UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JENNIFER STRANGE and MAGAN MORRIS,

Plaintiffs,

v.

LES SCHWAB TIRE CENTERS OF WASHINGTON, INC., et al.,

Defendants.

CASE NO. C06-0045RSM

ORDER

This matter comes before the Court for consideration of defendants' Rule 59(a) motion for a new trial or, in the alternative, remittitur of the punitive damage award. Dkt. # 359. Defendants contend that a new trial is warranted because the jury verdict on plaintiffs' retaliation claims is contrary to the clear weight of the evidence, and counsel's closing argument was improper. In the alternative, defendants move for remittitur of the punitive damages award. Plaintiffs have opposed the motion in all respects. The Court has fully considered the parties' memoranda and exhibits, and shall deny the motion for the reasons set forth below.

I. Motion for a New Trial

Plaintiffs' federal and state law claims of employment discrimination and retaliation were tried

to a jury in November, 2009. The trial began November 2, 2009, and the jury was instructed and began deliberations on November 6, 2009. On November 9, 2009, the jury returned a verdict in favor of both plaintiffs on their retaliation claims, but not on their discrimination and constructive discharge claims. Dkt. # 354. Each plaintiff was awarded $42,600 in damages for emotional distress, and $100,000 in punitive damages in connection with her federal claim of retaliation. *Id*. Defendants timely filed this motion for new trial or remittitur of punitive damages.

a. Legal Standard

Rule 59(a) states, "A new trial may be granted ... in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed.R.Civ.P. 59(a)(1). The burden of proof on a motion for a new trial is on the moving party, and the Court should not lightly disturb a plausible jury verdict.

Although Rule 59 does not specify the grounds on which a motion for a new trial may be granted, this Court is "bound by those grounds that have been historically recognized." *Zhang v. American Gem Seafoods, Inc*., 339 F.3d 1020, 1035 (9th Cir. 2003). Historically recognized grounds include, but are not limited to, claims "that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving." *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940). In the Ninth Circuit, "[t]he trial court may grant a new trial only if the verdict is contrary to the clear weight of the evidence, is based upon false or perjurious evidence, or to prevent a miscarriage of justice." *Passantino v. Johnson & Johnson Consumer Prods*., 212 F.3d 493, 510 n. 15 (9th Cir.2000).

Upon the Rule 59 motion of the party against whom a verdict has been returned, the district court has "the duty ... to weigh the evidence as [the court] saw it, and to set aside the verdict of the jury, even though supported by substantial evidence, where, in [the court's] conscientious opinion, the verdict is contrary to the clear weight of the evidence." *Molski v. M.J. Cable, Inc*., 481 F. 3d 724, 729 (9th Cir. 2007); *citing Murphy v. City of Long Beach*, 914 F.2d 183, 187 (9th Cir.1990) *(quoting Moist Cold Refrigerator Co. v. Lou Johnson Co.*, 249 F.2d 246, 256 (9th Cir.1957)). "The judge can weigh the evidence and assess the credibility of witnesses, and need not view the evidence from the perspective

most favorable to the prevailing party" in ruling on a motion for a new trial. *Landes Const. Co., Inc. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir.1987). However, it is an abuse of discretion to order a new trial if the jury's verdict is not "clearly contrary to the weight of the evidence." *Roy v. Volkswagen of America, Inc*., 896 F.2d 1174, 1176 (9th Cir.1990) *as amended*, 920 F.2d 618, 619; *cert. denied*, 500 U.S. 928 (1991) (citing *McGhee v. Arabian American Oil Co*., 871 F. 2d 1412, 1420 (9th Cir. 1989) (quoting *William Inglis & Sons v. ITT Continental Baking Co*., 668 F. 2d 1014, 1027 (9th Cir. 1981)).

b. Analysis

1 Motion Regarding Retaliation Claims

In moving for a new trial, defendants assert that the jury's verdict on the retaliation claims was not supported by the weight of the evidence as to either plaintiff. As to plaintiff Magen Morris' testimony that workplace went "from friendly to cold" after she filed her claim of discrimination with the Equal Employment Opportunity Commission ("EEOC"), defendants argue, "Morris did not identify anyone other than her manager, Doug Mowbray, who treated her differently, and **he** testified that after Morris filed her initial charge, things 'stayed about the same.'" Defendants' Motion, Dkt. # 359, p. 4 (emphasis added). This argument disregards Ms. Morris' testimony that after she filed the charge, she was "basically no longer talked to," she was "avoided," and "things just were different. Doug didn't talk to me anymore. And before, you know, they were my friends." Declaration of Warren Martin, Dkt. # 372, p. 43 (Trial Transcript ("Tr."), p. 315). The jury, in hearing this conflicting testimony, had the opportunity to observe the witnesses' demeanor and consider all the related testimony, and decide who was the more credible witness—Mr. Mowbray or Ms. Morris. The Court, in weighing the evidence and assessing the credibility of the witnesses, finds no basis for questioning the jury's choice to believe Ms. Morris' testimony.

Defendants also contend that Mr. Mowbray's handling of an offensive remark by employee Justin Babitsky was proper and not an example of retaliation. According to defendants, in calling Ms. Morris in to the office to witness the reprimands and hear an apology, Mr. Mowbray "did exactly what Morris wanted done and then went even further in resolving the matter." Defendant's Motion, Dkt. #

359, p. 5. Defendants' argument completely misses the point that Ms. Morris, as she testified, felt embarrassed and humiliated by being made to repeat the offensive comment in front of the men---a point that clearly was not lost on the jury. Tr. 322. Defendants point out that Mr. Mowbray denied that he made her recite the offensive comment in front of "a group of people." Tr. 428. Again, the jury drew its own conclusions about the two witnesses' statements about this incident and their relative credibility; a conclusion with which the Court agrees.

Defendants' related argument that this incident does not support liability because the comment was a "stray remark" unrelated to Ms. Morris' EEOC charge, is misplaced. It was Mr. Mowbray's handling of the incident, not the comment itself, that constituted the retaliatory conduct.

As to Jennifer Strange, defendants contend that the events and actions which she considered retaliatory amounted to nothing more than petty slights and minor annoyances, and some incidents were uncorroborated by other witnesses. Further, Ms. Strange's manager, Mark Witham, testified that he never saw or heard of the events which Ms. Strange described.

> Q [To Mr. Witham]: After Ms. Strange filed her charge, did managers come over to your store and laugh and make jokes about her?
>
> A: No.
>
> Q: Did you ever see your crew laughing or making jokes?
>
> A: No.

Tr. 411.

Defendants' summary of the evidence minimizes the weight of Ms. Strange's testimony about retaliation, and omits any mention of two significant events to which she testified. One was when she left work in tears, and Mr. Witham followed her out, "running alongside of me telling me, 'Say the words. Say the words. Tell me what you're doing. . . '" Tr. 224. Ms Strange testified that he was "trying to get me to say that I quit." *Id*. The second omitted incident occurred just prior to this, when, as Ms. Strange testified, Mr. Within informed her that he had hired another employee to do her work, and she would be doing cleaning. *Id.* Ms. Strange's testimony on these two incidents was credible and clearly supported the jury's verdict on her retaliation claim.

Defendants have also omitted mention of Ms. Strange's testimony about being called names by her co-workers after she filed her EEOC charge, apparently including these comments in the remarks of which Mr. Withham denied knowledge, as set forth above. However, Ms. Strange testified that

> I understand that people out in the tire bays were curious as to what was going on, and I don't know what they were hearing from Mark or Jeff, but I'd walk by and, under their breath or in a cough, they'd call me a bitch, they'd call me a whore. It was nonstop as soon as I got near anybody there.

Tr. 216. In light of this testimony, the other name-calling incidents which defendants do address—including the name-calling by Mr. Witham's wife—cannot be seen in isolation as mere "petty slights" as defendants suggest. Nor does Ms. Strange's testimony require corroboration before it can be accepted as true. The Court found her testimony on these events entirely credible, and apparently the jury did as well.

In their reply memorandum, defendants asset that

> Strange also harps on the event that gave rise to her failed constructive discharge claim (which, again, occurred months after her initial charge). The jury rejected that claim, and the Court can compare Strange's testimony about supposedly being told she would be the store's janitor with her store manager's and assistant manager's very different account of that meeting. This does not support the verdict on Strange's retaliation claim.

Defendants' Reply, Dkt. # 380, p. 5. This argument, in addition to indicating a somewhat dismissive attitude toward Ms. Strange, also demonstrates defendants' failure to recognize that the jury must have resolved the conflict in the testimony about the "janitor incident" by finding Ms. Strange a more credible witness than her managers. In independently assessing the witnesses' credibility for the purpose of this motion, the Court would agree with the jury. The testimony of Mark Witham, Ms. Strange's manager, was notable in particular for his repeated blanket denials of Ms. Strange's testimony, denials which in light of the totality of the testimony in this case were not entirely credible. *See, e.g.* Dkt. # 360-2 p. 39, 41- 43 (Tr. 406, 411-13).

Having viewed the evidence of retaliation as the Court itself saw it, the Court cannot find that the jury's verdict was at all "contrary to the weight of the evidence." *Roy v. Volkswagen of America, Inc.*, 896 F.2d at 1176. Defendants' motion for a new trial on this basis is accordingly DENIED. .

2. Motion to Reverse Punitive Damage Award

Defendants contend that even if there were sufficient evidence to support the jury's verdict on the retaliation claims, the punitive damage award is contrary to the weight of the evidence. Defendants assert that the evidence shows that defendants maintained policies prohibiting discrimination in the workplace, and that therefore they are entitled to assert a *Kolstad* defense. In *Kolstad*, the Supreme Court held that punitive damages may be awarded in a Title VII case only when a defendant engages in intentional discrimination "with malice or with reckless indifference to the [plaintiff's] federally protected rights." *Kolstad v. American Dental Association*, 527 U.S. 526, 535 (1999). Further, "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where those decisions are contrary to the employer's 'good faith efforts to comply with Title VII.' " *Id*. at 545. Defendants assert that under *Kolstad*, "[p]unitive damages cannot be awarded where an employer has adopted anti-discrimination policies and made good faith efforts to educate its employees and enforce its policies." Defendants' Motion, Dkt. # 359, p. 8, citing *E.E.O.C. v. Univ. of Phoenix, Inc.*, 505 F. Supp. 2d 1045, 1059 (D.N.M. 2007). Defendants contend that "this remains true even where managers are accused of the acts giving rise to the claim." *Id*., citing *E.E.O.C. v. Caterpillar Inc.*, 503 F. Supp. 2d 995, 1047-48 (N.D. Ill. 2007).

Under *Kolstad*, defendants "may now establish an affirmative defense to punitive damages liability when they have a bona fide policy against discrimination, regardless of whether or not the prohibited activity engaged in by their managerial employees involved a tangible employment action." *Passantino v. Johnson & Johnson Consumer Products*, 212 F. 3d 493, 516 (9th Cir. 2000). However, defendants did not plead this as an affirmative defense; their only defense asserted to the punitive damages is that they are barred under Washington law. Answer to Second Amended Complaint, Dkt. # 120, p. 6 ¶ 11; Pretrial Order, Dkt. # 236, p. 3. As a general rule, the omission of an affirmative defense from the responsive pleading constitutes a waiver of that affirmative defense. *Metcalf v. Golden* (*In re Adbox, Inc*.), 488 F.3d 836, 841 (9th Cir.2007). However, the Ninth Circuit has adopted a liberalized reading of this rule and holds that "[i]n the absence of a showing of prejudice, an affirmative defense may be raised for the first time at summary judgment." *Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th

Cir.1993) (citing *Rivera v. Anaya*, 726 F.2d 564, 566 (9th Cir.1984)). Defendants did raise *Kolsted* in a motion for partial summary judgment on the EEOC's punitive damages claim, but did not similarly raise it with respect to the individual plaintiffs' claims. Dkt. # 154. Nevertheless, for the purposes of this analysis, the Court will deem the *Kolstad* defense properly raised, and address it on the merits.

Defendants have cited only out-of circuit district court decisions for the assertion that punitive damages "cannot be awarded" where the employer has anti-discrimination policies in place; authority which does not bind this Court. A better statement of the rule in the Ninth Circuit is this:

> [I]t is well established that it is insufficient for an employer simply to have in place anti-harassment policies; it must also implement them." *See*, *Passantino v. Johnson & Johnson Consumer Products., Inc*., 212 F.3d 493, 517 (9th Cir. 2000); and *Lowery v. Circuit City Stores*, 206 F.3d 431, 446 (4th Cir.2000) ("While an employer's institution of a written policy against race discrimination may go a long way toward dispelling any claim about the employer's reckless or malicious state of mind with respect to racial minorities, such a policy is not automatically a bar to the imposition of punitive damages.") (citation omitted).

Swinton v. Potomac Corp., 270 F. 3d 794, 810-11 (9th Cir. 2001). Not only must the employer show it has an anti-discrimination policy, but that it has implemented the policy in good faith. *Passantino*, 212 F.3d at 517. The purpose of Title VII would be "undermined if those policies were not implemented and were allowed instead to serve only as a device to allow employers to escape punitive damages for the discriminatory activities of managerial employees." *Id*. Thus, the sincerity and effectiveness of the implementation of the anti-discrimination policy raise questions of fact for the jury.

The jury here was instructed, under *Kolstad*, that

> You may award punitive damages only if you find that the defendant's conduct that harmed the plaintiff was malicious, oppressive or in reckless disregard of the plaintiff's rights. Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring the plaintiff. Conduct is in reckless disregard of the plaintiff's rights if, under the circumstances, it reflects complete indifference to the plaintiff's safety or rights, or if the defendant acts in the face of a perceived risk that its actions will violate the plaintiff's rights under federal law. An act or omission is oppressive if the defendant injures or damages or otherwise violates the rights of the plaintiff with unnecessary harshness or severity, such as by the misuse or abuse of authority or power or by the taking advantage of some weakness or disability or misfortune of the plaintiff.

Court's Instructions to the Jury, Dkt. # 352, Instruction No. 24. This is the language from the Ninth Circuit Pattern Jury Instructions, Civil Instruction No. 5.5, exactly as it was requested by defendants. Joint Statement of Disputed Instructions, Dkt. # 341, p. 28-29. By requesting this instruction,

defendants agreed to put the question of Les Schwab's good faith effort to implement an anti-retaliation policy before the jury.

Had defendants raised *Kolstad* as an affirmative defense, they would have had the burden of proving that they had "an adequate anti-retaliation policy that was implemented in good faith." *Winarto v. Toshiba America Electronics Components, Inc.*, 274 F. 3d 1276, 1291 (9th Cir. 2001); citing *Passantino*, 212 F. 3d at 516-17. Instead, under the instruction requested by defendants and given by the Court, plaintiffs had the burden of proving that they were entitled to punitive damages because defendants' harmful conduct was "malicious, oppressive or in reckless disregard of the plaintiff's rights." Instruction No. 24. Nevertheless, the jury determined that plaintiffs met this burden with their testimony that after they filed charges with the EEOC, each one was subjected to belittlement, avoidance, changed schedules, reprimands, and demotion by her supervisor. Although the managers denied this, the jury was in the best position to view the conflicting testimony in light of witnesses' demeanor, and evaluate their credibility. As noted above, the Court, in making its own assessment of the witnesses' credibility as required, finds, as did the jury, that plaintiffs were the more credible witnesses. *Landes Const. Co., Inc. v. Royal Bank of Canada*, 833 F.2d at 1371. The Court therefore does not find that the jury's award of punitive damages was contrary to the clear weight of the evidence.

3. Improper Closing Argument

Defendants also move for a new trial on the basis that plaintiffs' closing argument was improper in several respects. First, defendants assert that in urging the jury, near the end of closing, to "do justice," counsel made "a bald appeal to the passion of the jury." Defendants' Motion, Dkt. # 359, p. 11. The argument to which defendants object was the following:

> When considering how to do justice in this case, do it in a way when you leave this courtroom, you look at your spouse or you look at your significant other, and you say, "I did justice." Do it in a way that if you see Magen Morris or Jennifer Strange on the street two years from now, you can look them in the eye and you can say, "I was on your jury and I did what was right." When you're thinking---

Dkt. # 360-4, p. 13 (Closing Argument, Tr. 63). At this point defendants objected, and the objection was sustained. *Id*. Counsel for plaintiffs then quickly finished his argument: "You've seen the evidence, you understand what the process is, you've heard arguments, now the case is yours. Do

what's right. Thank you." *Id*. Defendants contend that this argument was inflammatory because "it was the last thing the jury heard before deliberating." Defendant's Motion, Dkt. # 359, p. 11.

A new trial on the basis of improper closing argument should only be granted where the "flavor of misconduct" "sufficiently permeate[s] an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict." *Settlegoode v. Portland Public Schools*, 371 F. 3d 503, 516 (9th Cir. 2004); quoting *Kehr v. Smith Barney*, 736 F. 2d 1283, 1286 (9th Cir. 1984) (quoting *Standard Oil of California v. Perkins*, 347 F. 2d 379, 388 (9th Cir. 1965). Where the moving party failed to object to the alleged improper argument at trial, an even higher threshold applies. *Id*.

Here, defendants did object to counsel's suggestion that the jurors "do justice" so that they could look plaintiffs in the eye if they saw them on the street later. However, this argument did not rise to the level of passion and prejudice required to warrant a new trial. In this Court's experience it was well within the bounds of propriety. As the Ninth Circuit Court of Appeals has observed, "[u]sing some degree of emotionally charged language during closing argument in a civil case is a well-accepted tactic in American courtrooms. " *Id*. at 518.

Defendants also contend that counsel improperly vouched for plaintiffs' credibility when he stated, "It's difficult for me to be able to convey the harm that I know has been incurred in this situation" and "As far as the emotional distress . . . I know from working with these individuals how much this whole thing has hurt them, and that is huge." Dkt. # 360-4, p. 2, 9 (Closing Argument, Tr. 9, 29). Defendants ask that these statements be compared to a statement that a Michigan appellate court found worthy of reversal, namely "if there was one ounce of fake in that man, I wouldn't be here representing him." Defendants' Motion, Dkt. # 359, p. 11, quoting *Shemman v. Am. S. S. Co*, 280 N.W. 2d 852 (Mich. App. 1979). Defendants also contend that statements such as counsel made are forbidden by the Rules of Professional Conduct, which state that a lawyer shall not "assert personal knowledge of facts in issue . . . or state a personal opinion as to the justice of a cause [or] the credibility of a witness." RPC 3.4(c).

Neither statement here comes close to matching the "one ounce of fake" statement for impropriety. Indeed, when they are viewed in context—as the jury actually heard them—they do not

appear at all improper. The full first statement was made near the beginning of closing argument:

> It's times like this that, at least my adequacy as an attorney, it's difficult for me to be able to convey the harm that I know has been incurred in this situation. This is a circumstance that should never have happened.
>
> It's been 40 years since the Civil Rights Act of 1964 was passed, and the type of discrimination and retaliation that was set forth in this trial should have long been disposed of in our society.

Dkt. # 360-4, p. 2 (Closing Argument, Tr. 9). Nowhere in this brief statement does counsel assert personal knowledge of facts in issue; he is if anything expressing frustration at his own inadequacy in summarizing the case for the jury.

The second statement to which defendants object occurred in the context of assessing damages:

> [You take] Robert Moss's numbers that he determined for Jennifer Strange and you take the numbers regarding Magen Morris, and you consider a valid point raised by the defense, which is what is the probably [sic] of them achieving these positions, and you figure out what that percentage is, and you apply that number against that percentage.
>
> As far as the emotional distress, it's difficult to tell you what that number would be, but I know from working with these individuals how much this whole thing has hurt them, and that is huge. So I think the number that you assess for emotional distress should be somewhat equivalent to the economic loss that you apply.

Id., p. 9 (Closing Argument, Tr. 29). The Court does not view this statement, taken in context, as vouching for the witnesses' credibility.

Defendants also contend that "counsel argued improperly by suggesting that Les Schwab's very act of defending itself was in bad faith." Defendant's Motion, Dkt. # 359, p. 12. Again, defendants have taken isolated sections of the closing argument out of context in order to make them appear to be improper. The first challenged statement, in which counsel characterized his clients as "lambs," appeared within the argument on damages; counsel referred in the same sentence to the fact that the two plaintiffs had to endure "delving through medical records" and hearing mention of an affair one of them had with her supervisor at a young age. Dkt. # 360-4, p. 10 (Closing Argument, Tr. 30). This description of how difficult the case was for the plaintiffs to bring did not characterize defendants as acting in bad faith.

In the second challenged statement, counsel argued,

> And considering how much money and effort was spent to discredit, pick apart, and call liars of these two women, was this a company that, if they had gone to them, would have

embraced them?

Id., p. 8 (Closing Argument, Tr. 22). Counsel did not say this in the context of arguing on damages or defendants' culpability; he was explaining at that point why the plaintiffs did not take their complaints regarding their treatment higher in the company than their own managers. In the sentences immediately preceding, counsel asked the jury to consider,

> Is Jodie Hueske wearing a legal hat for the department really the employees' advocate? Is that where they should have gone? Would they have gotten a fair shake?

Id. Seen in context, this statement was not an invitation to the jury to view defendants' "very act of defending itself" as evidence of bad faith.

Finally, defendants argue that counsel "made confusing and improper references to irrelevant theories of liability and acts not in evidence." Defendants' Motion, Dkt. # 359, p. 12. Defendants did not object at the time to any of the statements they now challenge. In the absence of a contemporaneous objection, defendants must now demonstrate "plain or fundamental error." *Settlegoode*, 371 F. 3d at 517. The Court, having reviewed the challenged statements in context of the closing argument, as the jury heard it, finds no plain or fundamental error in any of them, and no basis for ordering a new trial.

II. Remittitur of the Punitive Damage Awards

Defendants contend that, in the event the Court declines to order a new trial, it should find that the amount of punitive damages awarded was excessive. If the Court concludes that a damages award is excessive, it may either grant the defendant's motion for a new trial, or deny the motion, conditioned upon the prevailing party's acceptance of a remittitur. *Silver Sage Partners, Ltd., v. City of Desert Hot Springs*, 251 F.3d 814, 818 (2001).

Remittitur is a remedy available to correct excessive verdicts. *Pershing Park Villas Homeowners Assoc. v. United Pac. Ins. Co.*, 219 F.3d 895, 905 (9th Cir.2000). A trial court reviewing a damages award attacked as excessive must consider the evidence of damages in a light most favorable to the prevailing party. *Seymour v. Summa Vista Cinema, Inc*., 809 F.2d 1385, 1387 (9th Cir.1987), *amended on other grounds by*, 817 F.2d 609 (9th Cir.1987). A trial court granting a motion for remittitur does not substitute its judgment for that of the jury, but instead reduces the judgment to the maximum amount

sustainable by the proof. *D & S Redi-Mix v. Sierra Redi-Mix & Contracting Co.*, 692 F.2d 1245, 1249 (9th Cir.1982) (citations omitted).

Due Process "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). No "simple mathematical formula" exists in this area. *BMW of N. America., Inc. v. Gore*, 517 U.S. 559, 582 (1996) ("*Gore*"). Nevertheless, the Court has pointed to three guideposts: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *State Farm*, 538 U.S. at 418, citing *Gore*, 517 U.S. at 575. In considering these factors, the goal is to determine whether the punitive damages achieved their ultimate objectives of deterrence and punishment, without being unreasonable or disproportionate. *See Exxon Shipping Co. v. Baker*, --- U.S. ----, 128 S.Ct. 2605, 2621 (2008); *State Farm*, 538 U.S. at 419, 426.

"[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *State Farm Mutual Auto. Ins. Co.*, 538 U.S. at 419 (quoting *Gore*, 517 U.S. at 575). To determine reprehensibility, the Court should consider whether the following aggravating factors are present: "(1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Id*.

Four of the factors enumerated are present. The harm to plaintiffs was physical (emotional distress and resulting symptoms); the targets of the tortious conduct were financially vulnerable; the conduct involved repeated actions by the managers and assistant managers; and, the harm was the result of intentional malice. This last determination is based on the instruction given the jury, that in order to award punitive damages, they must find that defendants' conduct was malicious, oppressive or in reckless disregard of the plaintiff's rights.

Turning to the second *Gore* factor, the ratio between compensatory and punitive damages awarded, the Court finds that the approximate 2-to-1 ratio between punitive and compensatory damages is reasonable, and well within the bounds of due process. As the Supreme Court has noted, there is no "bright line" rule, but single-digit multipliers are generally within an acceptable range.

> Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Haslip*,[1] in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. We cited that 4-to-1 ratio again in *Gore*. The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, or, in this case, of 145 to 1.

State Farm Mutual Auto. Ins. Co., 538 U.S. at 426 (internal citations omitted).

In considering the third *Gore* factor, the Court finds that the punitive damage award of $100,000 to each plaintiff is compatible with civil penalties authorized or imposed in comparable cases. For example, in a Ninth Circuit case involving race discrimination, in which the jury awarded $35,000 in compensatory damages and $1,000,000 in punitive damages, the court noted that it was the type of case described by the Supreme Court in *Gore:* a low award of compensatory damages supporting a higher ratio of punitive damages because of the egregious conduct and the difficulty of quantifying harm. *Swinton v. Potomac Corp.*, 270 F.3d 794, 818 (9th Cir.2001). This was particularly true because the injury was primarily personal. *Id*. In the same case, the Ninth Circuit held that a defendant's wealth could be a factor in assessing the ratio. *Id*. at 818-19.

In *Passantino*, a case arising in this district and cited extensively above in the context of the *Kolstad* defense, the jury found that although the defendant had not discriminated against Passantino initially, it did retaliate against her for complaining about what she perceived as sex discrimination. The jury awarded Passantino $100,000 in back pay, $2,000,000 in front pay, $1,000,000 in compensatory

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[1]*Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

emotional distress damages, and $8,600,000 in punitive damages. Defendant moved to strike or reduce the punitive and compensatory damage awards, a motion which the court granted in part and denied in part. The district court allocated all of the compensatory damages, front pay, and back pay to Passantino's state law claim and all of the punitive damages to the Title VII claim. It then reduced the punitive damage award to the $300,000 Title VII cap and affirmed the remainder of the award. On appeal, although the Ninth Circuit Court Appeals remanded for consideration of the punitive damages in light of *Kolstad*, the court specifically noted that the evidence was "unquestionably sufficient" to support the $300,000 punitive damage award. *Passantino*, 212 F. 3d at 514.

In a Title VII case in Idaho, the district court declined to apply a single digit multiplier to the nominal damage award of $1.00, and upheld punitive damages of $100,000. *Bjornson v. Dave Smith Motors/Frontier Leasing and Sales*, 578 F.Supp.2d 1269 (D.Id. 2008). In a case brought under both Title VII and 42 U.S.C. § 1981 in Oregon, where the jury awarded each of four plaintiffs $2.75 million in punitive damages, the district court granted remittiteur and reduced the punitive damages to $150,000 for each plaintiff. *Paul, et al., v. Asbury Automotive Group,LLC*, 2009 WL 188592 (D.Or.) The court found this amount reasonable even though the plaintiffs "suffered no physical, economic, or severe emotional harm," there was no evidence of malice or of retaliation against the plaintiffs for complaining about racial comments, and defendants had an anti-harassment policy in place. *Id*. at * 10. In another case arising in Oregon, the Ninth Circuit Court of Appeals affirmed the district court's denial of a motion for a new trial where the jury awarded $300,000 in punitive damages for Title VII violations. *Pavon v. Swift Transp. Co., Inc*., 192 F.3d 902 (9th Cir. 1999).

Having fully considered the *Gore* factors, including the reprehensibility of defendants' conduct, the ratio between the compensatory and punitive damages, and awards in comparable cases, the Court finds no basis for reducing the punitive damage award or granting defendants a new trial.

CONCLUSION

The Court in this case trusts the sound judgment of the jurors, who attentively listened to the testimony over the course of the trial. The Court finds that the jury's verdict and award of punitive

damages is supported by the record and should not be disturbed. Defendants' motion for a new trial (Dkt. # 359) is accordingly DENIED.

Dated this 8th day of January, 2010.

RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE