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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LYNN NOYES,)	
)	
Plaintiff,)	2:02-cv-2685-GEB-CMK
)	
v.)	<u>ORDER</u>
)	
KELLY SERVICES, INC.,)	
a corporation,)	
)	
Defendant.)	
_____)	

On April 21, 2008, Defendant Kelly Services, Inc. ("Kelly") filed a renewed motion for judgment as a matter of law or in the alternative for a new trial under Federal Rules of Civil Procedure 50(b) and 59.¹ Plaintiff Lynn Noyes ("Noyes") opposes the motion. Oral argument was heard on June 16, 2008, on the issues whether Noyes presented sufficient evidence of ratification by a Kelly officer of the decision not to promote Noyes and whether the jury's punitive damages verdict against Kelly is unconstitutionally excessive. The remaining issues raised by Kelly's motion were determined suitable for decision without oral argument under Local Rule 78-230(h).

¹ Subsequent references to Rules are to the Federal Rules of Civil Procedure unless otherwise noted.

BACKGROUND

1
2 Noyes prevailed at trial in this action on her claims that
3 she did not receive a promotion due to religious discrimination in
4 violation of Title VII, 42 U.S.C. § 2000e-2(a)(1), and the California
5 Fair Employment and Housing Act ("FEHA"), California Government Code
6 sections 12900 *et seq.*, when she was passed over for a promotion
7 because she was not a member of a group called the Fellowship of
8 Friends ("the Fellowship"). Noyes worked at Kelly's software and
9 multimedia department in Nevada City, California from October 1994
10 until May 2004. In April 2001, the position of Software Development
11 Manager became available. William Heinz ("Heinz"), a top-level
12 manager at Kelly and a member the Fellowship hired Joep Jilesen
13 ("Jilesen"), another member of the Fellowship, for the position.

14 The jury returned a special verdict for Noyes on both
15 claims, finding that Noyes's lack of certain religious beliefs was a
16 motivating factor for why she was not selected for the position.
17 (Jury Verdict ¶ 1, Apr. 4, 2008.) The jury also found by clear and
18 convincing evidence that an officer, director or managing agent of
19 Kelly had advance knowledge of conduct constituting malice, fraud or
20 oppression concerning the failure to promote decision and adopted or
21 approved of a religious discrimination promotion expressly or by
22 failure to act. (*Id.* ¶¶ 3-4.) The jury awarded Noyes \$147,174 in
23 economic damages, \$500,000 in emotional distress damages, and \$5.9
24 million in punitive damages.

STANDARDS OF REVIEW FOR JUDGMENT AS A MATTER OF LAW AND NEW TRIAL

25
26 "Under Rule 50, a court should render judgment as a matter
27 of law when 'a party has been fully heard on an issue and there is no
28 legally sufficient evidentiary basis for a reasonable jury to find for

1 that party on that issue.'" Reeves v. Sanderson Plumbing Prods.,
2 Inc., 530 U.S. 133, 149 (2000) (quoting Fed. R. Civ. P. 50(a)). "In
3 [reviewing the evidence], the court must draw all reasonable
4 inferences in favor of the nonmoving party, and it may not make
5 credibility determinations or weigh the evidence." Id. at 150.

6 [A]lthough the court should review the record as a
7 whole, it must disregard all evidence favorable to
8 the moving party that the jury is not required to
9 believe. That is, the court should give credence
10 to the evidence favoring the nonmovant as well as
11 that evidence supporting the moving party that is
12 uncontradicted and unimpeached, at least to the
13 extent that that evidence comes from disinterested
14 witnesses.

15 Id. at 151 (internal quotation marks and citation omitted).

16 A new trial may be granted under Rule 59 if the verdict is
17 contrary to the clear weight of the evidence. Passantino v. Johnson &
18 Johnson Consumer Prods., Inc., 212 F.3d 493, 510 n.15 (9th Cir. 2000).

19 [T]he district court has "the duty . . . to weigh
20 the evidence as [the court] saw it, and . . . set
21 aside the verdict of the jury, even though
22 supported by substantial evidence, where, in [the
23 court's] conscientious opinion, the verdict is
24 contrary to the clear weight of the evidence."

25 Molski v. M.J. Cable, Inc., 481 F.3d 724, 729 (9th Cir. 2007) (quoting
26 Murphy v. City of Long Beach, 914 F.2d 183, 187 (9th Cir. 1990)). The
27 court does not have to weigh the evidence under Rule 59 in the light
28 most favorable to the prevailing party. Landes Constr. Co. v. Royal
Bank of Can., 833 F.2d 1365, 1371 (9th Cir. 1987). A new trial should
be granted under Rule 59 where the court "is left with the definite
and firm conviction that a mistake has been committed." Id. at 1371-
72.

Rule 59 also authorizes the trial judge to grant a new trial
because of erroneous jury instructions. Murphy, 914 F.2d at 186-87 &

1 n.5; Cleveland v. S. Pac. Co., 436 F.2d 77, 80-81 (9th Cir. 1970).
2 But an erroneous instruction is not a "ground for granting a new trial
3 . . . unless [a new trial is necessary to achieve] substantial
4 justice. At every stage of the proceeding, the court must disregard
5 all errors and defects that do not affect any party's substantial
6 rights." Fed. R. Civ. P. 61; see also McDonough Power Equip., Inc. v.
7 Greenwood, 464 U.S. 548, 553 (1984) ("[C]ourts should exercise
8 judgment . . . and ignore errors that do not affect the essential
9 fairness of the trial.").

10 ANALYSIS

11 I. Judgment as a Matter of Law

12 A. Evidence That the Fellowship Was a Religion to Heinz

13 Kelly argues "Noyes failed to present sufficient evidence
14 that the Fellowship was a religion to William Heinz, the alleged
15 decisionmaker." (Mot. at 3:6-11 (citing O'Quinn v. Raley's, 2008 WL
16 686894, at *3 (E.D. Cal. Mar. 12, 2008)).) Noyes contends since this
17 is a case of reverse religious discrimination "[t]he personal beliefs
18 of Mr. Heinz are not determinative" and instead the issue is "whether
19 or not the Fellowship of Friends is a religion." (Opp'n at 2:2-9.)

20 The jury could have reasonably inferred from the evidence
21 that the Fellowship was a religion to Heinz and could have rejected
22 the credibility of Heinz's testimony that the Fellowship was not a
23 religion to him. Heinz testified that he was a member of the
24 Fellowship from 1976 until March of 2007 and served on the board of
25 directors of the Fellowship for a year in 1997. (Trial Tr., 106:2-15,
26 Apr. 3, 2008.) Noyes also presented sufficient evidence establishing
27 that the Fellowship is a religion. Accordingly, the jury could have
28 reasonably inferred that the Fellowship was a religion to Heinz.

1 B. Evidence That Kelly Knew the Fellowship Was a Religion

2 Kelly argues Noyes failed to present evidence that “Kelly
3 knew the Fellowship was a religion.” (Mot. at 3:17-19 (emphasis
4 omitted) (citing Lewis v. United Parcel Serv., Inc., 2005 WL 2596448,
5 at *7 (N.D. Cal. Oct. 13, 2005) (granting summary judgment on FEHA
6 religious discrimination claim where plaintiff presented no evidence
7 employer was aware of religious practices or beliefs); Aquirre v.
8 Chula Vista Sanitary Serv., 542 F.2d 779, 781 (9th Cir. 1976) (“A
9 showing by plaintiff that he was discharged following protected
10 activities of which the employer was aware establishes a prima facie
11 case of retaliatory dismissal [under Title VII].”)).) Kelly further
12 argues that “Kelly’s Senior Vice President for Human Resources, Nina
13 Ramsey, testified that Kelly did not know the Fellowship was a
14 religion and, after investigating, concluded it was more of a social
15 group.” (Id. at 4:15-18.) Noyes counters she presented evidence
16 “that as far back as 1998 [when Jeff Boswell, a former employee,
17 discussed favoritism shown the Fellowship members in his exit
18 interview] Kelly Corporate had been told about the religious nature of
19 the Fellowship of Friends. Kelly knew, or should have known [based on
20 information readily available on the internet, and an anonymous
21 letter], that the Fellowship was a religion years before the promotion
22 underlying this case.” (Opp’n at 3:5-4:10; Trial Tr. 84:2-3 & 10-11,
23 85:1-5, Mar. 25, 2008 (testimony of Jeff Boswell).)

24 Under Title VII and FEHA, “employers [are] liable for
25 discrimination by their supervisory employees.” Janken v. GM Hughes
26 Elects., 46 Cal. App. 4th 55, 67 (1996). Here, Heinz was a supervisory
27 employee of Kelly. As discussed above, the jury could have reasonably
28 inferred that the Fellowship was a religion to Heinz, and that Heinz

1 knew the Fellowship was a religious organization. Since Heinz knew
2 the Fellowship was a religion, and he discriminated against Noyes
3 because of her lack of religious beliefs, Kelly is liable for that
4 discrimination.

5 Kelly also argues "Noyes' failure to prove Kelly knew the
6 Fellowship was a religion prohibits (or at a minimum renders suspect)
7 the jury's award of punitive damages." (Mot. at 4:25-5:1 (citing
8 Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 536-37 (1999)).) Kelly
9 cites language from Kolstad holding that "intentional discrimination
10 does not give rise to punitive damages liability under [the perceived
11 risk] standard" where "the employer discriminates with the distinct
12 belief that its discrimination is lawful," for instance when "[t]he
13 underlying theory of discrimination [is] novel" Kolstad, 527
14 U.S. at 536-37. However, Kelly did not preserve this defense for
15 trial and the record does not support its argument. See Passantino,
16 212 F.3d at 516 (good faith effort to comply with Title VII an
17 affirmative defense); see also infra section II C (holding sufficient
18 evidence supports a finding that Darrah Bixler and Nina Ramsey knew
19 the Fellowship was a religion).

20 C. Evidence That Heinz Intentionally Discriminated Against Noyes

21 Kelly argues the record contains insufficient evidence for a
22 reasonable jury to conclude that "Kelly's reason for selecting another
23 employee (Joep Jilesen) was pretext, and that the real reason for the
24 decision was her religion (or lack thereof)." (Mot. at 5:6-28 (citing
25 evidence that Heinz first offered the position to Donna Walker, a non-
26 Fellowship member; that Maya Bonhoff, also a non-Fellowship member,
27 recommended Jilesen for the position; and other evidence).) Noyes
28

1 counters "Defendant's evidence was contradicted." (Opp'n at 5:23
2 (emphasis omitted).)

3 There was sufficient evidence to support a finding that
4 Heinz did not select Noyes for the position because she was not a
5 member of the Fellowship. For example, the jury could have inferred
6 from an anonymous letter sent to Kelly in 1999 that Heinz treated
7 Fellowship members favorably. In addition, Noyes was not a member of
8 the Fellowship and others testified she was qualified for the
9 position. Moreover, Maya Bonhoff testified that the reason she
10 recommended Jilesen for the position was that she thought Noyes was
11 "off the table" and not being considered based on what Heinz had told
12 her.

13 II. New Trial

14 A. Exclusion of Department of Fair Employment and Housing Letters

15 Kelly also argues exclusion of the California Department of
16 Fair Employment and Housing ("DFEH") "determination letters" in which
17 Noyes was informed that DFEH could not find sufficient evidence to
18 prove discrimination occurred was error. (Mot at 7:4-5.) One letter
19 was dated July 29, 2002, and responded to an administrative complaint
20 by Noyes regarding the April 2001 position. (Decl. of E. Joseph
21 Connaughton in Supp. of Kelly's Mot. in Limine ("Connaughton in Limine
22 Decl."), Ex. 4, July 29, 2002 Letter from DFEH to Noyes.) On August
23 13, 2002, another DFEH letter notified Noyes that it was closing her
24 file "based on insufficient evidence to show a violation of the Fair
25 Employment and Housing Act." (Connaughton in Limine Decl., Ex. 6, Aug
26 13, 2002 Letter from DFEH to Noyes.) Kelly's motion *in limine* to
27 include all evidence of these letters was denied and Noyes's motion *in*
28 *limine* to exclude the July 29, 2002 letter was granted. (Order

1 Addressing *in Limine* Motions ¶¶ 6-7, Mar. 11, 2008; see also Trial
2 Tr., 206:1-207:4, Mar. 27, 2008 (reaffirming exclusion).)

3 Kelly argues a new trial should be granted because the
4 exclusion of this "relevant and highly probative evidence from the
5 [DFEH's] detailed, year-long investigation of Ms. Noyes'
6 administrative complaint both confused the jury and constrained
7 Kelly's defense, specifically regarding Ms. Noyes' claim for punitive
8 damages." (Mot. at 6:24-28.) Kelly argues "the DFEH evidence was
9 especially necessary to explain to the jury why Kelly took the
10 actions, and non-actions, that it did" and that "[t]he jury's only
11 question [during deliberation] was whether the DFEH had reached a
12 determination." (Mot. at 8:13-14, 9:17-18 (emphasis omitted).)

13 Noyes counters the determination letters were properly
14 excluded after "balancing [their] probative value against negative
15 effects that [their] admission would cause." (Opp'n at 6:22-23.)

16 Noyes further argues

17 the jury was informed by stipulation that
18 Plaintiff had filed a charge with the DFEH in
19 August 2001 and that the investigation was carried
20 out until August 2002. Defendant was thus able to
21 argue to the jury if it chose to do so that in
22 deference to the DFEH's investigation, starting in
23 September, 2001, high-ranking personnel at
24 Defendant's corporate headquarters had reason to
25 suspend their own investigation

* * *

22 Nevertheless, the major thrust of Plaintiff's
23 evidence and arguments regarding punitive damages
24 involved the authorization and/or ratification by
25 corporate . . . managing agents of discriminatory
26 practices in Nevada City before the promotion at
27 issue and the authorization and/or ratification of
28 that promotion by corporate . . . managing agents
several months before Defendant learned of the
DFEH filing.

27 (Opp'n at 8:11-18 (citing Trial Tr., 104:20-105:4, 11:28-12:6 (Court's
28 Address to Jury).)

1 [A]n agency's determination that insufficient
2 facts exist to continue an investigation is not
3 *per se* admissible in the same manner as an
4 agency's determination of probable cause. . . .
5 There is a much greater risk of unfair prejudice
6 involved in introducing a final agency ruling as
7 opposed to a probable cause determination, because
8 a jury might find it difficult to evaluate
9 independently evidence of discrimination after
10 being informed of the investigating agency's final
11 results.

12 Beachy v. Boise Cascade Corp., 191 F.3d 1010, 1015 (9th Cir. 1999)
13 (citing Gilchrist v. Jim Slemons Imps., Inc., 803 F.2d 1488, 1500 (9th
14 Cir. 1986)). Accordingly, under Federal Rule of Evidence 403, the
15 DFEH letters' prejudicial effect must be weighed against their
16 probative value.

17 Kelly argues that the probative value of the letters is high
18 because it explains why Kelly did little in response to Noyes's
19 complaints about being passed over for the 2001 position. However,
20 since evidence of the dates of the DFEH investigation were presented
21 to the jury, the record allowed Kelly to argue that the DFEH
22 investigation was the reason for any inaction. In addition, the
23 probative value of the letters was substantially outweighed by the
24 risk of unfair prejudice to Noyes that evidence of a final agency
25 decision would pose and the mini-trial that would result on what
26 evidence was and was not considered when the DFEH made its
27 determination. Accordingly, exclusion of the DFEH determination
28 letters was not error.

29 B. Motivating Factor Jury Instruction

30 Kelly argues "the Court should have instructed the jury that
31 the liability standard was whether or not Ms. Noyes' religion (or lack
32 thereof) was a 'determining factor' (or the 'sole reason') for the
33

1 employment decision at issue in this lawsuit.”² (Mot. at 12:8-10.)
2 Kelly’s proposed “determining factor” jury instruction was rejected
3 (Kelly’s Proposed Jury Instruction No. 6., Dkt. No. 147) and the jury
4 was instructed that for Noyes to prevail on her Title VII claim she
5 must show that religion was a “motivating reason in the Defendant’s
6 decision not to promote Plaintiff.” (Jury Instructions Given, Dkt.
7 No. 187, Instruction No. 14.) Kelly argues it was error to give the
8 motivating factor instruction because “Noyes’ lawsuit . . . was not a
9 mixed motive case [since] Ms. Noyes repeatedly and singularly alleged
10 and argued that her religious beliefs (or lack thereof) were the only
11 reason she did not receive the position of Software Development
12 Manager in April 2001.” (Mot. at 10:21-25 (citing Compl. ¶¶ 32, 46;
13 Pl.’s Opp’n to Def.’s Mot. for Summ. J. at 15:6-9) (emphasis
14 omitted).) Kelly further argues “during trial Ms. Noyes never claimed
15 Kelly had a legal motivation to deny her the position she desired.”
16 (Id. at 11:23-24 (emphasis omitted).) Noyes rejoins that the
17 motivating factor instruction was correct because “based on all of the
18 evidence presented . . . , the jury could have found that
19 ‘discrimination [was] one of two or more reasons for the challenged
20 decision, at least one of which may [have been] legitimate . . . [.]’”
21 (Opp’n at 13:12-17 (quoting Costa v. Desert Palace Inc., 299 F.3d 838,
22 856 (9th Cir. 2002)).)

23 “‘[S]ingle-motive’ and ‘mixed-motive’ cases [are not]
24 fundamentally different categories of cases. Both require the
25

26 ² Kelly does not argue that a “same decision” defense
27 instruction (which it was entitled after a determination that a mixed
28 motive instruction was appropriate) should have been given. Kelly
declined that instruction at trial. (See Trial Tr., 181:4-183:3, Mar.
27, 2008 (discussion of the Court and counsel).)

1 from which the jury could have found that [Heinz] was an officer,
 2 director, or managing agent of Kelly" (Mot. at 13:20-23,
 3 14:6-9.) Noyes argues she

4 is basing (and has always based) her claim on the
 5 authorization and/or ratification of Mr. Heinz's
 6 discriminatory personnel decisions by numerous
 7 other corporate officers, directors and/or
 8 managing agents back at corporate headquarters in
 Michigan. These witnesses include . . . Darrah
 Bixler, Nina Ramsey, Tarek Brantley, Theresa
 Dolbert, and Dana Warren

9 (Opp'n at 19:26-20:4 (emphasis omitted) (citing evidence of Kelly
 10 corporate having prior knowledge of Heinz's favoritism of Fellowship
 11 members, and of Noyes's complaints to Bixler and Ramsey regarding the
 12 promotion).)

13 Kelly rejoins Noyes failed to show that any of these Kelly
 14 employees were directors or managing agents. (Reply at 11:19-28.)
 15 Kelly further argues that Noyes failed to show that any of these
 16 employees knew of Heinz's conduct and its outrageous character, which
 17 is required for ratification. (Id. at 11:22-28 (citing Cruz v.
 18 HomeBase, 83 Cal. App. 4th 160, 163 (2000).)³

19 [W]hen a motion for a new trial is based on
 20 insufficiency of the evidence, "a stringent
 21 standard applies . . . [and] a motion for a new
 22 trial may be granted on this ground only if the
 verdict is against the great weight of the
 evidence or it is quite clear that the jury has
 reached a seriously erroneous result."

23 Leavey v. UNUM/Provident Corp., 2006 WL 1515999, at *9 (D. Ariz. May
 24 26, 2006) (quoting Johnson v. Paradise Valley Unified Sch. Dist., 251

26
 27 ³ On June 17, 2008, NOyes filed Post-Hearing References to Trial
 28 Transcripts. On June 19, 2008, Kelly objected to submission of these
 references after the hearing. Since the Court was aware of the relevant
 sections of the trial transcripts before Noyes's June 17, 2008 filing,
 this dispute need not be decided.

1 F.3d 1222, 1229 (9th Cir. 2001)). "While the Court may weigh the
2 evidence and assess the credibility of witnesses [under the Rule 59
3 standard], it may not grant a new trial 'merely because it might have
4 come to a different result from that reached by the jury.'" Id.
5 (quoting Roy v. Volkswagen of Am. Inc., 896 F.2d 1174, 1176 (9th Cir.
6 1990)).

7 Under California Civil Code section 3294, an employer will
8 be liable for punitive damages based on the acts of an employee if, by
9 clear and convincing evidence, the employer

10 had advance knowledge of the unfitness of the
11 employee and employed him or her with a conscious
12 disregard of the rights or safety of others or
13 authorized or ratified the wrongful conduct for
14 which the damages are awarded or was personally
15 guilty of oppression, fraud, or malice. With
16 respect to a corporate employer, the advance
17 knowledge and conscious disregard, authorization,
18 ratification or act of oppression, fraud, or
19 malice must be on the part of an officer,
20 director, or managing agent of the corporation.

21 Cal. Civ. Code § 3294(b).

22 "'Managing agents' are employees who 'exercise[] substantial
23 discretionary authority over decisions that ultimately determine
24 corporate policy.'" Cruz v. HomeBase, 83 Cal. App. 4th 160, 167 (2000)
25 (citing White v. Ultramor, Inc., 21 Cal. 4th 563, 573 (1999))
26 (emphasis omitted). The trial testimony of Nina Ramsey ("Ramsey")
27 constitutes substantial evidence that she exercised substantial
28 discretionary authority over Kelly personnel decisions that ultimately
determined corporate policy.⁴ Ramsey testified she is "the Senior

26 ⁴ Darrah Bixler may also have exercised sufficient discretionary
27 authority to be a managing agent herself. See Cruz, 83 Cal. App. 4th at
28 168 (noting in White, 21 Cal. 4th at 569, the court found "a regional
director of eight stores, had sufficient authority over corporate policy
to be a 'managing agent' [since t]here was a strong inference that a
(continued...)

1 Vice President of Human Resources for Kelly Services [and has]
2 responsibility for the human resource function in [Kelly, including]
3 the employee relations practices around the world." (Trial Tr., 4:24-
4 5:6, Apr. 3, 2008 (testimony of Nina Ramsey).)

5 Kelly argues "Ms. Ramsey simply could not have know of, or
6 ratified Mr. Heinz' decision to promote Mr. Jilesen, rather than Ms.
7 Noyes, in April 2001" because "she first learned of Ms. Noyes' alleged
8 discriminatory treatment in July 2001 when she received an e-mail from
9 Ms. Noyes." (Reply at 12:15-23.) However, Ramsey need not have
10 ratified Heinz's decision to promote Jilesen before, or at the moment
11 that decision was made since "'ratification' is the '[c]onfirmation
12 and acceptance of a previous act.'" Cruz, 83 Cal. App. 4th at 168
13 (quoting Black's Law Dict. (7th ed. 1999) at 1268).

14 For purposes of determining an employer's
15 liability for punitive damages, ratification
16 generally occurs where . . . the employer
17 demonstrates an intent to adopt or approve
18 oppressive, fraudulent, or malicious behavior by
19 an employee in the performance of his job duties.
The issue commonly arises where the employer or
its managing agent is charged with failing to
intercede in a known pattern of workplace abuse,

20 ⁴(...continued)

21 manger with these powers had authority to set corporate policies," and
22 therefore, holding "a supervisor subordinate to the store manager in a
23 single outlet of a multi-store chain" was not a managing agent). Darrah
24 Bixler testified that in spring of 2001 she was a human resources
25 manager responsible for human resources at Nevada City, and she was also
26 responsible for human resources at Kelly's IT division, corporate sales
27 and marketing, and all the corporate groups that were located in Kelly's
28 corporate headquarters, which was a total of roughly 500 employees.
(Trial Tr., 32:5-19, 53:23-24, Apr. 3, 2008 (testimony of Darrah
Bixler).) She was responsible for how the hiring processes enacted as
a result of the 1999 investigation were implemented. (Id. at 68:13-20.)
She was also responsible for setting policies and approving salaries and
raises. (Id. at 84:23- 85:10.) However, because there is evidence that
Ramsey knew and approved of Bixler's actions regarding Heinz, this issue
is not reached.

1 or failing to investigate or discipline the errant
2 employee once such misconduct became known.
3 Corporate ratification in the punitive damages
context requires actual knowledge of the conduct
and its outrageous nature.

4 Coll. Hosp. v. Super. Ct., 8 Cal. 4th 704, 726 (1994) (citations
5 omitted).

6 Sufficient evidence exists from which the jury could have
7 found that Ramsey knew Heinz was discriminating against non-fellowship
8 members because of religion, and approved or ratified this conduct;
9 and the jury's verdict is not against the great weight of the
10 evidence. Ramsey testified that she learned of the anonymous letter
11 in 1999, was part of the team hearing results of the subsequent
12 investigation, and that eventually it became her responsibility to
13 ensure that higher-level management decisions were not made by Heinz
14 but by Kelly's corporate offices. (Trial Tr., 6:7-9, 9:1-3, 17:8-24,
15 Apr. 3, 2008.) Ramsey also testified that in 2001, she learned of
16 Noyes's complaints that Heinz was giving good jobs to members of the
17 Fellowship and that Noyes asked her to give Noyes the disputed
18 position and to fire Heinz. (Id. at 10:8-18, 11:11-13, 24:1-10.)

19 In 2001, Ramsey oversaw Darrah Bixler ("Bixler"), who was
20 the human resource manager responsible for Nevada City and reported to
21 Ramsey. (Id. at 10:15-18.) Ramsey testified that she instructed
22 Bixler to follow up on Noyes's complaint and to keep her informed of
23 the results of the investigation. (Id. at 24:18-25.) Accordingly,
24 the jury could have reasonably concluded that what Bixler learned and
25 concluded during her investigations was communicated to Ramsey.

26 In 2001, Bixler was a human resource manager and the lead
27 human resources person for the Nevada City office with the authority
28 to process and approve personnel decisions made by Heinz. (Trial Tr.,

1 53:23-55:6, Apr. 3, 2008 (testimony of Darrah Bixler).) Bixler
2 testified that in May of 2001, Noyes told her about the promotion of
3 Jilesen, that she immediately told Ramsey about it, and that she and
4 Ramsey began investigating the Fellowship. (Id. at 35:11-36:10.)
5 There was substantial evidence from which the jury could have drawn
6 the reasonable inference that, despite her testimony to the contrary,
7 Bixler had discovered that the Fellowship was a religion and that
8 Heinz was discriminating in favor of Fellowship members. Bixler
9 testified that she investigated the 2001 promotion and tried to learn
10 what the Fellowship was because she had heard that Heinz put
11 Fellowship members into management positions. (Id. at 63:7-21, 74:12-
12 21.) Bixler testified that Steve Wehrmann ("Wehrmann") told her in
13 his exit interview that he was upset with Heinz and his preference of
14 Fellowship members, using the hiring of Andrew Vernon as an example.
15 (Id. at 70:13-18, 60:9-61:5.) Wehrmann testified that he told Bixler
16 that he left Kelly because of issues with the Fellowship and hiring
17 practices and preferences shown to Fellowship member Mario Fantoni.
18 (Trial Tr., 41:12-17, Mar. 27, 2008 (testimony of Steve Wehrmann).)
19 Bixler also testified that Maya Bohnhoff told her that Heinz had
20 pressured her to hire Fellowship member Andrew Vernon. (Trial Tr.,
21 57:20-58:5, Apr. 3, 2008 (testimony of Darrah Bixler).) Bixler
22 testified that she looked up the Fellowship of Friends on the website
23 RickRoss.com, which she characterized as a "cult watchdog website."
24 (Id. at 74:22-11.) Evidence was presented that at that time Rick
25 Ross's website contained substantial information regarding the
26 Fellowship of Friends, characterizing it as a religious cult. (Trial
27 Tr., 46:12-48:5, 29:10-14, Mar. 25, 2008 (testimony of Rick Ross).)
28 Bixler also testified that she knew of the 1999 anonymous letter,

1 which had characterized the Fellowship as a religion, and that she
2 knew Fellowship members were required to tithe part of their income.
3 (Trial Tr., 57:1-3, 58:18-21, Apr. 3, 2008 (testimony of Darrah
4 Bixler).)

5 There was also evidence that cast doubt on the veracity of
6 Bixler's testimony and suggests that she was motivated to protect
7 Heinz and his employment decisions at the expense of Noyes's rights.
8 Bixler testified that another member of the Nevada City management
9 team, Victoria Smart, was a Fellowship member and warned her that any
10 decision to restrict hiring of Fellowship members would be religious
11 discrimination and that Bixler was worried about that. (Id. at 64:1-
12 3.) In May of 2001, Smart sent Bixler an email in which she wrote:
13 "We cannot refuse to consider or hire qualified Fellowship members
14 because that is prima facie religious discrimination and that has
15 occurred here." (Id. at 90:7-22.) This email suggests that Bixler
16 knew the Fellowship was a religious organization because one of its
17 members, Smart, was referring to discrimination against Fellowship
18 members as religious discrimination.

19 Bixler also testified that at some point she concluded Heinz
20 had not discriminated against Noyes, but could not tell when that
21 conclusion was made and admitted that she never communicated that
22 conclusion to Noyes. (Trial Tr., 64:8-66:22, Apr. 3, 2008 (testimony
23 of Darrah Bixler).) The jury could have concluded that if Bixler
24 truly believed no discrimination had occurred, she would have
25 communicated that conclusion to Noyes. (See Trial Tr., 145:6-24, Mar.
26 25, 2008 (testimony of Lynn Noyes, discussing that Bixler had not been
27 responsive to her complaint and she felt Kelly had decided to do
28 nothing).)

1 Further, an inference could be drawn from the record that
2 Bixler was attempting to silence Noyes's complaints. See Weeks v.
3 Baker & McKenzie, 63 Cal. App. 4th 1128, 1159 (1998) (finding
4 "evidence that persons who complained [about employee's sexual
5 harassment] actions were transferred or were themselves terminated as
6 employees" supported a finding that employer did not "take [the]
7 misconduct seriously" and consciously disregarded the rights of
8 others). Noyes testified that Bixler threatened her that she could be
9 sued for slander if she did not stop alleging that Heinz had promoted
10 Jilesen because of his religion (id. at 144:6-7, 146:10-11) and in an
11 email from Bixler to Noyes, Bixler wrote "your alleged comments
12 regarding Joep [Jilesen] and/or William [Heinz] appear to be based on
13 your speculation about previous events in which you were not directly
14 involved. I wanted to let you know that comments of this nature were
15 highly speculative and could potentially amount to defamation."
16 (Trial Tr., 82:10-22, Apr. 3, 2008 (testimony of Darrah Bixler).)

17 Finally, the jury could have reasonably inferred that Bixler
18 and Ramsey's failure to intercede or discipline Heinz as a result of
19 his 2001 promotion decision meant they intended to approve of and
20 ratify this decision. Bixler testified that she had responsibility
21 for and approved the 2001 personnel decisions made by Heinz. (Id. at
22 54:5-20.) Ramsey testified that Bixler was responsible for human
23 resources at Nevada City and that Bixler reported to her. (Id. at
24 10:8-18.) Noyes testified that four months after the promotion she
25 called Ramsey and told her that Bixler's inaction after her
26 investigation suggested "Kelly had decided to do nothing." (Trial
27 Tr., 145:6-24, Mar. 25, 2008 (testimony of Lynn Noyes).)

28 The jury could reasonably infer from the above evidence that

1 Bixler and Ramsey knew of Heinz's decision to promote Jilesen over
2 Noyes, knew that Heinz's decision was based on religion—and thus
3 constituted outrageous and discriminatory action—and approved of this
4 action by failing to intervene. On the other hand, Bixler and Ramsey
5 testified that they did not think the Fellowship was a religion or
6 that Heinz discriminated on the basis of religion. However, in
7 weighing the evidence, the jury's verdict is not against the great
8 weight of the evidence.⁵

9 III. Unconstitutionally Excessive Punitive Damages

10 Kelly argues the punitive damages verdict is
11 unconstitutionally excessive because Kelly did not act reprehensibly
12 and a 40 to 1 ratio of punitive to economic damages is "plainly
13 unconstitutional." (Mot. at 16:8, 17:22-18:2.) Noyes counters that
14 the "punitive damage award of \$5.9 million is 9.1 times the [total]
15 compensatory award, or a 9.1 to 1 ratio" and that Kelly's conduct
16 "clearly supports a verdict finding of 'reprehensibility.'" (Opp'n at
17 21:21-23, 22:25-26.)

18 "The Due Process Clause of the Fourteenth Amendment
19 prohibits the imposition of grossly excessive or arbitrary punishments
20 on a tortfeasor." State Farm Mut. Auto. Ins. Co. v. Campbell, 538
21 U.S. 408, 416 (2003) (citing Cooper Indus., Inc. v. Leatherman Tool
22 Group, Inc., 532 U.S. 424, 433 (2001)). The Supreme Court has
23 established "three guideposts" for assessing whether a punitive
24 damages award is unconstitutionally excessive: (1) "the degree of

25
26 ⁵ Kelly also argues in its Reply that because of this issue "the
27 punitive damages award is defective as a matter of law." (Reply at
28 11:17-18.) However, Kelly's arguments also fail under Rule 50's
judgment as a matter of law standard; drawing all reasonable inferences
in favor of Noyes, sufficient evidence exists for a reasonable jury to
find Kelly knew and approved of Heinz's actions.

1 reprehensibility" of the defendant's conduct; (2) "the disparity
 2 between the harm or potential harm suffered by [the plaintiff] and
 3 [her] punitive damages award; and" (3) "the difference between this
 4 remedy and the civil penalties authorized or imposed in comparable
 5 cases." BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996).

6 A. Degree of Reprehensibility

7 The degree of reprehensibility is determined by considering
 8 whether

9 the harm caused was physical as opposed to
 10 economic; the tortious conduct evinced an
 11 indifference to or a reckless disregard of the
 12 health or safety of others; the target of the
 13 conduct had financial vulnerability; the conduct
 involved repeated actions or was an isolated
 incident; and the harm was the result of
 intentional malice, trickery, or deceit, or mere
 accident.

14 State Farm, 538 U.S. at 419. Kelly argues Noyes presented no evidence
 15 on any of these factors.⁶ (Mot. at 16:19-25.)

16 I. Physical Versus Economic Harm

17 Noyes argues "the intentional discrimination [she]
 18 experienced . . . represents more than pure monetary harm, especially
 19

20 ⁶ Kelly also argues in its Reply that the Court "apparently
 21 determined that there were, in fact, legitimate reasons for not
 22 promoting Ms. Noyes - otherwise the Court could not have given a mixed
 23 motive instruction. Where - as here - legitimate factors were at play,
 24 reprehensibility is - at best - negligible or mitigated as a matter of
 25 law." (Reply at 15:6-12 (citation omitted).) A mixed motive
 26 instruction, however, only required a finding that the evidence *could*
 27 *reasonably support* the conclusion that there was a legitimate reason for
 28 the action. Costa, 299 F.3d at 857-59. In addition, the cases on which
 Kelly relies do not support its argument since their holdings relied on
 the finding that no evidence of malice was presented. See, e.g. Deneud
v. Nw. Airlines, Inc., 132 F.3d 431, 439 (8th Cir. 1998) ("[T]here is no
 evidence of malice or reckless indifference. Accordingly, the district
 court did not err by striking the jury award of punitive damages.")
 Here, there was substantial evidence to support a finding that Heinz
 acted with malice and his actions were approved by Ramsey.

1 since the jury awarded [her] \$500,000 for non-economic damages for her
2 emotional distress." (Opp'n at 23:8-12.) Kelly rejoins "the jury
3 awarded Ms. Noyes \$500,000 for emotional distress, despite the fact
4 that Ms. Noyes presented no evidence of emotional distress other than
5 her testimony that 'she got a prescription for Xanax a few times' and
6 felt depressed and anxious." (Reply at 17:16-20 (citing Opp'n at
7 23:13-20).)

8 Here, "[t]he harm arose from a transaction in the economic
9 realm, . . . there were no physical injuries" State Farm, 538
10 U.S. at 426. However, "intentional discrimination [is] 'more
11 reprehensible than would appear in a case involving economic harms
12 only[.]'" Zhang v. Am. Gem Seafoods, Inc., 339 F.3d 1020, 1043 (9th
13 Cir. 2003). Accordingly, this factor weights somewhat in Noyes's
14 favor.

15 ii. Reckless Disregard of the Health or Safety of Others

16 Noyes concedes "'[h]ealth and safety' is not strongly
17 implicated here other than Kelly's causing Ms. Noyes significant
18 emotional distress" (Opp'n at 23:25-27.) Noyes has not shown
19 that a risk of emotional distress shows a reckless disregard of the
20 health or safety of others. Accordingly, this factor weighs against
21 finding Kelly's conduct reprehensible.

22 iii. Financially Vulnerable Target

23 Noyes contends this factor weighs in favor of the
24 reprehensibility finding, relying on Planned Parenthood of the
25 Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 422 F.3d
26 949, 958 (9th Cir. 2005), and arguing she "is an employee, who, during
27 her employment, depended on Kelly for her income. While she was not
28 particularly 'vulnerable' . . . the financial disparity between the

1 two parties could hardly have been greater.” (Opp’n at 24:11-13.)

2 However, while the jury could have reasonably found that
3 Noyes was passed over for a promotion because she was not a member of
4 the Fellowship, Noyes still had a secure position at Kelly that
5 supported her livelihood, and thus she was not a particularly
6 financially vulnerable target. See Planned Parenthood, 422 F.3d at
7 958 (holding physicians were financially vulnerable “because their
8 livelihoods depended upon their [medical] practices,” which were
9 threatened by defendants). Nonetheless, “this subfactor militates in
10 favor of [finding] a modest degree of reprehensibility” since Noyes
11 relied on her job with Kelly for her livelihood and was found to have
12 been prevented from receiving a promotion because of Kelly’s conduct
13 involved with the discriminatory promotion of a Fellowship member.
14 Gober v. Ralphs Grocery Co., 137 Cal. App. 4th 204, 220 (2006)
15 (finding modest reprehensibility “where the victims [of sexual
16 harassment] were a group of grocery store employees that relied on
17 their jobs with [defendant] for their livelihoods”). In this sense,
18 Kelly allowed its wealth to be wielded in a manner bearing some
19 relation to the harm Noyes sustained. State Farm, 538 U.S. at 427.

20 iv. Repeated Actions or Isolated Incident

21 Noyes argues the evidence established

22 a pattern and practice of discriminatory conduct
23 in favor of Fellowship members. Stand-outs who
24 benefitted from such discriminatory treatment in
25 terms of hiring, promotions and salaries included
26 Fellowship members Mario Fantoni, Gilbert Moore
27 and Andrew Vernon. All of the discriminatory
28 conduct was similar, all of it took place in
 Nevada City, all of it was orchestrated by . . .
 Heinz, and all of it was authorized or ratified by
 Kelly Corporate representatives.

(Opp’n at 25:2-13 (citing Trial Tr., 121:17-25, 122:1-25, 123:9-11,

1 Mar. 26, 2008 (testimony of Maya Bohnhoff); Trial Tr., 41:16, Mar. 27,
2 2008 (testimony of Steve Wehrmann).)

3 Noyes presented substantial evidence that Kelly had been
4 aware of, and investigated, complaints of Heinz's favoritism towards
5 Fellowship members before April 2001, which led to, at least
6 officially, Kelly's limitation on Heinz's ability to hire high-level
7 management positions. (See, e.g., Trial Tr., Apr. 3, 2008 (testimony
8 of Nina Ramsey); Trial Tr., 41:5-17, Mar. 27, 2008 (testimony of Steve
9 Wehrmann).) Evidence was also presented that Heinz's favoritism
10 likely harmed Noyes on two occasions before 2001 when management
11 positions were given to other Fellowship members instead of Noyes.
12 (Trial Tr. 104:9-113:22, 119:21-24, Mar. 25, 2008 (Noyes Testimony).)
13 Thus, Kelly's conduct harming Noyes was not an isolated incident, and
14 this factor weighs in favor of finding Kelly's conduct reprehensible.

15 v. Intentional Malice or Mere Accident.

16 Kelly argues "there was, in fact, no trickery or deceit, and
17 Kelly acted in good faith" given the DFEH determination that there was
18 insufficient evidence to establish that any discrimination occurred
19 and Darrah Bixler's decision to investigate "whether there had been
20 discrimination in the Nevada City office." (Mot. at 17:1-10.) Noyes
21 argues "[a]s stated in the Special Verdict, the jury found that Kelly
22 engaged in prohibited conduct with 'oppression, malice, or fraud.'" (Opp'n at 25:27-26:2.)

24 Substantial evidence supports the jury's finding that Heinz
25 acted with oppression, malice or fraud and that a managing agent of
26 Kelly, Ramsey, knew of and ratified that conduct. While the record
27 does not shown that Ramsey herself discriminated against Noyes or
28 directed Heinz to do so, evidence exists that she knew Heinz was

1 discriminating against Noyes based on religion and she turned a blind
2 eye. Kelly's closing arguments and trial testimony indicate that
3 deceitfulness was afoot. During closing argument, Kelly's counsel
4 argued about the position to which Noyes failed to get promoted:

5 You could determine that there really wasn't even
6 a promotion to begin with. Remember what Joep
7 Jilesen said? He didn't think he was promoted.
8 He did the same thing that he was doing, he didn't
9 get a new title, he continued to do the exact same
10 stuff that he was doing before. Remember what Mr.
11 Heinz said? He didn't think there was a promotion
12 either. Joep didn't come to the managers
13 meetings, he wasn't doing performance reviews, he
14 wasn't setting people's compensation with HR,
15 anything like that.

16 (Trial Tr., 139:7-16, Apr. 3, 2008 (closing argument by Mr.
17 Connaughton).) Noyes's counsel countered:

18 the idea that this was not a management job has to
19 be considered with Darrah Bixler's testimony, and
20 others who have said, yes, it was a manager job,
21 someone had to manage the author/developers. That
22 ended up something that Joep did, and he ended up
23 getting a raise for that job. . . . [T]he job
24 didn't evaporate, there still needed to be a
25 manager, and it should have been Ms. Noyes.

26 (Trial Tr. 154:19-155:3, Apr. 3, 2008 (Rebuttal Argument by Ms.
27 Jones).) In other words, Kelly's counsel argued that Joep Jilesen was
28 not promoted when there was sufficient evidence for the jury to find
that indeed he was promoted. This argument, and the evidence relied
on for support thereof, indicates Kelly was being deceitful by trying
to hide the promotion. Accordingly, this factor weighs in favor of
finding Kelly's conduct reprehensible.

 In sum, viewing the factors as a whole indicates that
Kelly's conduct displayed a modest degree of reprehensibility.

B. Ratio of Punitive to Compensatory Damages

Kelly argues "[b]ecause the jury awarded Ms. Noyes such a

1 substantial sum [in compensatory damages], the \$5.9 million dollar
2 punitive damages award violates the Due Process Clause of the
3 Fourteenth Amendment as it reflects a multiplier of approximately 40.
4 Such a ratio . . . is plainly unconstitutional.” (Mot. at 17:22-18:2
5 (emphasis omitted).) Noyes counters that in cases of racial
6 discrimination the Ninth Circuit has held that a 9 to 1 ratio is
7 constitutional. (Opp’n at 29:2-22, 31:12-17 (citing Bains LLC v. Arco
8 Prods. Co., 405 F.3d 764, 776-77 (9th Cir. 2005); Swinton v. Potomac
9 Corp., 270 F.3d 794, 819 (9th Cir. 2001); Zhang, 339 F.3d at 1044.)

10 Kelly’s asserted 40 to 1 ratio was computed by excluding the
11 emotional distress damages component of Noyes’s award. Kelly cites no
12 authority supporting this exclusion. Contrary to Kelly’s position,
13 emotional distress damages are included in calculating the ratio of
14 punitive to compensatory damages. See, e.g., State Farm, 538 U.S. at
15 426; Pavon v. Swift Transp. Co. Inc., 192 F.3d 902, 909-10 (9th Cir.
16 1999). Accordingly, the appropriate ratio to examine is a ratio of
17 9.1 to 1.

18 The Supreme Court held in State Farm “few awards exceeding a
19 single-digit ratio between punitive and compensatory damages, to a
20 significant degree, will satisfy due process. . . . When compensatory
21 damages are substantial, . . . a lesser ratio, perhaps only equal to
22 compensatory damages, can reach the outermost limit of the due process
23 guarantee.” State Farm, 538 U.S. at 425. In Planned Parenthood, the
24 Ninth Circuit held

25 [i]n cases where there are significant economic
26 damages and punitive damages are warranted but
27 behavior is not particularly egregious, a ratio of
28 up to 4 to 1 serves as a good proxy for the limits
of constitutionality. In cases with significant
economic damages and more egregious behavior, a
single-digit ratio greater than 4 to 1 might be
constitutional.

1 Planned Parenthood, 422 F.3d at 962 (citing first State Farm, 538 U.S.
2 at 425, citing second, Zhang, 339 F.3d at 1043-44 & Bains, 405 F.3d at
3 776-77.)

4 Here, Noyes was awarded significant compensatory damages in
5 the amount of \$647,174. In addition, while Kelly's behavior was
6 sufficiently reprehensible to warrant punitive damages, it was not
7 highly egregious. Finally, \$500,000 of Noyes's compensatory damages
8 award is in emotional distress damages. The Supreme Court stated in
9 State Farm that emotional distress compensatory damages

10 likely [are] based on a component which [is]
11 duplicated in the punitive award. Much of the
12 distress was caused by the outrage and humiliation
13 the [plaintiffs] suffered at the actions of [the
14 defendant]; and it is a major role of punitive
15 damages to condemn such conduct. Compensatory
16 damages, however, already contain this punitive
17 element.

18 State Farm, 538 U.S. at 426. Accordingly, a ratio of 1 to 1 is the
19 constitutional limit in this case. See id. at 429 ("An application of
20 the . . . guideposts to the facts of this case, especially in light of
21 the substantial compensatory damages awarded (a portion of which
22 contained a punitive element), likely would justify a punitive damages
23 award at or near the amount of compensatory damages.").

24 C. Civil Penalties Authorized in Comparable Cases

25 Limiting the ratio of punitive to compensatory damages to 1
26 to 1 is further supported by the penalties authorized in Noyes's Title
27 VII claim.⁷ See Astor v. Rent-A-Center, Inc., 2007 WL 184741, at *18-
28 19 (Cal. App., 2007) (considering Title VII punitive damages cap when

27 ⁷ In its Motion, Kelly concluded the third guidepost is
28 inapplicable. (Mot. at 16 n.7.) However, at oral argument Kelly argued
that the Title VII punitive damage limit suggested damages awarded are
unconstitutionally excessive.

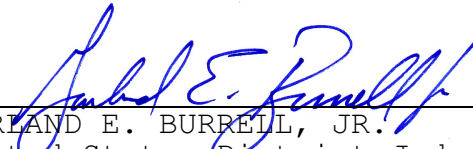
1 analyzing third guidepost in FEHA case). "Congress . . . imposed a
2 \$300,000 punitive damage cap for violations of Title VII"
3 Zhang, 339 F.3d at 1045; 42 U.S.C. § 1981a(b) (3) (D). Here, the \$5.9
4 million punitive damages award dwarfs the Title VII cap and the 1 to 1
5 ratio is more than double it.

6 CONCLUSION

7 For the reasons stated, the punitive damage award is reduced
8 to an amount equal to the compensatory damages: \$647,174. See
9 Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320, 1331 (11th Cir.
10 1999) ("[U]pon determination of the constitutional limit on a
11 particular award, the district court may enter a judgment for that
12 amount as a matter of law."); Leatherman Tool Group, Inc. v. Cooper
13 Indus., Inc., 285 F.3d 1146, 1151 (9th Cir. 2002) ("[W]e see no reason
14 to disagree with the Eleventh Circuit's opinion in Johansen, that an
15 appellate court need not remand for a new trial in every case in which
16 it finds that a punitive damages award exceeds the constitutional
17 maximum." (citation omitted)). Accordingly, the Clerk of the Court
18 shall enter judgment in favor of Plaintiff for a total of \$1,294,348.
19 The remainder of Defendant's motion for judgment as a matter of law
20 and new trial is denied.

21 IT IS SO ORDERED.

22 Dated: July 25, 2008

23
24 
25 _____
26 GARLAND E. BURRELL, JR.
27 United States District Judge
28