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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

TERRILL L. FINTON et al., Plaintiffs and Respondents, v. RALPHS GROCERY COMPANY, Defendant and Appellant.	D031670 (Super. Ct. No. N72142)

APPEAL from a judgment of the Superior Court of San Diego County, Joan P. Weber, Judge. Affirmed.

Ralphs Grocery Company (Ralphs) appeals a judgment in favor of Terrill L. Finton, Dianne Gober, Sarah Lang, Talma (Peggy) Noland, Suzanne Papiro and Tina Swann (collectively Respondents) on their complaint seeking compensatory and punitive damages for sexual harassment by one of Ralphs' store directors, Roger Misiolek. On appeal, Ralphs contends the Respondents' dismissal with prejudice of Misiolek acted to release Ralphs from liability; the punitive damages award was not supported by

substantial evidence meeting the requirements of Civil Code section 3294, subdivision (b);[1] the instructions on punitive damages were improper; an employer should not be held strictly liable for sexual harassment by a supervisor, the court's new trial grant was improperly limited to the amount of punitive damages and certain evidence of Misiolek's misconduct should be excluded in any future proceedings. We affirm.

FACTS

Ralphs does not contest the sufficiency of the evidence to support a finding Misiolek sexually harassed the Respondents. The issues on appeal include whether Ralphs had knowledge of Misiolek's sexual harassment conduct prior to the Respondents' complaints and whether Ralphs approved of or ratified Misiolek's conduct following the Respondents' complaints.

In the Ralphs grocery company, the highest onsite position at an individual store is that of store director. The store director has the responsibility for the store's operation, hiring entry level employees, disciplining employees and making recommendations for employee promotions, transfers and firings. The store director, according to Ralphs' written policy was also responsible for compliance with the company's policies and standards within the store. Below the store director is the

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1 All statutory references are to the Civil Code unless otherwise specified.

store's operations manager. Above the store director is the district manager who is in charge of several stores. The district manager has authority to transfer individuals from store to store within certain limits and acts as a liaison to upper management for the operation of the stores within the manager's district. The district manager reports to the division or group vice president of store operations.

Misiolek's Conduct at Prior Store Locations

The Respondents presented several employees who had worked at the Grossmont or Sports Arena stores while Misiolek was store director at these stores.

Lynne Green testified that while she worked as a cashier at the Sports Arena store Misiolek pressed his body against her when exchanging money with her and stroked her arm, wrist and hands while handing her money. She did not tell Misiolek to stop or complain to any one other than her husband.

Karen Keiko Henderson was a grocery manager at the Sports Arena store. She complained to Brian Finley, the Sports Arena operations manager, about Misiolek putting his arm around her shoulder and keeping her alone in his office for overly long periods of time. Finley offered to file a complaint on her behalf with upper management. She did not request Finley to file a complaint because she felt she could take care of the matter herself if it went further. At the time she complained

to Finley, Henderson had been recently promoted. She was transferred to another store the week after she complained to Finley. Finley testified he did not file a complaint with upper management. Henderson testified it was normal to be transferred to another store after being promoted.

Doreen Conroy worked one day as a substitute bookkeeper under Misiolek at the Grossmont store. On that day, Misiolek threw a phone at her while she was standing in the doorway of his office waiting to speak to him. Later, when Conroy sought a transfer from her regular store, she was offered a position at the Sports Arena store where Misiolek was store director. She did not want transfer to that store because of Misiolek but she was told it was the only transfer choice available at that time. While at the Sports Arena store, Misiolek called Conroy a "worthless bitch" and a "fat bitch," called a customer a "fucking cunt," said "you cunt" to others and regularly used profanity. His temper was directed at both men and women and he used profanity with everyone. On one occasion Misiolek threw a hard black cachet shield at Conroy's face while they were at the check stand. She saw him throw other items in the public area of the store. Frequently, he would bang hard on the door of the bookkeeping office with his briefcase when she was in the office. One time he came up behind her in the bookkeeping office while she was sitting in a rolling chair, pushed his body

against the back of the chair and pinned her to the desk which she found intimidating. She testified Misiolek never made a sexual advance or touched her in a sexual manner.

Conroy complained to her friends at another store, to family members and to Finley. In response to her complaints, Finley helped her to avoid contact with Misiolek. After she had complained, she was offered a transfer to another store by District Manager Gerald Smith. Smith testified he transferred Conroy to the Sports Arena store because the bookkeeper at the Sports Arena store lived near to the Bonita store where Conroy then worked and it seemed a logical transfer. Later, Conroy was transferred from the Sports Arena store because there was an opening at a new store in Chula Vista, which was closer to Conroy's home. Misiolek testified he believed Conroy sought a transfer from Sports Arena because she had moved. Smith testified he was unaware Conroy had any complaints about Misiolek.

Sheila Peles was a service deli manager at the Sports Arena store. While at the Sports Arena store, Misiolek berated her, threw a schedule on the floor at her feet, treated her with disrespect when she asked for her 10-year service pin, used profanity in front of customers, referred to a woman as a "fat slut," and commented that a woman employee who had many children "should have her twat sewn shut." Peles was also told that

Misiolek had called one of the women in Peles's department a "cunt."

Peles requested a transfer out of the Sports Arena store from her immediate supervisor. Peles believed her supervisor talked with District Manager Smith. Peles met with her supervisor and Smith about the transfer request. She did not remember if Smith asked why she was requesting the transfer. She did not bring up Misiolek's statement about the woman having her "twat sewn shut" at the meeting. Peles was granted a transfer to another store. Smith stated he was unaware of Peles's complaints, and that Peles was transferred because she was having operational and personnel problems at the Sports Arena store, including having people working under her complaining that she was not doing her fair share of the work.

In December 1997, over a year after Respondents had filed suit against Misiolek and Ralphs, Peles had a meeting with Smith and her union representative about her subsequent tardiness at the Bonita and National City stores. At the meeting Peles gave Smith a list documenting Misiolek's most serious misconduct at the Sports Arena store.

Operations Manager Finley testified that before he started working for Misiolek he had heard Misiolek had a bad temper. He heard Misiolek yell at people dozens of times, including customers, and saw Misiolek throw a telephone. Between 10 and

50 employees complained to him about Misiolek. Finley acted as a buffer between Misiolek and the employees in the store and did so fairly often. Finley recalled that Conroy and Henderson had complained to him. Conroy felt Misiolek treated her with disrespect. Henderson complained about Misiolek being too close to her in the bookkeeping office and about Misiolek touching her hair. Finley did not forward the complaints to upper management.

District Manager Smith testified that on his visit to stores he had observed that Misiolek was sometimes abrupt or abrasive. No one had complained to him about Misiolek being abrupt or abrasive. He testified the only complaint he had heard about Misiolek at the Sports Arena store was from the service deli manager about making a sandwich for Misiolek. When interviewed following the report of sexual harassment at the Escondido store, Smith stated he was aware of three complaints against Misiolek, two from customers; the third complaint was not by Peles.

Misiolek's Conduct at the Escondido Store

Misiolek became store director of the Escondido store in August 1995. The Respondents were employees at Ralphs' store in Escondido. Some were cashiers, one was the manager of the bakery department and one was a bookkeeper. The bakery

department manager also had bookkeeping responsibilities as did one of the other Respondents.

While store director at the Escondido store, Misiolek engaged in inappropriate touching including pressing his body against female cashiers when Misiolek did what he called "double tilling"; i.e., standing in the check stand area with a female cashier, making change while the cashier scanned for groceries, a practice that made body-to-body contact inevitable. Misiolek would also exchange money with female cashiers in the check stand area so that there would be body-to-body contact. In the bookkeeping office of the store, Misiolek would sometimes position his chair and his body so it would press against a female employee and sometimes place his hand over the employee's hand while she was writing. At various times, he grabbed some of the Respondents by their waists, stuck a finger in the ear of one appellant and twisted it, grabbed the faces of two of the Respondents and pulled them toward his and touched or tried to touch some of the Respondents' breasts.

Misiolek also used profanity, including in the public areas of the store, and called female employees or customers "cunt," "bitch," "fucking bitch," "fucking cunt," or "sluts." He made inappropriate comments on the sex life of some of the Respondents, and threw various items at some of the Respondents. In April 1996, in the bookkeeping office after appellant Gober

told Misiolek that she was too busy to help another employee look for a bill, Misiolek grabbed Gober by her shoulders and threw her in a chair with such force that the chair rolled across the room until it hit a desk. Misiolek stood over Gober and yelled, "You'll do what the hell I tell you to do." Gober was afraid Misiolek was going to hit her. That evening, Gober's husband in her presence telephoned Ralphs' Senior Vice President of Human Resources Mary Lou Wakefield to complain about the sexual harassment Gober had suffered.

Neither Gober nor any of the other Respondents had made any prior complaints to Ralphs' management about Misiolek's conduct.

Ralphs' Conduct Following Gober's Report

Following her conversation with Gober's husband, Wakefield contacted Gary Raymond, the group vice president of southern division store operations, who in turn contacted Misiolek's district manager, Dan Hutchinson. At Raymond's request, Hutchinson telephoned Misiolek and told him not to report to the Escondido store the next day; Ralphs transferred Misiolek to another store that was being closed. Wakefield then called Gober to tell her Misiolek would not be returning to the Escondido store while Gober's complaint was being investigated.

Within a week of Gober's complaint, Wakefield and Raymond interviewed each of the Respondents at the Escondido store, other employees at the Escondido store, Misiolek's current and

past superiors (Hutchinson and Smith) and Misiolek's operations managers at the Escondido and Sports Arena stores. Misiolek denied the allegations.

Ralphs concluded the complaints about Misiolek had merit. On May 13, 1996, Group Vice President Raymond and District Manager Hutchinson met with Misiolek and presented him with a written memorandum concerning his inappropriate physical touching and profanity toward female employees as well as his harassment and harsh treatment of customers. The memorandum stated Misiolek had undergone professional counseling and had been counseled to follow Ralphs' management guidelines and sexual harassment policy. It also stated Misiolek would be reassigned to another store "to provide an opportunity for [him] to demonstrate that he has considered the seriousness of his counseling and made corrective adjustments to his management style." Misiolek signed a statement on the memorandum indicating that he understood that he had been put on notice and "that failure to bring about immediate and substantial improvement in the areas discussed will result in further disciplinary action, up to and including termination." After signing the written warning and acknowledging that if he did not improve he could face further discipline, including termination, Misiolek was escorted into the office of the senior vice president of store operations who stressed the seriousness of

the matter to Misiolek. Misiolek testified there was no mention of the possibility of discipline or termination at the meeting.

Ralphs transferred Misiolek to a store in Mission Viejo. The Mission Viejo store was further from Misiolek's home and therefore his commute would be longer and this longer commute was intended as a punishment. Additionally, the store was located outside the San Diego region where the Respondents worked and could be assigned. Misiolek testified he did not believe the transfer to the Mission Viejo store was a demotion because its store volume was similar to the Escondido store, but admitted he preferred working at the Escondido store because it was a lot closer to his home. Ralphs did not inform the Mission Viejo operations manager, Kathleen Young, about the reason for Misiolek's transfer.

Operations Manager Young began receiving complaints from employees about Misiolek's temper, use of profanity and throwing things. There were no complaints about inappropriate touching. In December 1996, Operations Manager Young reported the complaints to District Manager Hutchinson. In August 1997, Young asked Hutchinson to remove Misiolek from the store because of Misiolek's foul language and batting a phone across a desk in the front of the store. Hutchinson was ineffectual in his attempts to have Misiolek stop his offending conduct. Young testified she believed Misiolek was demeaning to women. She

sought a transfer from Hutchinson to another store in part because she did not like working with Misiolek and she told Hutchinson she was willing to take a demotion, if necessary, to obtain the transfer.

In September 1997, a customer complaint about Misiolek's conduct was forwarded to Ralphs' Vice President of Human Resources Sheri Meek. Meek investigated the complaint. In October 1997, Group Vice President Raymond and an assistant district manager visited the Mission Viejo store, found problems in the store displays and produce department, brought in workers from other stores to bring the Mission Viejo store up to standard, wrote a memo to Hutchinson summarizing the problems, and placed a copy of the memo in Misiolek's personnel file. The memo stated Misiolek needed to improve his performance or face removal from management.

In late November 1997, Raymond and the assistant district manager met with Misiolek and informed him of the problems they saw at the Mission Viejo store, including that customers and employees were dissatisfied with him. In December 1997, Ralphs demoted Misiolek from store director to food clerk and reassigned him to work as a merchandise receiver working in a warehouse of another store. His pay was cut in half and he lost any chance for advancement in the company.

DISCUSSION

I

Retraxit

Ralphs argues the plaintiffs' dismissal of Misiolek before trial acts as a retraxit barring the continuation of the lawsuit against it.[2]

In support of its argument, Ralphs relies on a number of old cases stating that a release of one joint tortfeasor releases the remaining tortfeasors. (See, e.g., *Dougherty v. Cal. Kettleman Oil R., Inc.* (1939) 13 Cal.2d 174, 180; *Bee v. Cooper* (1932) 217 Cal. 96, 100-101; *Lamoreux v. San Diego etc. Ry. Co.* (1957) 48 Cal.2d 617, 624.) This rule was designed to prevent a plaintiff from obtaining a double recovery. (*Dougherty v. Cal. Kettleman Oil R., Inc., supra*, 13 Cal.2d at p. 180; *Charleville v. Metropolitan Trust Co.* (1934) 136 Cal.App. 349, 355.) Some of the old cases focused on the language of the particular documents as to whether they were "covenants not to sue" rather than "releases" and a dispute existed in the law as to whether a plaintiff could settle with one joint tortfeasor without releasing the remaining joint tortfeasors. (See, e.g., *Hawber v. Raley* (1928) 92 Cal.App. 701

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2 "A dismissal with prejudice is the modern name for a common law retraxit." (*Torrey Pines Bank v. Superior Court* (1989) 216 Cal.App.3d 813, 820.)

[holding release of one defendant was not a covenant not to sue but a release that released all other defendants]; *Flynn v. Manson* (1912) 19 Cal.App. 400 [holding the weight of authority supported a conclusion that a release intended to release only the settling defendant was ineffective].)

In the intervening years, as a result of changes in statutory law, it has become clear that the terms and intentions of a settlement agreement or release are controlling and that a plaintiff may settle and release one tortfeasor without releasing the remaining tortfeasors. (See Code of Civ. Proc., § 877; *McCall v. Four Star Music Co.* (1996) 51 Cal.App.4th 1394, 1400 ["The intent of the parties as expressed in the release is controlling."]; *Milicevich v. Sacramento Medical Center* (1984) 155 Cal.App.3d 997, 1003, fn. 8; *Ritter v. Technicolor Corp.* (1972) 27 Cal.App.3d 152, 153.) The Legislature enacted Code of Civil Procedure section 877, in part, to abrogate the common law rule "mandating that a release of one joint tortfeasor for consideration released all others." (*Neverkovec v. Federicks* (1999) 74 Cal.App.4th 337, 345, fn. 4.) Further, contrary to Ralphs' suggestion, it now is clear that ". . . release of an agent before trial does not discharge his principal from tort liability, even though the sole basis alleged for recovery from the principal is his vicarious liability for the acts of his agent." (*Ritter v. Technicolor Corp., supra,* 27 Cal.App.3d at

p. 153; *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 303.)

Ralphs, focusing on Code of Civil Procedure section 877, nonetheless argues that the old rule applies when it is established that the settlement with one tortfeasor was not made in good faith. Code of Civil Procedure section 877, in pertinent part, provides:

> "Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in *good faith* before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort . . . , it shall have the following effect:
>
> "(a) It shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater." (Italics added.)

There are a number of problems with Ralphs' argument. Initially, we note Ralphs never sought a determination that the settlement with Misiolek, as a factual matter, was not made in good faith. Ralphs' only challenge to the settlement was made in a motion for a judgment on the pleadings where Ralphs specifically objected to the court's consideration of the terms of the settlement because it was outside the scope of the pleadings. Ralphs' argument in the motion was limited to an assertion that, as a matter of law, a settlement with the person primarily liable (Misiolek) cannot be a good faith settlement as

to a person secondarily liable (Ralphs). As we have pointed out above, the law permits a settlement with an agent or person primarily liable and a continuation of a lawsuit against the principal. Further, we note there were claims of direct liability against Ralphs, i.e., for continuing to employ Misiolek in conscious disregard of the rights or safety of others or for ratifying Misiolek's conduct.

Second, the "good faith" requirement of Code of Civil Procedure section 877 is directed to the issue of whether the settling tortfeasor will be liable to the remaining tortfeasors for contribution or equitable indemnification rather than whether the plaintiff may proceed against the remaining tortfeasors. If the settlement is in good faith, then the settling tortfeasor is protected from claims of contribution or equitable indemnification from the other tortfeasors. (Code Civ. Proc., § 877, subd. (b); *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 499-500; *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1283-1284; *Standard Pacific of San Diego v. A. A. Baxter Corp.* (1986) 176 Cal.App.3d 577.) In this case, the result of a showing that the Misiolek settlement was not made in good faith would not be a dismissal of the suit against Ralphs but an establishment of Ralphs' right to seek contribution or equitable indemnification from Misiolek for his share of the damages.

In sum, the plaintiffs' settlement with Misiolek did not preclude them from proceeding to trial against Ralphs.

No reversal is merited on this ground.

II

Liability for Punitive Damages

A. Section 3294

Imposition of punitive damages is governed by section 3294. In pertinent part, this statute provides:

> "(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
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> "(b) An employer shall not be liable for [punitive] damages . . . based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.
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> "(c) As used in this section, the following definitions shall apply:
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> "(1) 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

"(2) 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

"(3) 'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury."

In other words, there are three bases for imposing punitive damages against a corporate employer based on the oppressive, fraudulent or malicious conduct of an employee: (1) the employee is an officer, director or managing agent of the corporation; (2) an officer, director or managing agent of the corporation had knowledge of the employee's unfitness and employed him with a conscious disregard for the rights or safety of others; or (3) an officer, director or managing agent of the corporation authorized or ratified the wrongful conduct.

B. Misiolek as a Managing Agent

Ralphs contends there is insufficient evidence to support the jury's finding Misiolek was a managing agent for the purpose of imposing punitive damages.

When the factual findings of the jury are attacked for insufficiency of evidence, our duty begins and ends with the determination "'as to whether there is *any* substantial evidence to support'" the findings. (*Leff v. Gunter* (1983) 33 Cal.3d 508, 518.) Under the substantial evidence rule, all the evidence most favorable to the respondent must be accepted as

true and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. (*Estate of Teel* (1944) 25 Cal.2d 520, 527.) The appellate court has no power to judge the effect or value of the evidence, to weigh the evidence, to consider the credibility of witnesses or to resolve conflicts in the evidence or the reasonable inferences which may be drawn from that evidence. (*Hinson v. Clairemont Community Hospital* (1990) 218 Cal.App.3d 1110, 1125, disapproved on other grounds in *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1228, fn. 10.) Substantial evidence "must be reasonable in nature, credible, and of solid value." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 51.)

Our Supreme Court recently issued an opinion explaining the meaning of the term "managing agent" as used in section 3294, subdivision (b). In *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 566, the California Supreme Court granted review to resolve a conflict among the Courts of Appeal over the definition of the term. The Supreme Court stated:

> "We disagree with the Court of Appeal's conclusion that the mere ability to hire and fire employees renders a supervisory employee a managing agent under section 3294, subdivision (b). Instead, we conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a

question of fact for decision on a case-by-case basis." (*Id.* at pp. 566-567.)

In reaching its conclusion, the Supreme Court noted that the Legislature had placed the term "managing agent" in section 3294, subdivision (b) next to the terms "officer" and "director" and thus had "intend[ed] that a managing agent be more than a mere supervisory employee" and "be someone who exercises substantial discretionary authority over decisions that ultimately determine corporate policy." (*White v. Ultramar, Inc.*, *supra*, 21 Cal.4th 563, 573.) The court noted a contrary rule equating supervisory status with managing agent status would abrogate the Legislature's intent to limit the liability of corporate entities for punitive damages. The Supreme Court explained:

> "As amicus curiae Beverly Enterprises-California, Inc., appearing on Ultramar's behalf, explains, in the overwhelming majority of employment cases, the wrongdoer, by definition, had supervisory authority over the plaintiff. A rule defining managing agent as any supervisor who can hire or fire employees, but who does not have substantial authority over decisions that ultimately determine corporate policy, effectively allows punitive damage liability without proof of anything more than simple tort liability, which we have long recognized is insufficient. [Citations.] If we equate mere supervisory status with managing agent status, we will create a rule where corporate employers are liable for punitive damages in most employment cases. Such a rule would ignore [the] sound reasoning [in *Egan* v. *Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809], defeat the Legislature's intent to discourage corporate acts of oppression, fraud, or malice under section 3294, subdivision (b),

> and end our emphasis on the limited role and deterrent purpose of punitive damages awards: 'to punish wrongdoers and thereby deter the commission of wrongful acts.' [Citations.] It might also discourage employers from making good faith efforts to enforce policies that forbid discrimination or retaliation." (*White v. Ultramar, supra*, 21 Cal.4th at p. 575.)

In *White*, the court concluded that the employee in the case before it was a managing agent. In *White*, a former assistant manager (plaintiff) of a convenience store owned by Ultramar sued, alleging that Ultramar wrongfully fired him for testifying at an unemployment benefits hearing of another employee, a violation of company policy and public policy. Plaintiff presented evidence showing that when he returned to work after the hearing, he was fired for a pretextural reason by the company's zone manager, Lorraine Salla, who had consulted with the corporate human resources department prior to firing plaintiff. Salla was responsible for managing at least eight stores and sixty-five employees. Individual store managers reported to her and she reported to the department heads in the corporation's retail management department. Her supervisors delegated most, if not all of the responsibility of running the stores to her. The Supreme Court found Salla was a managing agent, explaining:

> "The supervision of eight retail stores and sixty-five employees is a significant aspect of Ultramar's business. The testimony of Salla's superiors establishes that they delegated most, if not all, of the responsibility for running these stores to her. The fact that Salla spoke

> with other employees and consulted the human resources department before firing plaintiff does not detract from her admitted ability to act independently of those sources. In sum, Salla exercised substantial discretionary authority over vital aspects of Ultramar's business that included managing numerous stores on a daily basis and making significant decisions affecting both store and company policy. In firing White for testifying at an unemployment hearing, Salla exercised substantial discretionary authority over decisions that ultimately determined corporate policy in a most crucial aspect of Ultramar's business." (*White v. Ultramar, Inc.*, *supra*, 21 Cal.4th 563, 577.)

The Respondents, comparing this case to the *White* case, contend evidence supports a conclusion Misiolek was a managing agent. They point to evidence showing Misiolek "had autonomous discretionary control over the operation and profit-affecting decisions of each of the supermarkets of which he directed, and a store is plainly a significant aspect of a retail grocer's business"; he supervised a larger staff (70-90 people) than the zone manager in *White v. Ultramar*, and he had "sole responsibility for hiring of entry-level employees [citation], 'progressive discipline' of employees, setting schedules, and preparing annual reviews"; "[h]e acted as management's representative in all union grievances for the store."

We disagree with the Respondents' analysis. The facts of this case are significantly different from the *White* case. We first note that unlike Misiolek's situation, the zone manager in the *White* case was not a manager of a single store, but a supervisor of the managers of eight different stores; her

position was more akin to Ralphs' district manager, rather than Misiolek's position of a store director. Second, in *White*, the question was whether Salla was a managing agent as to a decision to fire an employee, i.e., whether she had substantial discretionary authority over firing decisions that ultimately determined corporate policy. There was evidence in *White* showing that Salla's managers had delegated most if not all responsibility for running the stores, including the power to terminate employees. Here, Misiolek did not have such broad authority delegated to him by Ralphs, either in the area of terminating employees or developing sexual harassment policy.

Misiolek's situation is more similar to that of the manager in *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397. In *Kelly-Zurian*, the plaintiff, a regional supervisor of six stores in Los Angeles, was sexually harassed by a manager who was in charge of the plaintiff and another individual. The plaintiff claimed the manager was a managing agent of the company and therefore the company was liable for punitive damages. The plaintiff based her argument on evidence showing the manager had immediate and direct control over her with the responsibility for supervising her performance and had the authority to terminate her. The *Kelly-Zurian* court rejected the plaintiff's argument, explaining:

> "Not only did [plaintiff] fail to present any evidence to show [the manager] was in a

> policymaking position, but [the company] presented substantial evidence to the contrary. [There was testimony that the manager] did not 'have authority to change or establish business policy for [the company] in Southern California[.]' That authority rested in the St. Louis office, 'whether it be the operational part of the business, set the policies, the guidelines, administered salaries, reviews, and the people in the field advise St. Louis [and make] recommendations and St. Louis acts on them, signs the salary increase and so forth. But it is administered through the St. Louis office.' [The manager] could not even set [the plaintiff's] salary or give her a raise without authorization from St. Louis.
>
> "Thus, the uncontroverted evidence established [the manager] was not in a policymaking position and therefore was not a managing agent for [the company]." (*Kelly-Zurian v. Wohl Shoe Co., supra*, 22 Cal.App.4th at p. 422.)

As in the *Kelly-Zurian* case, the undisputed evidence here established that although Misiolek had significant authority over the Respondents, he was not in a policymaking position. That authority rested elsewhere in the Ralphs organization. The sexual harassment policy was developed elsewhere by Ralphs and distributed to Misiolek.

Respondents nonetheless argue Misiolek "formulated [an] ad hoc sexual harassment policy for his store." They argue "[b]ecause executives senior to Misiolek did not monitor whether store directors made employees aware of sexual harassment policy and Ralphs provided no effective training, Misiolek could formulate an ad hoc policy of tolerance for harassment." Respondents point to testimony indicating Misiolek referred to

Ralphs' sexual harassment policy as "'just more garbage'" at a meeting of the department managers in his store. We disagree with Respondents' analysis. There was no evidence indicating that Misiolek had the authority to ignore this policy and substitute a different policy.

We find unpersuasive the Respondents' argument that because Misiolek decided to ignore Ralphs' corporate policy, therefore he became a managing agent vis-à-vis the sexual harassment policy. This argument is particularly unpersuasive in light of the Supreme Court's language in the *White* case explaining that although the situation was not being decided in the case before it, ". . . in future cases, if a company has a written policy that specifically forbids retaliation against employees who testify at unemployment hearings, it may operate to limit corporate liability for punitive damages, as long as the employer implements the written policy in good faith. (See *Kolstad v. American Dental Assn.* (1999) [527 U.S. 526, 541-542] [existence of written policy forbidding discrimination under title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) may operate as a bar to punitive damage liability].)" (*White v. Ultramar, Inc.*, *supra*, 21 Cal.4th 563, 568, fn. 2.) The United States Supreme Court has explained, "[I]n 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.'" (*Kolstad v. American Dental Assn., supra*, 527 U.S. at p. 545.) Here, Misiolek's conduct was clearly contrary to Ralphs' written sexual harassment policy.

To the extent the Respondents' argument raises questions as to whether Ralphs in good faith implemented its sexual harassment policy in not adequately supervising or training Misiolek, that argument goes to the other two bases for imposing punitive liability, i.e., whether Ralphs had knowledge of Misiolek's conduct and (1) continued to employee him in conscious disregard of the rights or safety of others or (2) authorized or ratified his conduct.

In sum, the Respondents presented no evidence to support a conclusion Misiolek was a managing agent in the context of this case. Misiolek had no authority to and did not participate in formulating Ralphs' sexual harassment policy; Misiolek's role was limited to a decision, made on his own and contrary to company policy, to ignore the sexual harassment guidelines.

C. Advance Knowledge - Conscious Disregard

The second basis for imposing punitive liability on a corporate employer is when the corporate employer, with knowledge of the employee's conduct, continues to employ the individual in conscious disregard of the rights or safety of

others. Ralphs contends there is no substantial evidence to support imposing liability on this basis. We disagree.

The Respondents presented evidence that Misiolek's improper conduct did not begin with his employment at the Escondido store; they presented evidence of his improper conduct at his prior store, Sports Arena. Four female employees who worked under Misiolek at the Sports Arena store testified about Misiolek's inappropriate touching, crude statements about women and profanity. One Sports Arena employee, a cashier, testified Misiolek had inappropriately touched her in the cashier stand area, but she also testified that she complained only to her husband and therefore there was no evidence suggesting Ralphs was aware of this harassment. As to the other three women, there was evidence they complained either to the operations manager or their immediate supervisor about Misiolek's profanity, temper, touching (hugging) and throwing things.[3] These women all received transfers away from the Sports Arena

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[3] Respondents in their appellate briefs state that one of these women (Sheila Peles) gave District Manager Smith a written statement summarizing Misiolek's most serious misconduct at the Sports Arena store and argue this as a basis for Ralphs' prior knowledge of Misiolek's misconduct at the Sports Arena store. The record, however, indicates that this employee gave Smith this written summary in a disciplinary meeting regarding her tardiness at subsequent store locations in December 1997, long after Gober made her complaint in April 1996 and over a year after the Respondents filed their suit in August 1996.

store. While the operations manager testified he did not forward these complaints to upper management and the district manager denied these complaints were a basis for the transfers, the jury was entitled to reject this testimony and draw an inference that the complaints were communicated to at least the district manager level, that Ralphs was aware Misiolek had engaged in improper conduct and yet continued him in their employ, and that Ralphs' policy as implemented by the district manager was to address the problem by transferring the victims away from Misiolek rather than dealing with Misiolek's conduct directly.

A reasonable jury could conclude that Ralphs, through its managing agent Smith, had knowledge of Misiolek's inappropriate conduct prior to his becoming store director at the Escondido store, including inappropriate touching and demeaning language toward women prior to his becoming store director at the Escondido store, and continued to employ him as a store director in conscious disregard of the rights of Ralphs' employees to be free from sexual harassment. No reversal is merited on this ground.

C. Approval or Ratification of Employees' Conduct

Respondents argue Ralphs approved or ratified Misiolek's conduct by imposing minimum discipline following a finding the Respondents' complaints had merit.

"For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 726.) In order to impose punitive damages, in the context of corporate ratification, it must be shown that the corporation had actual knowledge of the misconduct and its outrageous nature. (*Ibid.*) "The issue [or approval or ratification] commonly arises where the employer or its managing agent is charged with failing to intercede in a known pattern of workplace abuse, or failing to investigate or discipline the errant employee once such misconduct became known." (*Ibid.*) In those cases where corporate ratification has been upheld on appeal, generally there was either no or very minimal investigation and no formal discipline imposed on the individual; essentially, the employer although aware of the problem, did nothing. (See, e.g., *Roberts v. Ford Aerospace & Communications Corp.* (1990) 224 Cal.App.3d 793, 800-801 [no investigation made or discipline imposed for misconduct and complaining employee terminated shortly after filing written complaint]; *Hart v. National Mortgage & Land Co.* (1987) 189 Cal.App.3d 1420, 1433 [holding plaintiff should be allowed to amend complaint to allege liability for punitive

damages based on company's failure to investigate or take action on complaints of misconduct]; *Pusateri v. E. F. Hutton & Co.* (1986) 180 Cal.App.3d 247 [no investigation made]; *Greenfield v. Spectrum Investment Corp.* (1985) 174 Cal.App.3d 111, 119-121, overruled on other grounds in *Latkin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [no investigation made of misconduct and employee was not terminated or penalized for his actions]; *McChristian v. Popkin* (1946) 75 Cal.App.2d 249, 256-257 [no investigation made of misconduct or discipline imposed on employee]; Contrast *College Hospital Inc. v. Superior Court, supra*, 8 Cal.4th at p. 727 [employer's cautioning employee against misconduct was an "attempt[] to repudiate -- not adopt -- such conduct"].)[4] "'Ratification is a question of fact. The burden of proving ratification is upon the party asserting its existence.'" (*Greenfield v. Spectrum Investment Corp., supra*, 174 Cal.App.3d at p. 118.)

Respondents' argument that Ralphs ratified or approved of Misiolek's conduct is based on assertions that Ralphs should have conducted more extensive interviews following Gober's

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[4] In their ratification/approval argument, Respondents rely on *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128. The court in that case focused on the conscious disregard issue and specifically declined to consider whether the employer ratified or approved of the employee's conduct. (*Id.* at p. 1160, fn. 14.)

complaint and should have disciplined Misiolek more quickly and severely. Contrary to the Respondents' assertions, the record shows Ralphs disapproved and repudiated Misiolek's conduct.

The record shows Ralphs immediately removed Misiolek from the Escondido store, promptly investigated Gober's complaint, documented the investigation in writing, formally disciplined Misiolek, placed a written copy of the warning memorandum in Misiolek's personnel file, and transferred him to a store that was more distant from his home. As to these particular Respondents, Ralphs' actions resulted in protecting them from any further harassment by Misiolek. Additionally, Ralphs subsequently instituted additional sexual harassment training of its employees and a zero tolerance policy making it clear such complaints should be reported to management. Finally, we note that the discipline imposed on Misiolek was apparently effective in eliminating the major complaint of Respondents, i.e., the inappropriate touching; no evidence was presented of any complaints from the Mission Viejo employees about improper physical touching by Misiolek of female employees after the discipline by Ralphs.

The evidence in this case was insufficient to support a conclusion that Ralphs either approved of or ratified Misiolek's misconduct following the complaints of the Respondents. Nonetheless, since there was substantial evidence to support a

finding of liability based on conscious disregard, reversal is not required.

III

Punitive Damages' Instructions

A. Conscious Disregard

Ralphs contends the instructions on punitive damages misled the jury into believing that it was necessary only to find despicable conduct and not also willful conduct or conscious disregard.

The court's duty to instruct the jury is "fully discharged if the instructions given by the court embrace all the points of the law arising in the case. [Citations.] [¶] A party is not entitled to have the jury instructed in any particular phraseology and may not complain on the ground that his requested instructions are refused if the court correctly gives the substance of the law applicable to the case." (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 335.) "'A reviewing court must adopt the construction of jury instructions which will support rather than defeat the judgment if they are reasonably susceptible to such interpretation. [Citations.]'" (*Travelers Ins. Co. v. Lesher* (1986) 187 Cal.App.3d 169, 189, disapproved on other grounds in *Buss v. Superior Court* (1997) 16 Cal.4th 35, 50, fn. 12.) We also presume that the jury acted reasonably in interpreting and applying the instructions.

(*People v. Guiton* (1993) 4 Cal.4th 1116, 1126-1127.) In reviewing the adequacy of jury instructions, the question is whether a material issue has been withheld from the jury. (*Rogers v. County of Los Angeles* (1974) 39 Cal.App.3d 857, 862.)

"Instructional error in a civil case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict.' [Citations.] Of course, that determination depends heavily on the particular nature of the error, including its natural and probable effect on a party's ability to place his full case before the jury. [¶] But the analysis cannot stop there. Actual prejudice must be assessed in the context of the individual trial record." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.)

The court instructed the jury as follows:

> "If you find that any plaintiff suffered actual injury, harm, or damage caused by harassment based on gender, or harassment based on gender and Ralphs Grocery Company's failure to take all reasonable steps necessary to prevent harassment based on gender from occurring, or for retaliation, you must decide for that plaintiff in addition whether by clear and convincing evidence you find that there was oppression, malice, or despicable conduct in the conduct on which you base your finding of liability.
>
> "'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
>
> "'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the

> defendant with a willful and conscious disregard for the rights or safety of others. A person acts with conscious disregard of the rights or safety of others when he is aware of the probable dangerous consequences of his conduct and willfully and deliberately fails to avoid those consequences.
>
> "'Despicable conduct' is conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people.
>
> "You may find an employer guilty of oppression, malice or despicable conduct based upon acts of an employee if, but only if, you find by clear and convincing evidence that:
>
> "The employer had advance knowledge of the unfitness of the employee and with a conscious disregard of the rights or safety of others employed that person, or
>
> "The employer authorized or ratified the conduct which is found to be oppression, malice, or despicable conduct.
>
> "If the employer is a corporation, the act of oppression, malice or despicable conduct, advance knowledge and conscious disregard, authorization, or ratification must be on the part of an officer, director, or managing agent of the corporation."

The special verdict forms submitted to the jurors asked the jurors whether they found "by clear and convincing evidence that Roger Misiolek acted with malice, oppression or despicable conduct as to" any of the Respondents and whether Misiolek was a managing agent of Ralphs. The verdict form then asked:

> "Do you find by clear and convincing evidence that Ralphs Grocery Company committed malice, oppression or despicable conduct because <u>either</u> a managing agent of Ralphs Grocery Company ratified

> the wrongful conduct of Roger Misiolek which is found to be malice, oppression or despicable conduct, or that a managing agent of Ralphs Grocery Company had advance knowledge of the unfitness of Roger Misiolek and employed him with a conscious disregard of the rights and safety of others?" (Emphasis in original.)

Ralphs argues the instructions and the special verdict forms were misleading and that based on the instructions, the jury could have based their punitive damages finding solely on a finding of Misiolek's despicable conduct. Ralphs, relying on *College Hospital Inc. v. Superior Court, supra*, 8 Cal.4th 704, 725, and *Waits v. Frito-Lay, Inc.* (9th Cir. 1992) 978 F.2d 1093, 1105, argues "that since the 1987 amendments to section 3294, subdivisions (c)(1) and (c)(2) [defining malice and oppression], a plaintiff must establish *both* the despicable quality of the conduct alleged *and* a conscious disregard of rights or safety by the defendant, in order to prove malice or oppression" and that "reckless behavior is *not* enough to win an award of punitive damages in California." Ralphs states any error in the instructions was not harmless because there was conflicting evidence as to whether Misiolek knew "his behavior was so offensive as to become sexual harassment," and therefore there was the possibility that the jury could have returned a punitive damages' verdict against Ralphs based only a finding that Misiolek's behavior was despicable without also considering whether Misiolek, Ralphs' managing agent, acted with conscious

disregard of the Respondents' rights, i.e., acted with malice as defined in section 3294, subdivision (c)(1).[5]

Initially, we note that this argument is largely mooted by our conclusion Misiolek was not a managing agent. Further, we find Ralphs' argument unpersuasive. There is no reasonable possibility that the jury would have interpreted the instructions as Ralphs suggests.

Closing arguments by both the Respondents and Ralphs made it clear that not only did the jury have to find despicable conduct but also that a managing agent (including Misiolek) acted with conscious disregard. The jury was fully instructed on the statutory meaning of the terms "malice" and "oppression," including the conscious disregard requirement. In order to reach the interpretation urged by Ralphs, i.e., that merely

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5 Respondents contend Ralphs is precluded from challenging the instruction pursuant to the invited error doctrine. The invited error doctrine precludes an appellant from attacking a verdict that resulted from a jury instruction proposed by the appellant or that was jointly drafted by the parties. (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1653.) The record indicates the parties jointly developed the instructions, but this particular instruction was proffered by Respondents. The record also shows that Ralphs was given an opportunity to object to the instruction and did not raise this particular objection. While there is merit to Respondents' claim that Ralphs should have objected below so that any error in the instruction could be remedied, we believe the invited error rule does not apply here since the instruction was drafted by Respondents.

reckless conduct was sufficient to impose punitive liability, the jury would have had to ignore the arguments of counsel and the instructions that clearly required a finding of conscious disregard. We are required to presume, in the absence of evidence to the contrary, that the jury followed the instructions. (See *People v. Delgado* (1993) 5 Cal.4th 312, 331.) There is no evidence to the contrary. Further, the evidence in the record indicates that Misiolek's conduct was not merely negligent or reckless, i.e., he did not accidentally use profanity, press against the women in the cashier stand or make demeaning remarks; his conduct was intentional. There was also evidence indicating that Misiolek knew Ralphs' policy against sexual harassment since he received a written copy of the policy stating that sexual harassment included verbal or physical conduct of a sexual nature having the "effect of substantially interfering with an individual's work performance, or creating an intimidating, hostile, or offensive working environment." The conduct involved here, sexual harassment of lower level employees and in particular the inappropriate touching, did not involve some newly created right or area of prescribed conduct of which it would be unfair to charge Misiolek with knowledge and conscious disregard. (See *Waits v. Frito-Lay, Inc., supra*, 978 F.2d 1093, 1104-1105.)

No reversal is merited on this ground.

B. Managing Agent - Preponderance of the Evidence Standard

Ralphs contends the jury instructions improperly instructed the jury that they could find Misiolek was a managing agent by a preponderance of the evidence standard. Ralphs asserts that a managing agent finding must be made by clear and convincing evidence. Initially we note this argument has been mooted by our finding Misiolek was not a managing agent. Further, we find no merit to Ralphs' contention.

Ralphs bases its argument on the following language in section 3294, subdivision (a): "In an action for the breach of an obligation not arising from contract, *where it is proven by clear and convincing evidence* that *the defendant* has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover [punitive damages]." (Italics added.) By its terms, this language only applies to the finding of oppression, fraud or malice. Nothing in the language of this subdivision or elsewhere in section 3294 requires that the finding an individual is a managing agent of a corporation must also be made by a clear and convincing evidence standard.

No reversal is merited on this ground.

III

Retrial Limited to Amount of Punitive Damages

Ralphs moved for a new trial or judgment not withstanding the verdict on a number of different grounds, including that the

punitive damages award was excessive and that jury misconduct occurred during the jury's phase two deliberations.[6] The trial court rejected Ralphs' challenges to the liability portion of the trial but agreed that prejudicial juror misconduct had occurred during the deliberations on the amount of punitive damages and required a new trial on the amount of punitive damages. The court did not reach the issue of whether the amount of punitive damages was excessive.

Ralphs contends the trial court improperly granted a retrial limited only to the issue of the amount of punitive damages. Ralphs relies on section 3295, subdivision (d), which states:

> "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. *Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud.*" (Italics added.)

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6 One of the juror's checked the stock price of Ralphs' parent company and shared that information with the other jurors during the deliberations on the amount of punitive damages.

It has been held that a trial court commits reversible error if it dismisses the jury who heard the liability phase and has the amount of punitive damages tried before a different jury. (See *Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048-1049, and cases cited therein; *City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 276-277.) On the other hand, our Supreme Court in interpreting section 3295, subdivision (d) has held that an appellate court has discretion to order a retrial limited to punitive damages. (*Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 782.)

In *Torres*, the Supreme Court observed there was no language in section 3295, subdivision (d) barring retrials limited to the punitive damages issues nor any language indicating an intent to overrule long-standing case law permitting appellate courts to order retrials on the amount of punitive damages. (*Torres v. Automobile Club of So. California, supra*, 15 Cal.4th 771, 776, 778-780.) The Supreme Court noted the underlying purpose of the restrictions in section 3295, subdivision (d) were to "safeguard defendants in two ways: 'The pretrial discovery limits ensure that defendants are not coerced into settling suits solely to avoid unwarranted intrusions into their private financial affairs, while the evidentiary restrictions minimize potential prejudice to the defense in front of a jury.'" (*Torres v. Automobile Club of So. California, supra*, 15 Cal.4th at p. 777.)

The court stated, "Read as a whole, subdivision (d) of section 3295 suggests that the same-trier-of-fact restriction is directly related to the consequences of a bifurcation. That is, the same trier of fact is required to resolve all of the bifurcated issues when a defendant has requested and obtained bifurcation. By requiring that the bifurcated issues be submitted to a single trier of fact, section 3295(d) promotes judicial economy and avoids delay." (*Id.* at p. 778.) The court observed that disclosing profits and financial condition "threatens no prejudice once a bifurcated trial has been held and the issues of liability, compensatory damages and malice, oppression, or fraud have been resolved against the defense by both the trier of fact and the appellate court." (*Id.* at pp. 778-779.) The court also explained:

> "[I]n the context of retrials, it generally is unnecessary for the same jury to determine liability and punitive damages in order to ensure a reasonable relation between actual and punitive damages: 'The rule that exemplary damages must bear a reasonable relation to actual damages . . . is designed solely to guard against excessive punitive damages. [Citation.] Upon a retrial of the issue of exemplary damages the jury can maintain that reasonable relation between general and exemplary damages without having to determine for itself the amount of general damages. The amount of general damages has been properly determined by the first jury. Upon a retrial of the issue of exemplary damages it is only necessary for the second jury to be advised of the amount of general damages already awarded in order that it may maintain a reasonable relation between such damages and the

> exemplary damages, if any, that it awards. If it fails to do so and awards excessive exemplary damages, there is an adequate remedy by way of an appropriate motion before the trial court or by appeal.' [Citation.] In short, because there are adequate safeguards for ensuring that the jury in a limited retrial can maintain a reasonable relationship between actual and punitive damages, there ordinarily is no need for a complete retrial to guard against an excessive punitive damages award." (*Torres v. Automobile Club of So. California, supra*, 15 Cal.4th at p. 781, fn. omitted.)

The *Torres* court concluded ". . . section 3295(d) does not entitle a defendant to a new trial on liability and compensatory damages following the reversal of a punitive damages award." (*Torres v. Automobile Club of So. California, supra*, 15 Cal.4th 771, 782.)

Under the reasoning of the *Torres* case, we see no reason to distinguish between a post trial grant of a retrial on the amount of punitive damages by the trial court on a motion for a new trial and a post trial grant of a retrial on the amount of punitive damages by the appellate court on a reversal. The same policy concerns apply to both situations. Further, we note that the *Torres* court pointed out that one of the safeguards for maintaining the relationship between compensatory and punitive damages in a limited retrial was the availability of a motion *in the trial court* on the basis the damages were excessive. We have no doubt that the Supreme Court meant the trial court in that situation would have the power to order another trial limited to the amount of punitive damages and would not be

compelled to order a new trial on both liability and the amount of punitives. It seems to follow that following the initial punitive damages finding, the trial court should also have the power to order a limited retrial when a claim of excessive punitive damages is made.

Ralphs also contends the trial court abused its discretion in limiting the scope of the retrial because the second jury would be put in the position of guessing for what conduct the prior jury thought Ralphs deserved punishment. As Ralphs acknowledges, however, on retrial evidence related to the reasons for imposition of liability and punitive damages could be presented.[7] On the other hand, Ralphs argues that because the retrial could include such evidence, "there are no significant judicial economies that will result from limiting the scope of the retrial," and therefore a new trial should be ordered on all issues. While the judicial economy of ordering a limited retrial in this case may be less than perfect, nonetheless, there will be some savings and we note that Ralphs has raised no issues challenging the sufficiency of the evidence

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7 The trial court observed as to ordering a limited retrial on the amount of punitive damages: "In essence, most of the same evidence has to be put before the trier of fact in order to deliberate on punitive damages. About the only thing that wouldn't take place is deliberations on phase one. You know, those are obviously complete. [¶] But I agree; the case would in essence have to be retried . . . ."

as to the liability phase nor contends it presented a close case meriting a retrial of the liability phase.

We find no abuse of discretion in the trial court's decision to grant a new trial limited to the amount of punitive damages.

IV

Strict Liability for Sexual Harassment

Ralphs argues the recent United States Supreme Court decision in *Faragher v. City of Boca Raton* (1998) 524 U.S. 775 supports a conclusion that an employer should not be held strictly liable for compensatory damages based on sexual harassment by a supervisory employee.

In *Faragher*, the court held that an employer should be permitted "to show as an affirmative defense to liability that the employer had exercised reasonable care to avoid harassment and to eliminate it when it might occur, and that the complaining employee had failed to act with like reasonable care to take advantage of the employer's safeguards and otherwise to prevent harm that could have been avoided." (524 U.S. 775, 805.)

The court stated: "This composite defense would, we think, implement the statute sensibly, for reasons that are not hard to fathom." (524 U.S. 775, 805.) The *Faragher* court was not interpreting California law, but rather was interpreting federal

law, i.e., interpreting title VII of the Civil Rights Act of 1964. (42 U.S.C. § 2000e-2(a)(1).) Some courts have declined to follow *Faragher* on state law grounds. (See, e.g., *Myrick v. GTE Main Street Inc.* (1999) 73 F.Supp.2d 94; *Pollock v. Wetterau Food Distribution Group* (Mo.App. E.D. 1999) 11 S.W.3d 754.) We likewise believe it would be improper to follow *Faragher* on state law grounds in light of a recent statement by the California Supreme Court that the California Fair Employment and Housing Act (Gov. Code, §§ 12900 et seq., 12940) (under which this case was brought) "makes the employer strictly liable for harassment by an agent or supervisor." (*Carrisales v. Department of Corrections* (1999) 21 Cal.4th 1132, 1136.)

No reversal is merited on this ground.

V

Exclusion of Witness on Retrial

Ralphs argues that if we find on appeal that it lacked advance knowledge of Misiolek's conduct, then we should direct the trial court to exclude the Sports Arena and Grossmont employee witnesses as irrelevant. Similarly, Ralphs argues that if we find on appeal that there was no evidence to support a ratification finding, then we should direct the trial court to exclude evidence relating to Misiolek's misconduct at Mission Viejo as irrelevant. Ralphs does not contend that the court erred in admitting the testimony of any particular witness at

the trial below, nor does Ralphs contend the judgment should be reversed on that basis. Instead, Ralphs is asking us to render an advisory opinion as to whether certain evidence should be permitted on retrial. We decline to do so. (See *People v. Massie* (1998) 19 Cal.4th 550, 571 [courts should not render merely advisory opinions]; *Salazar v. Eastin* (1995) 9 Cal.4th 836, 860 ["'The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court.'"].)

DISPOSITION

The judgment is affirmed.

KREMER, P.J.

WE CONCUR:

HUFFMAN, J.

NARES, J.