 1981a(b)(1) as awarding Title VII punitive damages only under egregious circumstances is consistent with Congress's desire to prevent excessive litigation costs incurred by employers.²⁷⁸ For example, § 1981a's legislative history discusses Congress's belief that a higher burden on complaining parties to recover punitive damages would prevent frivolous lawsuits.²⁷⁹ In House Report 40(1), the Committee on Education and Labor stated:

[t]here is also no merit to the suggestion that adding a damages remedy to Title VII will cause juries to award damages

7, 1991) (Interpretive Memorandum of Rep. Hyde); 137 CONG. REC. S15,343 (Oct. 29, 1991) (statement by Sen. Danforth); 137 CONG. REC. S15,276 (Oct. 25, 1991) (statement by Sen. Danforth); Statement of President George Bush Upon Signing S. 1745, 27 WEEKLY COMP. OF PRES. DOC. 1701 (Nov. 25, 1991).

²⁷³ See H.R. REP. NO. 40 pt. I, at 70 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 608.

²⁷⁴ See 137 CONG. REC. H9525 (Nov. 7, 1991) (statement by Rep. Brooks); 137 CONG. REC. S 15276 (Oct. 25, 1991) (statement by Sen. Danforth).

²⁷⁵ See, e.g., 42 U.S.C. § 1981a(b)(3) (capping the sum of compensatory and punitive damages depending on the number of employees working for the respondent); *see also* 137 CONG. REC. H9525 (Nov. 7, 1991) (statement by Rep. Brooks); 137 CONG. REC. S 15276 (Oct. 25, 1991) (statement by Sen. Danforth).

²⁷⁶ See 42 U.S.C. § 1981a(a)(1), (b)(3).

²⁷⁷ See H.R. REP. NO. 102-40 pt. I, at 70-72 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 608-10.

²⁷⁸ See *supra* notes 275-81 and accompanying text; *see also* 42 U.S.C. § 1981a(b)(1) (1994); H.R. REP. NO. 102-40 pt. I, at 72 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 610; *Kolstad I*, 139 F.3d at 961.

²⁷⁹ See H.R. REP. NO. 102-40 pt. I, at 72 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 610; *see also* 42 U.S.C. § 1981a(b)(1) (1994); *Kolstad I*, 139 F.3d at 961.

vastly disproportionate to the offenses committed by the defendant or the injuries sustained by the plaintiff. Strict standards limit the recovery of damages by plaintiffs with meritorious claims. Plaintiffs must first prove intentional discrimination, then must *prove actual injury or loss* arising therefrom to recover compensatory damages, and must meet an even higher standard (establishing that the employer acted with malice or reckless or callous indifference to their rights) to recover punitive damages.²⁸⁰

By awarding punitive damages only in egregious circumstances, Congress believed that employers would not face disproportional jury awards, and there would still be incentives for complaining parties to pursue mediation for settling disputes.²⁸¹ Therefore, the circumstances surrounding the passage of the 1991 Act—including concerns of disproportional jury awards and unnecessary litigation expenses—favor an interpretation of § 1981a(b)(1) that imposed an egregious conduct requirement, reserving punitive damages for the worst cases of intentional discrimination.²⁸²

D. *The Structure of § 1981a*

Finally, the structure of § 1981a also supports the conclusion that Congress intended to award Title VII punitive damages only under egregious circumstances.²⁸³ The Supreme Court in *Kolstad II* recognized that the structure of § 1981a presents a two-tier damages scheme for Title VII victims—one for liability and another for the exceptional remedy of punitive damages.²⁸⁴ The *Kolstad II* Court noted § 1981a's structure "suggests a congressional intent to authorize punitive awards in only a subset of cases involving intentional discrimination."²⁸⁵

²⁸⁰ H.R. REP. NO. 102-40 pt. I, at 72 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 610.

²⁸¹ See H.R. REP. NO. 102-40 pt. I, at 72-73 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 610-11.

²⁸² See H.R. REP. NO. 102-40 pt. I, at 142-43 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 671-72; 137 CONG. REC. H9525 (Nov. 7, 1991) (statement by Rep. Brooks); 137 CONG. REC. H9542 (Nov. 7, 1991) (statements by Rep. Hyde); 137 CONG. REC. H9543 (Nov. 7, 1991) (Interpretive Memorandum of Rep. Hyde); 137 CONG. REC. S 15,276 (Oct. 25, 1991) (statement by Sen. Danforth); Statement of President George Bush Upon Signing S. 1745, 27 WEEKLY COMP. OF PRES. DOC. 1701 (Nov. 25, 1991).

²⁸³ Compare 42 U.S.C. § 1981a(a)(1) (1994) (authorizing a victim's right to recover compensatory and punitive damages for unlawful intentional discrimination), with 42 U.S.C. § 1981a(b)(1) (describing the circumstances when a victim can recover punitive damages).

²⁸⁴ See 119 S. Ct. at 2124.

²⁸⁵ *Id.*

Section 1981a(a)(1) enables a victim to recover compensatory and punitive damages under Title VII.²⁸⁶ Although § 1981a does not articulate a compensatory damages standard, § 1981a(b)(1) explicitly states that punitive damages are awarded only if the complaining party meets the threshold of proving that the respondent engaged in conduct with "malice or reckless indifference to the federally protected rights of an aggrieved individual."²⁸⁷ The statute's silence on a compensatory damages standard implies that such a remedy would be available in all cases of unlawful intentional discrimination.²⁸⁸ The inclusion of a section defining when punitive damages would be available, however, demonstrates that Congress did not intend punitive damages to be available in every case of unlawful intentional discrimination.²⁸⁹

The fact that Congress set forth a separate punitive damages standard implies that there is an egregious conduct requirement that reserves punitive damages only for the worst cases of intentional discrimination.²⁹⁰ As the D.C. Circuit in *Kolstad I* observed, "[t]he structure of the statute—one standard for basic liability another for the exceptional remedy of punitive liability—strongly suggests that, before the question of punitive damages can go to the jury, the evidence of the defendant's culpability must exceed what is needed to show intentional discrimination."²⁹¹ Thus, only if aggrieved parties meet the higher-threshold standard of proof of § 1981a(b)(1) would they then be entitled to the exceptional remedy of punitive damages.²⁹²

CONCLUSION

Since § 1981a's enactment, courts have struggled to determine the appropriate circumstances to award Title VII punitive damages. This confusion originated from the varying and inconsistent circumstances in which courts have awarded §§ 1981 and 1983 punitive damages. Although Congress explicitly stated that it was adopting § 1981's punitive damages standard for Title VII, Congress failed to articulate what § 1981 punitive damages standard it adopted: the *correctly-applied Smith v. Wade* standard that allows punitive damages to be assessed under the

²⁸⁶ See 42 U.S.C. § 1981a(a)(1).

²⁸⁷ See *id.* § 1981a(a)(1), (b)(1).

²⁸⁸ See *id.*

²⁸⁹ See *id.*; *Kolstad I*, 139 F.3d at 961.

²⁹⁰ See *Kolstad I*, 139 F.3d at 961.

²⁹¹ See *id.*

²⁹² Compare 42 U.S.C. § 1981a(a)(1) (authorizing a victim's right to recover compensatory and punitive damages for unlawful intentional discrimination), with 42 U.S.C. § 1981a(b)(1) (describing the circumstances when a victim can recover punitive damages).

same circumstances as compensatory damages, or the *misguided Smith* standard that requires egregious conduct for punitive damages awards.

In *Kolstad v. American Dental Ass'n* ("*Kolstad II*"), the Supreme Court rejected an egregious conduct requirement for Title VII punitive damages. Rather, the Supreme Court determined that Title VII punitive damages should be awarded based on employers' state of mind, not the severity of their conduct. Because society has become arguably more aware of its rights and obligations under federal employment statutes, the consequences of the Supreme Court's holding in *Kolstad II* could be a rise in the number of cases where punitive damages may be awarded.²⁹³

Despite the Supreme Court's determination, § 1981a's legislative history indicates that Congress intended Title VII punitive damages to be awarded only under egregious circumstances. Not only do House reports and congressional debate support this interpretation, but also § 1981a's structure suggests a desire by Congress to award this remedy only in limited situations. This interpretation of § 1981a(b)(1), moreover, would be consistent with the circumstances surrounding its enactment. Thus, under the egregious conduct requirement, punitive damages would remain an extraordinary remedy reserved for the worst cases of intentional discrimination.

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²⁹³ Although the *Kolstad II* Court's interpretation of § 1981a(b)(1) appears to make it easier for employees to win punitive damages against their employers, the Supreme Court's decision may, in fact, make the remedy more difficult to win. See *Kolstad v. American Dental Ass'n*, 119 S. Ct. 2118, 2129 (1999) ("*Kolstad II*"). In the second part of the *Kolstad II* decision, the Supreme Court held that agency principles place limits on an employer's liability for the acts of its agents in Title VII punitive damages. See *id.* The Court stated that, "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good-faith efforts to comply with Title VII.'" *Id.* (citing *Kolstad v. American Dental Ass'n*, 139 F.3d 958, 974 (D.C. Cir. 1998) (Tatel, J., dissenting), *vacated*, 119 S. Ct. 2118, 2139 (1999) ("*Kolstad I*"). Many employers can avoid the possibility of punitive damages at trial by implementing and enforcing antidiscrimination policies. See *id.* at 2130.