

No. 08-15855

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**KIRAN PANDE,**

*Plaintiff-Appellee,*

**v.**

**CHEVRON CORPORATION and CHEVRON  
INTERNATIONAL EXPLORATION & PRODUCTION,**

*Defendants-Appellants.*

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On Appeal From the United States District Court  
For the Northern District of California  
Case No. C 04-5107 JCS  
The Honorable Joseph C. Spero

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**APPELLANTS' OPENING BRIEF**

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## **CORPORATE DISCLOSURE STATEMENT**

Appellant Chevron Corporation has no parent company and no publicly traded company owns 10% or more of its stock. Chevron International Exploration & Production is a division of Chevron U.S.A. Inc., which is an indirectly wholly owned subsidiary of Chevron Corporation.

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## **INTRODUCTION**

This case is a good illustration of how anti-retaliation laws can be misused to immunize an employee from later, lawful employment decisions. Plaintiff is Kiran Pande, a petroleum engineer formerly employed by Chevron. In 2003, Chevron decided to relocate to Houston the group in which Pande worked, so that it would be closer to other related Chevron groups and to the business units they supported. Along with the other employees in her group, Chevron offered Pande a continuing position in Houston and encouraged her to accept it. But Pande declined that offer for personal reasons, saying that she preferred to stay in the San Francisco Bay Area and that she did not view the Houston position as being on her desired career path. She thereafter applied for various alternative positions within Chevron (for most of which she was admittedly not qualified), but she was not selected. At the end of 2003, having declined Chevron's offer and having not obtained an alternative position, Pande's employment with Chevron was terminated.

Pande immediately claimed that the termination was due, not to her personal decision to turn down Chevron's offer to move to Houston, but because Chevron was retaliating against her. She primarily argued that the retaliation was on account of her decision in late October 2003 (just before her group was scheduled to move to Houston and her employment was to be terminated) to take an indefinite medical leave. She asserted that this alleged retaliation violated her rights under the Family Medical Leave Act and the California Family Rights Act. The jury, however, rejected that claim of retaliation.

That left her fallback theory that her employment was terminated at the end of 2003 because of a complaint she had in made March 2002—twenty months earlier—against a previous supervisor from a different group. She did not claim that this previous supervisor had anything to do with the termination decision itself. Instead, her theory was that this supervisor interfered with her efforts, long after she had left his group and switched to a different area of the company, to get an alternative position within Chevron. The jury accepted this theory and awarded Pande over \$3 million in alleged lost wages, premised on the notion that it would take Pande (a Stanford Ph.D. petroleum engineer in an admittedly hot oil industry job market) a full five years to get another job equivalent to her job at Chevron.

Pande's fallback theory, however, was unfounded. That theory required that she prove an actual causal link between her complaint against her previous supervisor, on the one hand, and the decision of others in the company nearly two years later, on the other, not to offer her another job within Chevron. She offered no such proof. Instead, her case was founded on her unsupported speculation that the decisions at issue *must* have been infected by her former supervisor either because he *must* have spoken to the selection committees or because the few negative comments made about her in those committees *must* have originated from that supervisor. Such speculation is not enough. The testimony at trial was uncontradicted that the supervisor did not speak with anyone on the selection committees and there was no evidence the concerns expressed about Pande came from him, as opposed to from the numerous others

in the company who had worked with her and expressed such concerns well before Pande registered any complaint about the supervisor. The law is clear that Pande was required to offer substantial evidence of retaliation, not mere assumption or speculation. Because she did not do so, the jury's unsupported verdict cannot stand.

In addition to \$3 million as alleged lost income, the jury also awarded Pande \$2.5 million in punitive damages. This award must be reversed, whether or not the compensatory damages were proper. Governing California law permits an award of punitive damages against a corporate employer only when the plaintiff shows, by clear and convincing evidence, that the wrongdoer was an "officer, director or managing agent" of the corporation. And the California Supreme Court has defined "managing agent" as requiring that the wrongdoer have authority to set general corporate policy and as not including someone who has only supervisory authority (even when that authority extends to hiring, disciplining or terminating employees). The supervisor Pande accused of retaliation was just that, a supervisor—and only in a small advisory and consulting group, not a policymaking group. He did not have authority to determine corporate policy. Punitive damages were therefore not proper.

#### **STATEMENT OF JURISDICTION**

The district court had jurisdiction under 28 U.S.C. § 1331. The district court issued a final judgment on all claims on October 29, 2007. ER 9. Chevron timely filed a motion for judgment as a matter of law or, alternatively, a new trial on November 13, 2007. ER 386. That motion was denied on

March 11, 2008. ER 1. The district court granted plaintiff's motion for attorneys' fees on April 1, 2008, and awarded costs on March 12, 2008. ER 417, 420. Chevron timely appealed on April 4, 2008. ER 434; *see* Fed. R. App. P. 4(a)(4)(A). This Court has jurisdiction under 28 U.S.C. § 1291.

### **STATEMENT OF THE ISSUES**

1. Did plaintiff establish the required causal link between her complaint of discrimination and her failure to obtain a new position within Chevron twenty months later, after she declined Chevron's offer to move with her group to Houston?

2. Did plaintiff establish that her supervisors in her small advisory and consulting group were managing agents of the corporation?

### **STATEMENT OF THE CASE**

Kiran Pande was an employee of Chevron U.S.A. Inc. in a division known as Chevron International Exploration and Production Company ("Chevron"). She filed this suit in December 2004, alleging that she lost her job at Chevron in retaliation for her decision to take a medical leave beginning in November 2003. She claimed this violated the federal Family Medical Leave Act, 29 U.S.C. § 2615 *et seq.* ("FMLA"), and the California Family Rights Act (Cal. Govt. Code § 12945.1 *et seq.* ("CFRA")). She also asserted that Chevron's policies were inadequate under those statutes, and also that Chevron violated her right to medical confidentiality under those statutes. In addition, she alleged claims for gender and racial discrimination under California's Fair Employment and Housing Act, Cal. Govt. Code § 12900 *et seq.* ("FEHA"); for retaliation under

FEHA; for wrongful termination; and for violation of her constitutional right to privacy and the California Confidentiality of Medical Information Act, Cal. Civ. Code § 56 *et seq.*

The district court granted summary judgment for Chevron on the FMLA and CFRA claims to the extent they challenged Chevron's policies or confidentiality practices. ER 35. The court likewise granted summary judgment on the causes of action for violation of the right to privacy and violation of the Confidentiality of Medical Information Act. *Id.* Pande thereafter abandoned her claims of discrimination. ER 60. This left for trial Pande's claims for: (1) violation of the FMLA and CFRA for allegedly terminating Pande's employment in retaliation for her taking a medical leave, (2) violation of FEHA for allegedly retaliating against her for complaining about discrimination, and (3) wrongfully terminating her in violation of public policy.

The jury found against Pande on her FMLA and CFRA claims. ER 10. It found in her favor on the FEHA retaliation claim and her claim for wrongful termination. *Id.* As damages, it awarded \$836,048.50 for past economic loss, \$2,235,387 in future economic loss and \$2,500,000 in punitive damages. *Id.* The district court thereafter awarded fees and costs to Pande in the total amount of \$541,353.93. ER 417, 420.

## STATEMENT OF FACTS

### **A. Pande's employment as a planning analyst.**

Pande holds a Ph.D. from Stanford University in petroleum engineering and an MBA from the University of California at Berkeley. Tr. 212:15-213:6.<sup>1</sup> She began working for Chevron in 1988. Tr. 213:9-10.

In September 2000, Pande became a planning analyst in the business and strategic planning group of Chevron's "international upstream" company. Tr. 236:20-25, 237:17-238:2.<sup>2</sup> Her job was to assist Chevron's business units in coordinating their business plans and making funding requests for capital projects. Tr. 237:17-238:2. Her supervisor was Rex Mitchell, whose title was "planning manager." Tr. 881:1-2. A year later, in October 2001, at Mitchell's request, she took a new position as a "portfolio analyst" within the same group. Tr. 245:12-21. She described her work in that new position as portfolio modeling, price forecasting and competitive assessment. Tr. 245:22-246:2; *see also* ER 245-46.

Pande testified that by February 2002 she felt that Mitchell was treating her differently from the men in her group. Tr. 253:8-254:12. She said that, on

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<sup>1</sup> The reporters' transcript pages cited in this brief are all contained in volume 2 of the Excerpts of Record.

<sup>2</sup> In the oil industry, "upstream" refers generally to crude oil exploration and production. "Downstream" refers to refining the oil into gasoline and other products and distributing those products for sale. Tr. 880:1-21, 1331:19-1332:3. At the time, the Chevron entity of which Pande's group was a part was known as ChevronTexaco Overseas Petroleum. Tr. 881:1-15.

February 27, 2002, she requested a meeting with Mitchell's supervisor, Jay Johnson, to speak with him about Mitchell. Tr. 255:1-256:2. That meeting occurred on March 4. According to Pande, Johnson told her in that meeting that he had spoken with Mitchell, who reported that he had "significant performance issues" with Pande. Tr. 257:5-15. She further claimed that Johnson told her that her options were to stay in Mitchell's group, find a position in a different group in Chevron, or find a job outside Chevron. Tr. 257:19-25. A second meeting was held on March 14 between Pande, Johnson and Mitchell, in which Pande claimed that Mitchell detailed his complaints about her without giving her a chance to respond. Tr. 258:4-260:2. Pande said that she felt she was being retaliated against and that she told them that she would like to find another job within Chevron. Tr. 259:22-23, 260:3-6.

The following month Pande received her annual performance evaluation from Mitchell. Mitchell's evaluation commented favorably upon her work, did not include any negative comments, and gave her an overall "fully meets performance expectations" ranking of 2. ER 254. Although Pande admitted that a ranking of 2 is generally "perfectly acceptable in a normal year," she testified that she felt this ranking was unfair and retaliatory, given what she felt was her outstanding work during the review period and the previous favorable comments from Mitchell about her performance. Tr. 266:18-267:4.<sup>3</sup>

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<sup>3</sup> Pande claimed at trial that Mitchell had given her a 2 ranking after learning about her complaint about him. Mitchell testified that he had assigned the ranking to her (along with the ranking of all other employees in his group)  
(continued . . .)

Upset about her ranking, Pande spoke with the Chevron ombudsman, Gary Yamashita, who set up a meeting on April 24 between Pande, Johnson, Mitchell, Yamashita and another female employee in the group. Pande claimed that that meeting was also unproductive, consisting simply of Johnson detailing the complaints Mitchell had with Pande's performance. Tr. 271:22-272:5. She asserted that she was not given any chance to discuss any of her complaints of unfair treatment. Tr. 272:6-8. She said that the meeting concluded with her stating that she wanted to find a new position outside the group. Tr. 273:2-6.

According to Pande, Mitchell continued to treat her unfairly after the meeting. She said he virtually stopped speaking with her, excluded her from a key meeting and did not assist her in finding another position. Tr. 273:20-25. She also claimed that he failed to advance her to a higher pay grade, as she said he had earlier promised he would. Tr. 246:10-19, 1631:18-22. Pande did not complain to anyone about these alleged retaliatory actions until December 2003 when she asserted that Chevron was unlawfully terminating her employment. ER 282.

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no later than March 1—*i.e.*, before the March 4 meeting in which Pande registered her complaint about Mitchell—and that he did not know anything about her complaint when he did so. Tr. 1472:14-1473:23. Pande asserted that Mitchell was aware of her complaint before March 1 because she told Johnson's assistant on February 27 that she wanted to speak with Johnson and Johnson then spoke with Mitchell in advance of the March 4 meeting. Tr. 255:1-11, 256:22-257:5. She presented no evidence, however, as to whether Johnson spoke with Mitchell before or after March 1.

**B. Pande's 2002 applications.**

In the fall of 2002, Pande applied for alternative positions within Chevron. These applications were considered in Chevron's formal "personnel development committee" meetings that occur twice a year. Tr. 498:17-19, 1341:13-16. At these meetings, the PDC takes up all the open positions within the company in a given area and seeks to match them with the best available applicant for each position. Tr. 969:16-971:9, 1338:13-1340:15, 1147:2-7. A given PDC may include 20-30 members, consisting of representatives from the various business units involved and representatives for the applicants. Tr. 1339:14-1340:1.

Pande testified that she applied for three jobs in the fall 2002 PDC and that she was put on the "slate" for three or four other jobs that were open at Chevron at the time. Tr. 275:23-276:7. The PDC ultimately selected her for a position as a simulation engineer in the Southern Africa Strategic Business Unit ("SASBU"). Tr. 276:10-13, 279:5-15. This was an "attractive" high-profile position, involving an important oil field in which Chevron was investing \$3.6 billion. Tr. 1368:3-1370:6; ER 297 ("This is one of the best assets the company has, and it will be a high profile project . . . [with] real opportunity for growth from a professional standpoint . . ."). The position had a "lot of visibility"

within the company and accordingly was a “very positive” position to have on one’s resume. Tr. 1369:12-1370:6.<sup>4</sup>

Pande admitted that there were “definitely a lot of interesting and challenging aspects” to the SASBU job, but she was disappointed in being selected for that job because it was “really not the career path I wanted to go on” given that it involved engineering work of the kind she had done previously. Tr. 279:2-24. She said that she would have preferred some of the other jobs for which she had been a candidate and claimed that she was turned down for those positions as a result of retaliation from Rex Mitchell. For all but two of these other positions, she introduced no evidence at all that Mitchell (who was not a member of the PDC considering her applications) had any connection with the decisions at issue.<sup>5</sup> For example, two of the three jobs for which she applied were in the International Gas Group. Tr. 521:13-24. She did not contend, however, that Mitchell (or anything related to her time in Mitchell’s group) played any role in the decision on those jobs. Nor did she introduce any evidence that she was qualified for those jobs. Instead, she admitted that the reasons that she was given for not getting the jobs were that the jobs required “hit the ground running gas experience” that she lacked, that she did not want to

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<sup>4</sup> Pande was selected for this position over a male co-worker from Mitchell’s group. The co-worker was given a position in Australia. Tr. 1376:6-15, 1409:15-21.

<sup>5</sup> As her counsel admitted in closing argument, “we have no idea whether he talked to the others. And we don’t know what they would say he said.” Tr. 1634:8-10.

do the significant travel the jobs would require, and that she did not have a long-term career aspiration to work in the gas business. Tr. 522:20-25, 526:4-530:16; ER 300-01. She also admitted that she did not know who was selected for those jobs or whether they were far better qualified than she was. Tr. 523:7-14 (“I have no idea, no.”).

As to the only two jobs to which Mitchell had any connection, the evidence was similar. The first was a position in Corporate Planning working under Des King, which was the other job for which Pande affirmatively applied. Tr. 531:2-15. When Mitchell learned that Pande had not made the short list to be interviewed for the position, he urged King to interview Pande, which King did. Tr. 975:7-25. Pande did not present evidence that Mitchell said anything negative about Pande or that Pande’s experience in Mitchell’s group played any role in Pande not being selected for that job. To the contrary, Mitchell testified without contradiction that he supported Pande’s application and said nothing negative to King about her. Tr. 989:7-12. Further, Pande admitted that the position was a highly competitive one and that she did not know how her qualifications compared to the person who got the job. Tr. 549:17-551:6. Chevron’s witness testified, without any rebuttal from Pande, that the successful applicant was more qualified, in part because she had experience as a manager in a Chevron refinery. Tr. 976:3-977:4.

The other job as to which Pande claimed Mitchell played a role was in a technical group supporting an upstream business unit in Congo. Tr. 1027:22-1028:9. Pande asserted that she was not offered that job after Mitchell spoke

with the supervisor there. But Pande did not testify that this was one of the jobs for which she had applied or in which she had any interest. To the contrary, the uncontradicted testimony was that the supervisor had contacted Mitchell to inquire whether Pande might be interested in joining his group and Pande told Mitchell she was not interested. Tr. 1027:22-1028:3, 1028:22-1029:4. Pande's representative in the fall 2002 PDC likewise recalled, again without dispute from Pande, that Pande said she was not interested in the Congo position. Tr. 1413:14-19.

**C. Pande declines to move to Houston with her group.**

Pande began working in the SASBU on December 9, 2002. Tr. 280:5-7. She was part of the group assigned to work on deepwater oil fields, known as Block 14. Tr. 276:10-13, 639:16-19. Her supervisor in Block 14 was Jack Dunn. Tr. 280:3-4. At the time Pande joined the group, it was located in San Ramon, California.

In May 2003, after months of study, Chevron decided to move the U.S.-based groups associated with the SASBU, including Block 14, to Houston, effective at the end of 2003. The move was formally announced by e-mail to the employees on May 13, 2003 (Tr. 288:11-289:22; ER 257), and was discussed at a town hall meeting on May 22, 2003. ER 257; Tr. 289:23-290:5. Employees were told that, if they declined to move to Houston with the group, their Chevron sponsor would work with them to find an alternative position within Chevron. ER 267. They were further told that, if no alternative position were found, "employees may be eligible for a separation payment under the surplus

employee program in place and will be advised of their eligibility at the time of termination.” *Id.*<sup>6</sup> The FAQs given to employees similarly explained that employees “who decline the offer to move will be expected to work with their sponsor to find alternative employment. There is no guarantee that such alternative employment will be found.” ER 284. The FAQs further warned that, if no alternative employment is found, “employment with ChevronTexaco will be terminated.” *Id.* at 3; *see* Tr. 1170:12-1172:23.<sup>7</sup>

Pande declined the offer to move to Houston. Tr. 295:17-21. She said that she preferred to live in California, close to her elderly parents in the Bay Area, and that she did not view the job as one on her desired career path. Tr. 296:8-22.

**D. Pande’s unsuccessful applications for an alternative Chevron position.**

Having declined Chevron’s offer to move with her group to Houston, Pande began applying for another position within Chevron in August or September 2003. Tr. 301:8-11. She testified at trial that she applied “probably for about 15 or 16” positions. Tr. 302:5-7. She admitted, however, that for many of the positions she had no “realistic expectation that I would be selected”

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<sup>6</sup> Pande was out of the country at the time of the meeting but she testified that, when she returned, she received and read a copy of the presentation containing this information. Tr. 290:15-291:4.

<sup>7</sup> The letter given to Pande offering her a position with the group in Houston likewise required that she confirm that, if the position was declined, “I understand that the Company might not place me in another position and that I may be subject to termination of employment.” ER 272; Tr. 294:18-21.

based on her qualifications, and she thought she was a “good candidate” only for about half of them. Tr. 302:22-303:2. Further, for nearly all of the jobs for which she asserted at trial she was qualified, she offered no evidence attempting to show that the reason she was not offered the job was retaliatory. For example, she said she was qualified for analyst positions in the Global Gas Group (even though she admitted she had no experience in the gas business). Tr. 305:19-306:12, 309:11-24. But she presented no other evidence regarding these jobs, including who the successful applicant was, what the decisionmaking process was or (most importantly) whether the decision was influenced in any way by any retaliation. Similarly, she said she was “well qualified” for two positions as a planning coordinator with Energy Technology Company, but then offered no further evidence regarding what happened with those positions. Tr. 317:23-318:4.<sup>8</sup>

Ultimately, there were only two job decisions for which Pande made any attempt to establish any retaliatory connection. The first was the decision on two reservoir engineer positions located in London. The positions were filled in the fall 2003 PDC. Tr. 1119:2-5, 1123:1-5. Pande did not call as a witness any of the participants in that PDC, which consisted of engineering managers and did not include any representatives from the planning groups. Tr. 1124:19-21.

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<sup>8</sup> On cross-examination, she admitted that she had no information regarding who made the decision regarding those positions or to whom they were offered. Tr. 569:5-570:20, 574:1-575:11. Chevron’s witness testified without contradiction that no issue was raised in the selection process for these positions regarding Pande’s time working for Mitchell or Dunn. Tr. 1296:9-1298:22.

Instead, she relied on an e-mail exchange with her sponsor, Brian Smith, which she claimed showed she was not selected for the jobs because of “teamwork” issues she had while in planning. ER 279. As discussed below, however, she did not introduce any evidence that it was Mitchell who raised this issue. She admitted that she did not know who made the decision or whether that person had any contact with Mitchell. Tr. 559:1-25.

The other decision related to two engineer positions in San Ramon that were advertised in late 2003 after the fall 2003 PDC had closed and that were filled in January 2004. Pande relied on evidence that some of her former engineering supervisors commented negatively about her to the selection committee. Tr. 1208:3-1210:9, 1311:10-1312:12, 1314:20-1315:6; ER 366-67 (31:14-32:11). As discussed below, however, Mitchell was not one of the supervisors who commented or was contacted, because this was an engineering position. Nor was there any testimony that anyone on the committee even spoke with Mitchell or that Mitchell otherwise had any input into their selection process.

**E. Pande’s medical leave.**

After Pande was turned down for the engineering jobs in London in October (and the fall PDC had closed, leaving her with few remaining positions to apply for within Chevron), she submitted a disability claim to Chevron’s disability insurer, stating that she had a medical condition that made her unable to perform her job and that she needed a medical leave for an indefinite period starting on November 10, 2003. ER 273; Tr. 323:21-324:14, 334:14-15.

On November 4, 2003, a week after announcing her intention to go on leave, Pande participated in a team meeting with others in her group, in which Dunn questioned Pande about who would be taking over her work while she was out on leave. Tr. 1194:20-1197:20. This questioning, which Pande claimed was pointed and overly aggressive (Tr. 329:8-22), became the genesis for her claim that Dunn was retaliating against her for taking a medical leave. As noted, the jury found against Pande on her FMLA and CFRA retaliation claims.

**F. Termination of Pande's employment.**

On November 18, 2003, with the move to Houston being imminent, Chevron notified Pande by letter that, as a result of her decision to not move with her SASBU group to Houston, her employment with Chevron would be terminated as of December 31, 2003, unless she was selected for another Chevron position before then. ER 277. The letter noted that her group would be officially relocated in Houston as of December 12, 2003, thus eliminating her existing job in San Ramon.

Even after receiving the termination letter and going on her medical leave, Pande had some pending applications for positions within Chevron. The last such application was for the San Ramon engineering jobs discussed above. She was notified regarding those jobs in January 2004. Pande testified that she began searching for a job with another company beginning at that same time in January 2004. Tr. 370:16-20.

**G. Pande's asserted mitigation efforts and damages.**

Pande asserted that, despite diligent efforts (and despite supposedly being willing to relocate anywhere in the world other than Libya, Nigeria or Saudi Arabia, Tr. 1524:24-1525:18), she was not able to get a job with any other oil company. Although her professional experience was working for a major oil company, she did not apply to any other major oil companies. Tr. 577:10-13. The only specific company she named as having applied to was Anadarko, where her brother worked. Tr. 577:13-578:6. Claiming that no one would hire her, she decided to do consulting work, which she began in 2005, along with part-time teaching at Stanford University. Tr. 578:15:-579:10, 379:12-380:20. At the time of trial, she testified that she had only two consulting clients and that her share of the consulting income in 2005 totaled only \$7,406 and in 2006 totaled \$18,303. Tr. 376:1-378:10, 582:4-12.

The jury awarded her \$2,235,387 in future economic losses, which matched nearly exactly her expert's testimony as to her alleged losses under a scenario in which it would take her a full five years to again reach the level of the salary she had earned at Chevron. Tr. 803:16-19, 1642:12-15. Pande admitted that at least by the time of trial (in October 2007, less than three years into the alleged damage period) that "there are lots of job opportunities out there" for persons with her skill set and that she would not be surprised to learn that oil companies are paying signing bonuses to hire engineers. Tr. 578:11-579:6. She said, however, that she had elected to pursue her consulting business with her brother. Tr. 579:7-10.

## ARGUMENT

### **I. PANDE FAILED TO CARRY HER BURDEN OF PROOF TO CONNECT HER LOSS OF EMPLOYMENT AT CHEVRON WITH ANY RETALIATION.**

#### **A. With The Jury Having Rejected Her Primary Theory of Retaliation, Pande Was Required to Prove That Mitchell Caused Her To Not Be Offered An Alternative Position.**

Pande's claim that she lost her job because Chevron was retaliating against her was always tenuous, at best. Far from trying to terminate her, Chevron gave her an unconditional offer to remain in her current position. As Pande herself admitted, Jack Dunn told her "that he would be really, really thrilled if I moved to Houston and that he felt that, you know, he'd be very happy if that happened." Tr. 541:13-15. Pande offered no reason why she could not have accepted that offer. She does not claim that Chevron was seeking to force her out of her existing job, or otherwise unlawfully made the conditions of continued employment intolerable. She simply felt that the position did not fit her desired career path and she did not want to move to Houston. Tr. 296:8-22. Whether or not those personal reasons were valid, they do not turn her decision to reject Chevron's offer into a retaliatory termination.

Pande's tenuous claim, however, became completely unmoored once the jury rejected her theory that she was terminated because Jack Dunn was retaliating against her for her decision to take a medical leave. That left her with only the argument that it was retaliation by Mitchell that caused her to lose her job. To prevail on that theory, Pande was required to prove a causal link between her protected activity and Chevron's decision not to offer her another

position beyond the one it had already given her. *Chen v. County of Orange*, 96 Cal. App. 4th 926, 949 (2002) (“Significantly, the necessity of a causal link is a part of a plaintiff’s *prima facie* case of retaliation.”). Requiring proof of this causal connection is important because FEHA’s anti-retaliation provisions were not intended to grant employees “de facto immunity” from any later employment decisions the employee might view as adverse—such as less-than-hoped-for performance evaluations or not getting a desired position in the company. *Id.* at 948 (noting the risk that the employees can “manipulate the system” and make the employer “afraid to take any action” for fear of being sued for retaliation); *Akers v. County of San Diego*, 95 Cal. App. 4th 1441, 1455 (2002) (noting concern that “employers will be paralyzed into inaction once an employee has lodged a discrimination complaint”); *Sweeney v. West*, 149 F.3d 550, 557 (7th Cir. 1998) (expressing concern that, absent a sufficiently exacting evidentiary standard for retaliation claims, “a simple statutory prohibition against retaliation would be turned into a bizarre measure of extra protection for employees who—though they might genuinely need counseling—at one point complained about their employer”).

Moreover, Pande cannot rely for proof of this required causal link simply on the fact that her unsuccessful job search occurred after she complained about Mitchell. At the time the decisions at issue were made, it had been nearly a year since Pande had worked for Mitchell—and nearly twenty months since she had lodged her complaint against him. *See supra*, pp. 6-7, 14-15. This lapse of time between her discrimination complaint and the alleged adverse action precludes

Pande from arguing that the jury could infer a causal link simply on the basis that one occurred after the other.<sup>9</sup> Instead, Pande was obligated to adduce evidence showing an actual causal link between her complaint and her inability to obtain another position twenty months later. She did not do so.<sup>10</sup>

**B. Mitchell Played No Role In The Decisions On Pande's Applications.**

As discussed above, Pande attempted to establish a connection between Mitchell and only two decisions on her applications in 2003: one related to two engineer positions in London and the other to two engineer positions in San Ramon. As to both decisions, however, there was no evidence that Mitchell played any role.

As to the London positions, the entirety of Pande's evidence was the e-mail from her sponsor, Brian Smith, in which he told her that she was rated

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<sup>9</sup> *Clark Co. School Dist. v. Breeden*, 532 U.S. 268, 273-74 (2001) (no causal relationship found where adverse action taken 20 months after claimed protected activity); *Vasquez v. County of Los Angeles*, 307 F.3d 884, 896 (9th Cir. 2002) (affirming summary judgment where the plaintiff failed to show a causal link because “[t]he protected activity occurred thirteen months prior to the alleged adverse action”); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002) (18 month lapse is too long to create inference of causation); *Manatt v. Bank of America, NA*, 339 F.3d 792, 802 (9th Cir. 2003) (9 months between protected activity and adverse employment action not sufficiently close).

<sup>10</sup> The sufficiency of the evidence to support the jury's verdict is reviewed under the substantial evidence standard. *Watec Co. v. Liu*, 403 F.3d 645, 651 n.5 (9th Cir. 2005). Chevron raised this issue in its motions for judgment as a matter of law during trial and following the judgment. Tr. 926:3-21; ER 319-24, 399-408. The district court reserved ruling on the motion during trial and denied the post-judgment motion. ER 333; ER 1.

relatively lower on teamwork based on “some mention” of her time in “planning and some of the relationships when [she] was in that group.” ER 279. Pande claimed at trial that Mitchell was the source of these comments because he was her supervisor when she was in planning. Pande presented no evidence, however, that Mitchell ever spoke with anyone on the selection committee, or that Mitchell was otherwise the source of whatever was said at the committee meeting. Pande did not call Brian Smith as a witness at trial to have him state whether the information came from Mitchell. Nor did she call any other witness to try to make that connection. The only witness at trial who was on the selection committee was George Alameda, Pande’s representative on that committee. He testified that he did not speak with Mitchell (Tr. 1146:20-22), and that the comments about Pande came from other managers present at the meeting. Tr. 1124:6-21. He said the practice of the selection committee is to talk with the applicant’s current supervisor, not to reach back to former supervisors. Tr. 1133:14-23, 1146:17-22.

Nor can it be inferred that Mitchell must have been the source of the comments. The information did not come from Mitchell’s written evaluation of Pande because that evaluation contained no negative comments about any teamwork issues—and there is no evidence that the selection committee reviewed that evaluation in any event. ER 254. Nor was Mitchell the only possible source of criticism about Pande’s work. Pande admitted that Mitchell told her in 2001—long before she made her discrimination complaint—that others in her group had been complaining about her work performance.

Tr. 506:10-508:8 (“[H]e said that everyone in the group had complained to him.”). Mitchell likewise testified without contradiction that Pande’s co-workers had complained to him about Pande. Tr. 907:24-908-14. Similar criticisms were made about Pande both before and after her time in Mitchell’s group. Pande admitted, for example, that David Kennedy (her supervisor before she joined Mitchell’s job) told her others in her group had complained that she was coming in late to work. Tr. 483:8-25.<sup>11</sup> She likewise testified that Kennedy told her in late 2000 that he was concerned about her attitude. Tr. 489:21-491:11. Significantly, Pande also admitted that Kennedy at the same time told her that he had expressed this concern to Tom McMillen, another Chevron manager, as the reason why he did not rank her as a “high potential” employee. Tr. 490:1-11. McMillen was one of the members of the selection committee for the London jobs who told the committee he had concerns about Pande’s teamwork. Tr. 1124:6-18, 1140:3-8.

In short, there were numerous avenues through which concerns about Pande’s teamwork (both during her time in planning and otherwise) could have come to the selection committee’s attention, wholly apart from Mitchell. Pande cannot defend the jury’s verdict on the basis of supposed inferences that do not rise above “mere speculation” or “conjecture.” *Villiarimo v. Aloha Island Air*,

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<sup>11</sup> See also Tr. 683:4-689:23 (testimony from one of Pande’s co-workers in Dunn’s group, describing how her commitment level diminished after the move to Houston was announced and how he complained to Dunn that she was not pulling her weight).

*Inc.*, 281 F.3d 1054, 1065 n.10 (9th Cir. 2002) (internal quotation marks omitted); *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001) (“A plaintiff’s belief that a defendant acted from an unlawful motive, without evidence to support that belief, is no more than speculation or unfounded accusation about whether the defendant really did act from an unlawful motive.”). Her claim that Mitchell had anything to do with the decision on the London jobs fails that standard.

Pande’s evidence regarding the San Ramon engineering positions likewise fails. No witness testified that Mitchell had any input into that decision or that Pande’s experience in Mitchell’s group played any role. Instead, the uncontradicted testimony was that the selection committee received input only from Pande’s supervisors when she worked in engineering positions, consistent with the fact that the San Ramon positions were engineering jobs. Zuwa Omoregie, a member of the committee and the supervisor of the group in which the jobs were located, testified that the selection committee consisted of engineering managers, and that he spoke with Jack Dunn, Dave Kennedy and Jean Camy—Pande’s three most recent supervisors in engineering positions. ER 367 (32:15-21).<sup>12</sup> Omoregie did not speak with Mitchell, and to his knowledge no one else did. ER 365 (30:14-16).

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<sup>12</sup> Camy was also a member of the selection committee, in part because his new group in London would be supported by Omoregie’s group. Tr. 1308:8-11, 1312:4-1313:25.

(continued . . .)

Lacking any evidence of Mitchell's involvement, Pande's theory at trial was that Mitchell must have had some undocumented behind-the-scenes influence to which no one testified. She relied principally on an exchange of e-mails unrelated to the London positions that occurred in September 2002—well over a year before the decision on the London jobs. The exchange was initiated by a Chevron HR manager inquiring of David Kennedy whether Pande had been rated “high potential” when she worked for him. ER 295. Kennedy responded that she had not been, and gave some of the reasons, including questions he had about her commitment and teamwork. *Id.* As noted above, these were the same concerns that Pande admits Kennedy raised with her directly in late 2000—well before Pande complained about Mitchell—when he told her that she was not being rated “high potential.” Kennedy's response to the inquiry was then forwarded by the HR manager to Mitchell, which led to a further exchange of e-mails between Mitchell and Kennedy about concerns they each had about Pande's performance. ER 292-95.

Based on this exchange, Pande theorized at trial that, when Kennedy told the selection committee sixteen months later that he had concerns about Pande's attitude and commitment, he was simply parroting what Mitchell told him rather than describing his own experience with Pande. Again, that theory was nothing

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Tellingly, in her application in the fall PDC 2003 for an engineering position in London, Pande did not list Camy or any of her other three most recent engineering supervisors. Instead, she reached back years earlier to list only her supervisors before Dunn, Camy and Kennedy. Tr. 557:1-558:14.

but unfounded speculation. Kennedy had worked directly with Pande and had admittedly raised the same concerns about her long before Pande had any issues with Mitchell. Kennedy was not disqualified from voicing those concerns—on pain of the company being held liable for retaliation—simply because he later learned about Pande’s complaint against Mitchell and Mitchell’s response. If that were the law, no supervisor who learned of an employee’s discrimination complaint (even if directed at another supervisor) could ever raise any concern about the employee’s performance. This would create the very “de facto immunity” for employees against which the courts have repeatedly warned. *See supra*, p. 19. To avoid that result, Pande was required to produce evidence, not mere surmise, that the employment action in question was caused by retaliation.

Pande tried to supply the missing link by noting that Kennedy told Omoregie that Pande’s attitude had changed for the worse when she did not “get a promotion, . . . or maybe the promotion and ranking were not what she expected.” ER 366 (31:14-20). Pande asserted that this comment must have been referring to the pay grade advancement Pande did not get when she worked for Mitchell and to the ranking Mitchell gave her in her PMP for 2001—and that Kennedy was therefore channeling Mitchell’s (allegedly retaliatory) views. But there was no evidence that Kennedy was aware of any dispute between Mitchell and Pande over a promotion or ranking. The e-mail exchange between Kennedy and Mitchell referred only to Mitchell having “confronted [Pande] about her performance in her 2001 PMP,” without mentioning what performance ranking

he gave her. ER 292-95. Similarly, there was no mention of any issue related to any increase in pay grade.

Moreover, even if Kennedy had known of those issues, there is no basis upon which to conclude that that was what he was referring to. As noted, Pande admits that Kennedy had not ranked her as “high potential” in late 2000, a ranking that Pande said she believed was valuable in opening opportunities in the company. Tr. 486:20-487:9. Similarly, in his initial response to the HR manager in September 2002, Kennedy had written that Pande had become disillusioned over promises she believed had been made to her and not kept. ER 295. While she was working for Kennedy, she was turned down the first time she interviewed for a position in Mitchell’s group. Tr. 881:16-882:12. There is no basis—other than speculation—upon which the jury could have concluded that Kennedy’s comment to Omoregie was referring to events during her time with Mitchell (in which Kennedy had no involvement), rather than to these or other events in which Kennedy was involved.

**C. The Alleged Adverse Actions in 2002 Do Not Support The Verdict.**

No doubt recognizing the lack of evidence showing any connection between Mitchell and her job applications in 2003, Pande devoted considerable time at trial to contending that Mitchell retaliated against her in 2002 by not giving her the highest possible performance ranking, not advancing her to a higher pay grade and allegedly not doing enough to assist her efforts to find a

new position when she left his group. These purported retaliatory actions do not support the jury's verdict for two independent reasons.

*First*, the jury did not award damages limited to any difference in pay resulting from Pande remaining in a lower pay grade or obtaining the "attractive" SASBU position in 2002 rather than some other position. Nor did Pande present any evidence as to what those amounts might have been. Instead, the jury awarded damages for lost income resulting from Pande no longer working at Chevron (and supposedly not being able to obtain comparable employment in an admittedly hot job market for a period of five years). *See supra*, p. 17. The jury's verdict thus depends on whether there was proof that Pande lost her job in 2003 as a result of retaliation, not simply whether she did not get a pay raise in 2002 or got a less-than-hoped-for performance ranking. And those 2002 events do not constitute such proof because Pande made no attempt to connect the 2002 events to her lack of success in getting an alternative position in 2003. There was no evidence that Pande's performance ranking on her PMP for 2001, her pay grade or her position in SASBU played any role in the decisions on her applications in 2003. *See supra*, pp. 8-10.

*Second*, any attempt to predicate liability or damages on the 2002 events is barred by the statute of limitations. FEHA requires that the plaintiff file an administrative charge within one year of the alleged unlawful conduct. *Morgan v. The Regents of the Univ. of Cal.*, 88 Cal. App. 4th 52, 63 (2000) (citations omitted). Pande did not file her charge until December 8, 2003, well more than a year after the 2002 events in question. ER 306.

Pande argued below that the continuing violation doctrine applies to her claims. That doctrine, however, does not permit her to reach back to the events in 2002 to which she points. In *Richards v. CH2M Hill, Inc.*, 26 Cal. 4th 798 (2001), the California Supreme Court held that the continuing violation doctrine tolls the limitations period only when each of the following exists: (1) the employer's actions outside the limitations period are sufficiently similar in kind to the unlawful conduct within the limitations period; (2) the actions have occurred with reasonable frequency; and (3) the employer's actions have not acquired a "degree of permanence." *Id.* at 823.

Pande has not met this test. Even if she met the first two prongs, she did not meet the third. Each of the events in 2002 had acquired a "degree of permanence" sufficient to trigger the statute of limitations before December 8, 2002. The evidence established that her 2001 PMP was final, and that Pande treated it as final, no later than April 2002. As Pande testified, she met with Jay Johnson and the ombudsman on April 24, 2002, was not satisfied with the outcome of that meeting, but elected not to pursue any further challenge to what she believed at the time was the retaliatory evaluation. Tr. 269:4-22, 518:23-520:5. Similarly, Pande knew that she had not been advanced to the next highest pay grade that she claims Mitchell had earlier promised her would be given in the April 2002 salary cycle. Tr. 246:14-19, 1019:9-10. And her search for a new position in 2002 was completed no later than December 3, 2002, when she accepted the SASBU position. ER 303. To the extent any of these events

were retaliatory, they occurred and were complete more than a year before Pande filed her charge and are therefore time-barred.

A similar situation was presented in *Cucuzza v. City of Santa Clara*, 104 Cal. App. 4th 1031 (2002). The plaintiff there claimed that her foreman over a period of years had been discriminating against her in job assignments, commencing with taking away her technical duties. When she complained about that decision, she was told her only option was to accept a different position in the company, which she did. She claimed, however, that the discrimination continued when she transferred back to her old position a year later. The court held that the statute of limitations barred any claim based on the original loss of her technical duties, even though the same alleged discrimination at the hands of the same foreman continued into the one-year limitations period:

In answer to the grievance plaintiff filed in 1994 in which she alleges that she complained about the loss of those job duties, City's only response was to give her the opportunity to transfer out of the department. We can conceive of little that would be a more definitive denial of plaintiff's request to perform certain job duties than an offer to transfer her out of the job altogether. Plaintiff, herself, admits that she accepted the transfer because she was told that was her only choice.

*Id.* at 1042-43. The same is true here. Pande complained in 2002 about what she claimed were Mitchell's retaliatory actions, was given what she says was an unsatisfactory answer, and decided to seek a new position and not pursue the matter further. Because those events occurred, and reached a degree of

permanence, more than a year before Pande filed her complaint, they cannot form the basis for the jury's verdict.<sup>13</sup>

**II. THE PUNITIVE DAMAGE AWARD MUST BE REVERSED BECAUSE PANDE PRESENTED NO EVIDENCE—LET ALONE CLEAR AND CONVINCING EVIDENCE—THAT ANY OF THE RELEVANT PERSONS WAS A MANAGING AGENT.**

The foregoing establishes that the judgment must be reversed in its entirety and judgment entered for Chevron on the ground that Pande failed to prove her claim of retaliation. The jury's award of punitive damages must also be reversed for the additional and independent reason that Pande did not meet the standard under California law for imposing such damages.

California law prohibits punitive damages from being awarded against an employer based on vicarious liability principles—*i.e.*, based simply on the fact that the alleged wrongdoer was an employee. Instead, the employer itself must be “personally guilty of oppression, fraud, or malice” or must have authorized or ratified the wrongful conduct or had advance knowledge of the employee's unfitness. Cal. Civ. Code § 3294(b). Moreover, when the employer is a corporation, 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.” *Id.* Each of these

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<sup>13</sup> Pande conceded below that her claim of wrongful termination was based on the same conduct as her retaliation claim under FEHA. ER 416. Thus, the insufficiency of Pande's evidence to support the FEHA verdict also requires that the judgment be reversed as to the wrongful termination claim.

requirements must be established by clear and convincing evidence. *Id.* § 3294(a); *Barton v. Alexander Hamilton Life Ins. Co.*, 110 Cal. App. 4th 1640, 1644 (2003) (clear and convincing evidence standards applies to all of the elements required by Civ. Code § 3294). To be clear and convincing, the evidence must be “sufficiently strong to command the unhesitating assent of every reasonable mind.” *In re Angelia P.*, 28 Cal. 3d 908, 919 (1981) (internal quotation marks omitted). This requirement presents “a heavy burden, far in excess of the preponderance sufficient for most civil litigation.” *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1186-87 (9th Cir. 2001) (internal quotation marks omitted).

Pande did not allege that any of the people she claims retaliated against her was an officer or director. Thus, the punitive damages she was awarded cannot stand unless she introduced sufficient evidence to permit the jury to find, under the clear and convincing standard, that one or more of the relevant actors was a managing agent. She did not.<sup>14</sup>

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<sup>14</sup> The sufficiency of the evidence to support a punitive damages award is reviewed under the substantial evidence standard. *Fair Housing of Marin v. Combs*, 285 F.3d 899, 907 (9th Cir. 2002). Where the burden of proof at trial requires clear and convincing evidence, this Court reviews whether substantial evidence exists to support the jury’s finding under the clear and convincing standard. *Khodagholian v. Ashcroft*, 335 F.3d 1003, 1006 (9th Cir. 2003).

Chevron raised this issue in its motions for judgment as a matter of law during trial and following the judgment. Tr. 923:2-926:21; ER 393-99. The district court denied both motions. Tr. 926:2; ER 1.

The California Supreme Court has rejected the notion that a “managing agent” is anyone who supervises other employees or who has the power to hire or fire or make pay or promotion decisions. “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.” *White v. Ultramar Inc.*, 21 Cal. 4th 563, 575 (1999). Thus, a “managing agent” includes “only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy.” *Id.* at 566-67. “Corporate policy” refers to the “general principles which guide a corporation or rules intended to be followed consistently over time within corporate operations. A ‘managing agent’ is one with substantial authority over decisions that set these general principles and rules.” *Cruz v. HomeBase*, 83 Cal. App. 4th 160, 167-68 (2000). This definition ensures that a corporation is not punished for the conduct of employees whose intentions do “not reflect the corporate ‘state of mind’ or the intentions of corporate leaders. This assures that punishment is imposed only if the *corporation* can be fairly viewed as guilty of the evil intent sought to be punished.” *Id.* at 167 (emphasis in original).

Pande did not meet this standard. At best, she showed only that the people she accuses of retaliation were supervisors, not managing agents of the corporation. She focused primarily on Mitchell, her supervisor in the planning

group. However, Pande introduced virtually no evidence regarding Mitchell's position or authority in the Chevron hierarchy—and none showing that he had anything close to the kind of corporate policy-making authority that is required. *See Gelfo v. Lockheed Martin Corp.*, 140 Cal. App. 4th 34, 63 (2006) (affirming directed verdict on “managing agent” issue where the plaintiff “did not introduce any evidence to establish [the alleged managing agent’s] position in Lockheed’s corporate hierarchy”; fact that the manager was a Lockheed vice-president insufficient).

Mitchell was a “planning manager” in a small group that assisted Chevron’s international business units with such things as funding requests, price forecasting, and competitive assessments. Tr. 237:5-7, 245:24-246:2. The group was very small—about five to ten employees. By contrast, the larger overseas upstream operation to which it belonged had 15,000 employees. Tr. 271:15-18, 431:21-432:8. Pande introduced no evidence that, in his role managing this small group, Mitchell had any authority to set corporate policy. The group was an advisory consulting group, not a policy-setting group. Moreover, it did not conduct any of Chevron’s oil exploration, production, refining or marketing businesses. As Pande herself put it, “the business units actually run the business.” Tr. 237:23. It thus cannot be said that Mitchell had “substantial discretionary authority over significant aspects of [the] corporation’s business.” *White*, 21 Cal. 4th at 577.

Indeed, even within the planning group itself, Mitchell’s authority was circumscribed. Mitchell did not have the authority to hire, transfer, promote or

adjust salaries on his own. He could make recommendations, but he needed approval from others before any such actions were implemented. Thus, Mitchell testified that, while he sought out Pande for his group in 2000, he did not have the authority to simply transfer her into his group. Tr. 883:19-884:7. Nor did he have the authority to promote her. Tr. 897:16-898:7. Rather, he had to seek approval from the PDC. *Id.*

In denying Chevron's motion for judgment as a matter of law on this issue, the district court did not point to any evidence that Mitchell had any corporate policy-making authority. Instead, the court asserted that Mitchell controlled the group's "day-to-day operations," and was responsible for employee discipline and for promotion and salary recommendations. ER 7. This, however, is precisely the analysis that the California courts have rejected as a permissible basis for imposing punitive damage liability. The California Supreme Court in *White* expressly repudiated earlier court of appeal decisions that had found a corporate employee to be a "managing agent" simply on the basis that the employee had "immediate and direct control over the decision to demote plaintiff, and . . . was directly responsible for evaluating plaintiff's performance." *White*, 21 Cal. 4th at 574 (quoting *Stephens v. Coldwell Banker Commercial Group, Inc.*, 199 Cal. App. 3d 1394, 1404 (1988)). The Supreme Court adopted the approach taken in *Kelly-Zurian v. Wohl Shoe Co.*, 22 Cal. App. 4th 397 (1994), in which the court of appeal found it insufficient that the alleged managing agent "had immediate and direct control over [the plaintiff] with the responsibility for supervising her performance." *Id.* at 421, *quoted in*

*White*, 21 Cal. 4th at 574. As the court concluded, “the fact that Zurian reported to Lawicki and that he had the authority to terminate her merely reflect that Lawicki was Zurian’s *supervisor*, not that he was a managing agent.” *Id.* at 421-22 (emphasis in original). The same conclusion applies here. Indeed, Mitchell had even less authority than the supervisor in *Kelly-Zurian*, because he had no power to terminate employees in his group.

Pande also argued below that Jay Johnson was a managing agent. But the evidence as to Johnson was similarly lacking. Johnson was Rex Mitchell’s supervisor and was engaged in the same planning and development function. Tr. 1055:14-18, 1057:11-13. Along with Mitchell’s group, he supervised a business opportunity assessment group and a decision analysis group. Tr. 1056:16:25. These groups had a combined total of 20 to 25 employees (again, in an organization of 15,000 total employees). Tr. 1057:1-10. Pande relied on Johnson’s testimony that he acted as an adviser to the company president on business portfolio and planning issues. Tr. 1056:19-21. But she introduced no evidence as to what this meant, and certainly no evidence that it meant that Johnson had any discretionary authority to set policy for the company. To the contrary, Johnson’s testimony indicates only that he (like the employees he supervised) provided analysis and support services to the managers operating Chevron’s business units, not that he had power to set policy or make decisions himself. This testimony would be insufficient to establish managing agent status even if the evidentiary standard were merely preponderance of the evidence. It unquestionably fails to rise to the level of

clear and convincing evidence—*i.e.*, evidence that “command[s] the unhesitating assent of every reasonable mind.” *In re Angelia P.*, 28 Cal. 3d at 919 (internal quotation marks omitted).

Moreover, there is no evidence that Johnson engaged in any retaliation against Pande or that he ratified any alleged retaliation by Mitchell. Pande’s theory of retaliation (and the basis for her damages award) was that Mitchell gave her a lower performance ranking, denied her pay grade increase and then undermined her attempts to find other positions within Chevron. Pande did not offer evidence that Johnson played any role in any of that. She asserted that he did not adequately investigate her initial claim of *discrimination*, but she did not show that he did anything to *retaliate* against her.

Straying even further afield, Pande also argued that David Kennedy and Gary Yamashita were managing agents. This argument was also meritless. The only evidence as to Kennedy was that he was the supervisor of a “technical support group” of between eight to twelve employees. Tr. 222:4-8, 1304:19-1305:7. Pande made no effort to show that this position involved any policy-making authority. Yamashita was a Chevron ombudsman, who was authorized to investigate and “facilitate resolution of employee complaints and concerns.” ER 313. But the ombudsman “cannot mandate changes in policies, procedures, or the attitudes and behaviors of others.” *Id.* Likewise, the ombudsman is required to be “neutral” and “will not take sides in an issue or dispute.” *Id.* This is the antithesis of someone who exercises “substantial independent authority

. . . so that their decisions ultimately determine corporate policy.” *White*, 21 Cal. 4th at 566-67.

In short, even if there were some basis for finding Chevron liable for retaliation (which there is not), there is no evidence that any Chevron officer, director or managing agent was involved in that retaliation. Thus, the award of punitive damages was improper.

### **CONCLUSION**

For the foregoing reasons, the judgment should be reversed (including the post-judgment award of fees and costs to plaintiff) with directions that judgment be entered for defendants. Alternatively, the punitive damages portion of the judgment should be vacated.

Dated: August 25, 2008.

JONES DAY

By \_\_\_\_\_  
Craig E. Stewart

Attorneys for Defendants-Appellants

**STATEMENT OF RELATED CASES**

Appellants are not aware of any related cases pending before this Court.

No. 08-15855

**CERTIFICATE OF COMPLIANCE PURSUANT TO**  
**CIRCUIT RULE 32-1**

I certify that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 9,709 words.

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Craig E. Stewart  
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