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

**EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION,**

**Plaintiff,**

**OLIVIA TAMAYO,**

**Plaintiff-Intervenor,**

**v.**

**HARRIS FARMS, INC.,**

**Defendant.**

**CIV F 02-6199 AWI LJO**

**ORDER ON DEFENDANT'S  
RENEWED MOTION FOR  
JUDGMENT AS A MATTER  
OF LAW**

After a 23 day jury trial that began in December 2004 and ended in January 2005, a jury awarded Plaintiff-Intervenor Olivia Tamayo approximately \$1 million. Defendants have filed 3 motions. This order resolves Defendant's renewed motion for judgment as a matter of law with respect to punitive damages.

*Defendant's Argument*

Defendant argues that there was no legally sufficient basis for the jury to find for Plaintiffs on the issue of malice or reckless disregard of Ms. Tamayo's rights. Defendant argues that the evidence showed that on every instance that Tamayo complained of harassment, Defendant took action to remedy the situation. Defendant also argues that it had a policy against harassment, made good faith efforts to prevent harassment, and took appropriate action when

1 other employees lodged complaints of harassment.

2 Defendant specifically points out that the Court stated that the issue of malice and  
3 reckless disregard was very close, but would let the jury decide. Defendants argue that there is  
4 no evidence of ill-will, spite or egregious behavior on the part of Defendant, nor evidence that  
5 Defendant acted with knowledge that its actions violated the law. See Kolstad v. American  
6 Dental Ass'n, 527 U.S. 526 (1999).

7 Defendant states that it is undisputed that if Rodriguez was engaging in harassment of  
8 Ms. Tamayo, Defendant did not have knowledge of it until 1999. When Tamayo finally reported  
9 Rodriguez, Defendant argues that it took action immediately, suspending Rodriguez and  
10 transferring him to another area of operation, and also called the County Sheriff. Then, three  
11 weeks later, the complaint was amended to include Tamayo's claim of rape and Defendant  
12 investigated. Finally, two years later when Tamayo complained of co-worker harassment,  
13 Defendant investigated and suspended or fired those involved.

14 Also, there is substantial evidence of good faith. Defendant in 1999 helped Tamayo  
15 obtain a TRO; in 1997, Defendant acted promptly to help Maria Martinez when she complained  
16 of harassment (which ended the harassment); and Defendant had a policy against discrimination  
17 and harassment and regularly trained supervisors and employees.

18 Finally, the only evidence of malicious conduct, assuming Plaintiffs' allegations are true,  
19 was by Rodriguez. However, Rodriguez's conduct cannot be imputed to Defendant. In *Kolstad*,  
20 the Supreme Court made clear that an employer may not be vicariously liable for the  
21 discriminatory employment actions of its agents where the actions are contrary to the employer's  
22 good faith efforts to comply with Title VII. Assuming Rodriguez's conduct was as alleged, it  
23 would clearly have been against Defendant's policy.

24 *Plaintiffs' Opposition*

25 Plaintiffs respond that Defendant's motion is based on the argument that there was "no  
26 legally sufficient evidentiary basis for the jury to find for Plaintiffs on the issue of malice."  
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1 Defendant's argument fails as a matter of law simply because the jury's award does not require a  
2 finding of malice, rather punitive damages may be based on a finding of either malice or reckless  
3 disregard for Tamayo's federally protected rights. A finding of malice is not necessary. The jury  
4 found that Defendant acted with malice or reckless disregard and the affidavits of the two jurors  
5 (Stepp and Arambula)<sup>1</sup> show that the juror found that there was evidence of reckless disregard.  
6 That is all that is necessary to support the award of damages.

7 Defendant's Reply

8 Defendant argues that Plaintiffs's opposition is without merit and the Defendant is  
9 entitled to judgment. Defendant argues that Plaintiffs' opposition "completely misconstrues" the  
10 motion and applicable law. Plaintiffs seem to argue that Defendant does not dispute the finding  
11 of "reckless disregard." Plaintiffs merely respond that the jury found "reckless disregard" and  
12 that is enough to support an award of punitive damages. Defendant argues that Plaintiff's  
13 response completely misses the point of Defendant's motion: there was no legally sufficient  
14 evidence to support an award of punitive damages. Given the number of times that Defendant  
15 stated this contention in its motion, that there was no evidence or no legally sufficient evidence  
16 of malice or reckless disregard, Plaintiffs' opposition is ridiculous. Furthermore, it does not  
17 matter that the jury found "reckless disregard," because there must still be sufficient evidence to  
18 support such a finding.

19 **LEGAL STANDARD**

20 "A district court may set aside a jury verdict and grant judgment as a matter of law 'only  
21 if, under the governing law, there can be but one reasonable conclusion as to the verdict.'" Settlegoode v. Portland Pub. Schs, 371 F.3d 503, 510 (9th Cir. 2004); Winarto v. Toshiba Am.  
22 Elecs. Components, Inc., 274 F.3d 1276, 1283 (9th Cir. 2001); Fed. R. Civ. Pro. 50. When  
23 considering a motion to set aside a jury verdict, the court "should review all of the evidence in  
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26 <sup>1</sup>This evidence is inadmissible under Rule of Evidence 606(b) because the affidavits, from jurors, discuss  
27 and pertain to the jury's deliberative process. See Fed. R. Evid. 606(b); Hard v. Burlington Nothem R.R. Co., 870  
F.2d 1454, 1461 (9th Cir. 1989). The Court will not consider these affidavits in resolving this motion.

1 the record” in the light most favorable to the non-moving party and must draw all reasonable  
2 inferences in favor of the nonmoving party. Reeves v. Sanderson Plumbing Prods., Inc., 530  
3 U.S. 133, 150-51 (2000); see also Settlegoode, 371 F.3d at 510; City Solutions v. Clear Channel  
4 Communs., Inc., 365 F.3d 835, 839 (9th Cir. 2004); Horphag Research, Ltd. v. Pellegrini, 337  
5 F.3d 1036, 1040 (9th Cir. 2003). The court “may not make credibility determinations or weigh  
6 the evidence” and “must disregard all evidence favorable to the moving party that the jury is not  
7 required to believe.” Reeves, 530 U.S. at 150-51; Settlegoode, 371 F.3d at 510. “The court must  
8 accept the jury’s credibility findings consistent with the verdict . . . [and] may not substitute its  
9 view of the evidence for that of the jury.” Winarto, 274 F.3d at 1283. A party cannot raise  
10 arguments in its post-trial motion for judgment as a matter of law under Rule 50(b) that it did not  
11 raise in its pre-verdict Rule 50(a) motion. Freund v. Nycomed Amersham, 347 F.3d 752, 760-61  
12 (9th Cir. 2003).

13 Punitive damages are appropriate when a “defendant’s conduct was malicious or in  
14 reckless disregard of the plaintiff’s rights.” Ninth Circuit Model Jury Instruction § 7.5 – Punitive  
15 Damages.<sup>2</sup> Conduct is considered malicious if it is “accompanied by ill will, or spite, or if it is  
16 for the purpose of injuring another.” Id. Conduct is considered to be in reckless disregard of a  
17 plaintiff’s rights “if, under the circumstances, it reflects complete indifference to the plaintiff’s  
18 safety [or] rights, or the defendant acts in the face of a perceived risk that its actions will violate  
19 the plaintiff’s rights under federal law.” Id. In order to impose punitive damages against a  
20 corporation for violations Title VII, a plaintiff must: (1) prove that the employer engaged in a  
21 discriminatory practice with malice or a reckless indifference to the federally protected rights of  
22 an aggrieved individual; (2) prove that liability is properly imputed to the employer; and (3)  
23 defeat the employer’s affirmative defense (if asserted) that it made good faith efforts to comply  
24 with Title VII. Kolstad, 527 U.S. at 534-35; Hemmings v. Tidyman’s, Inc., 285 F.3d 1174,

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26 <sup>2</sup>This instruction is found at:  
27 <http://www.ce9.uscourts.gov/web/sdocuments.nsf/civ?OpenView&Start=1&Count=250&Expand=9#9>

1 1197-99 (9th Cir. 2002). “The terms ‘malice’ or ‘reckless indifference’ pertain to the  
2 defendant’s knowledge that it may be acting in violation of federal law, not its awareness that it  
3 is engaging in discrimination.” Kolstad, 527 U.S. at 535. Thus, the pertinent question for the  
4 first prong is whether the defendant “acted in the face of a perceived risk that its actions will  
5 violate federal law.” Id. at 536; Hemmings, 285 F.3d at 1197. Evidence of retaliation, lying  
6 about actions taken as part of a scheme to cover up harassment, intentional conduct, or conduct  
7 performed with knowledge of anti-discrimination principles or policies may also fulfill the first  
8 prong. See Hemmings, 285 F.3d at 1198-99 (and cases cited therein); Passantino v. Johnson &  
9 Johnson Consumer, 212 F.3d 493, 515-16 (9th Cir. 2000). To impute liability to the employer  
10 under the second prong, the plaintiff must show that the discrimination by an employee is  
11 attributable to the employer by using traditional agency principles, for example, that a managerial  
12 employee acted within the scope of his or her employment. Kolstad, 527 U.S. at 540-41;  
13 Hemmings, 285 F.3d at 1198. Finally, good faith efforts to comply with Title VII through an  
14 anti-discrimination policies are insufficient if the policies are not enforced or are ineffective. See  
15 Bains LLC v. Arco Prods. Co., 405 F.3d 764, 774 (9th Cir. 2005); Costa v. Desert Palace, Inc.,  
16 299 F.3d 838, 864 (9th Cir. 2002). The good faith affirmative defense is also not available where  
17 the improper conduct is committed by agents of the corporation who are sufficiently senior so as  
18 to be considered proxies for the corporation. See Hemmings, 285 F.3d at 1198.

## 19 20 DISCUSSION

21 As applied to this case, there is sufficient evidence to support the award of punitive  
22 damages. First, evidence was presented that Defendant had an out of date written policy against  
23 sexual harassment. For example, the policy did not describe conduct that could constitute sexual  
24 harassment or have an anti-retaliation provision. From 1989 until 2001, the same policy, without  
25 any updates, was in force and distributed to Defendant’s employees. Despite testimony from  
26 Erick Johnson (former executive vice president) and John Harris (president) that they knew that

1 the policy was out of date, no revisions or up-dates of Defendant's policy were printed or  
2 distributed.<sup>3</sup>

3 Second, when Tamayo made complaints, negative evidence was introduced concerning  
4 the investigations. Evidence was presented that the translations of reports or interviews  
5 involving Tamayo were inaccurate. In particular, the summary in Spanish of the August 18,  
6 1999, meeting where Tamayo reported the rapes was partly translated by the court interpreter  
7 before the jury, and the official interpretation was nonsensical. This was a document that  
8 Tamayo understandably refused to sign/adopt as an accurate reflection of the meeting and her  
9 complaints. Additionally, Tamayo had suspicions that the contemporaneous translations to  
10 Deputy Crittenden were inaccurate. The inaccuracy of the August 18, 1999, translation and  
11 Tamayo's own concerns about translation cast doubts on the translating involved during  
12 Defendant's investigation.

13 Also, evidence was presented that after the conclusion of Tamayo's first complaint  
14 against Rodriguez (for grabbing her arm and harassing her), Tamayo was assigned to work in a  
15 field near Rodriguez's home. Although Tamayo's supervisor, Raul Enriquez, admitted that he  
16 assigned Tamayo to work in the field near Rodriguez's home, he was not told by human  
17 resources that Tamayo had filed a complaint against Rodriguez or that the two should be kept  
18 apart. Similarly, when Tamayo reported Rodriguez's truck driving slowly back and forth near  
19 the field where she was working and that she was afraid, no further formal action appears to have  
20 been taken.

21 On August 18, 1999, two days after the "drive by" incident, evidence was presented that  
22 Tamayo reported to Defendant's human resources department that Rodriguez had raped her.  
23 Although Defendant had called Deputy Sheriff Crittenden to investigate the "grabbing incident"  
24 involving Rodriguez, Crittenden was not contacted about the rapes. Moreover, Rodriguez was  
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26 <sup>3</sup>Although Defendant presented evidence that it distributed sexual harassment bulletins and conducted  
27 informal "tailgate" meetings, Plaintiffs presented testimony from former Harris Farms's employees who refuted this.

1 not interviewed regarding the rapes until September 29, 1999, approximately six weeks after  
2 Tamayo reported the rapes. During this six week period, Tamayo filed a complaint with the  
3 EEOC on September 24, 1999. Despite the seriousness of the allegations, no further discipline  
4 was taken and no final report or findings were made by Defendant/the human resources  
5 department. Instead, the status quo remained and Rodriguez retired in December 1999.

6 Also, testimony was presented that between 1999 and 2001, rumors regarding Tamayo  
7 and Rodriguez were being spread. The rumors evolved into threats of violence, specifically that  
8 Rodriguez was willing to pay \$2,000 to have Tamayo drugged and then have pictures made  
9 showing her having sex. The pictures would then be sent to Tamayo's husband in order to break  
10 up the marriage. Additionally, rumors/gossip was spread that Tamayo preferred to be on top of  
11 men during sex. Tamayo complained of these rumors in late twice in late January 2001 to her  
12 immediate supervisors. On February 2, 2001, Tamayo went to the office and told the human  
13 resources director, Sylvia Gomez,<sup>4</sup> about the rumors, said that employees Hernandez, Mendoza,  
14 and Mosqueda were spreading the rumors, said that she was scared, and requested not to work  
15 alone. The following day Tamayo returned to the office and was informed that her request to be  
16 transferred to a job where she would not work alone was denied. Tamayo then requested that she  
17 and two witnesses to the gossip/rumors (Gustavo and Lourdes Ramirez) speak with Larry  
18 Chrisco, the farm manager. Despite the violent nature of the rumors and Tamayo's fears,  
19 Tamayo and her witnesses did not meet with Chrisco until approximately three weeks later on  
20 February 21, 2001. At the meeting with Chrisco, the gossip and rumors were related to Chrisco  
21 by both Tamayo and her witnesses. Additionally, the Ramirezes told Chrisco that their work  
22 vehicles had been vandalized prior to the meeting. Specifically that the tires of Gustavo's truck  
23 had been slashed and hydraulic lines on Lourdes's vehicle had been cut.

24 Gomez began an investigation that ended on March 12, 2001. Gomez concluded that  
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26 <sup>4</sup>In the interim between Tamayo's 1999 and 2001, Sylvia Gomez was internally promoted to human  
27 resources director.

1 there were two groups involved in the rumors, one group consisting of Tamayo and the  
2 Ramirez and a second group consisting of Hernandez, Mendoza, and Mosqueda. All involved  
3 in the gossip/rumors were disciplined, including Tamayo and the Ramirez. Tamayo was  
4 suspended for one day without pay and given a final written warning about engaging in sexually  
5 inappropriate behavior at the work place. Chrisco had recommended that everyone involved be  
6 suspended without pay for two weeks. Gomez concluded that Tamayo had participated in the  
7 gossip and made sexually inappropriate comments, but no specific evidence was introduced to  
8 support this conclusion. Gomez also refused to tell Tamayo what was going to happen to the  
9 other workers involved. Three of the workers involved, Lourdes Ramirez (one of Tamayo's  
10 witnesses), Mendoza, and Mosqueda were terminated because of prior warnings. Even though  
11 Tamayo was the one who complained about the gossip against her and sought help, and despite  
12 the prior histories of inappropriate gossip and harassment by Mendoza and Mosqueda, Gomez  
13 and Defendant's management reached the conclusion that Tamayo had engaged in inappropriate  
14 sexual communications/conduct and that discipline was appropriate.

15 Taken as a whole, the above evidence is sufficient to support a finding that Defendant  
16 acted with reckless disregard to Tamayo's rights. The evidence of the failure to transfer jobs,  
17 suspension, and a final written warning is sufficient to support the jury's finding of retaliation,  
18 which can support an award of punitive damages. See Hemmings, 285 F.3d at 1198-99 (and  
19 cases cited therein); Passantino, 212 F.3d at 515-16. The fact that Defendant maintained the  
20 same written sexual harassment policy for 12 years with no up-dates or modifications, despite  
21 knowing that changes in the law occurred, indicates reckless disregard for rights. Additionally,  
22 the out-of-date written policy, the amount of time to investigate complaints (particularly the rape  
23 allegation and the 2001 gossip allegation), the conclusion of the 2001 gossip complaint, the non-  
24 conclusion reached with respect to the rape allegations, and the translation problems point to an  
25 ineffective sexual harassment policy. See Bains LLC, 405 F.3d at 774 (noting that a sexual  
26 harassment policy must be enforced); Costa, 299 F.3d at 864 (noting that a sexual harassment

1 policy must be effective). Finally, the investigations of the 1999 complaints were performed by  
2 Defendant's human resources agents and the investigation and retaliatory conduct regarding the  
3 2001 complaint were performed and approved by Defendant's human resources director and  
4 management. See Hemmings, 285 F.3d at 1198. The standard for judgment as a matter of law  
5 under Rule 50 is very stringent as the court must view the evidence in the light most favorable to  
6 the non-moving party, draw all reasonable inferences in favor of the nonmoving party, and  
7 disregard all evidence favorable to the moving party that the jury is not required to believe.  
8 Reeves, 530 U.S. at 150-51; Settlegoode, 371 F.3d at 510. Viewed in this favorable light, the  
9 above evidence is sufficient to show that Defendant acted with reckless disregard to Tamayo's  
10 federally protected rights.

11  
12 **CONCLUSION**

13 Accordingly, for the above reasons, IT IS HEREBY ORDERED that Defendant's  
14 renewed motion for judgment as a matter of law is DENIED.  
15 IT IS SO ORDERED.

16 **Dated: August 25, 2005**  
17 Om8i78

/s/ Anthony W. Ishii  
UNITED STATES DISTRICT JUDGE