



## Management Alert

# California Supreme Court Expands Basis for Harassment Claims While Limiting Punitive Damages

On November 30, 2009, in *Roby v. McKesson Corporation*, the California Supreme Court decided two questions: (1) whether evidence of personnel actions can support harassment claims, and (2) whether the amount of punitive damages awarded was constitutionally excessive. The Court answered both questions in the affirmative.

The plaintiff, Charlene Roby, worked for McKesson as a customer service liaison. She began suffering from a panic disorder that required medical treatment and caused her to miss work. Roby's supervisor, Karen Schoener, disciplined and dismissed her for excessive absenteeism. Roby sued McKesson and Schoener, claiming disability discrimination.

### The Trial

The case was tried to a jury on four claims: (1) wrongful termination in violation of public policy; (2) disability harassment in violation of the California Fair Employment and Housing Act ("FEHA"); (3) disability discrimination in violation of the FEHA; and (4) failure to accommodate Roby's disability under the FEHA.

Roby presented evidence of what she claimed to be unfair treatment including: Schoener gave gifts and food to other employees, but not her; Schoener required Roby to answer phones during the company's Christmas party; Schoener called the physical side effects of Roby's disability "disgusting"; Schoener ignored Roby at staff meetings; and Schoener told Roby she needed to bathe more often when a medication she was taking caused body odor. Schoener also disciplined and belittled Roby in front of other employees, calling her job a "no-brainer."

The jury ruled for Roby on all claims, awarding \$3,511,000 against McKesson and \$500,000 against Schoener. The jury also awarded \$15,000,000 in punitive damages against McKesson and \$3,000 against Schoener. The trial court reduced the award against McKesson to \$2,805,000.

### The Appeal

McKesson and Schoener appealed. The Court of Appeal made several adjustments in the defendants' favor. First, because the jury had awarded overlapping noneconomic damages on the termination-related claims (wrongful termination, discrimination, and failure to accommodate), the court reduced that award against McKesson by \$800,000, to \$2,005,000. Second, the court also held that certain personnel management actions were not evidence of harassment, in that

discrimination claims and harassment claims are distinct. After “sifting out” the personnel actions, the court concluded that the remaining evidence—Schoener’s demeaning comments and gestures, her refusal to respond to Roby’s greetings, and her failure to give Roby gifts—could not support the harassment claim. The court therefore reduced the harassment damages award against McKesson by \$600,000, and vacated the harassment verdict of \$500,000 against Schoener. These reductions resulted in a total compensatory award of \$1,405,000. Finally, the court reduced the punitive damages award to \$2,000,000—a level that it determined to be the federal constitutional maximum for this case.

## The Supreme Court’s Decision

### *a. Personnel Management Actions May Evidence Harassment.*

The Supreme Court held that the Court of Appeal erred in excluding consideration of the personnel management actions in assessing the harassment claim. The Supreme Court generally agreed that discrimination claims concern explicit changes in the terms of employment, while harassment claims concern the work environment, but held that the two claims can sometimes rely on the same, overlapping evidence. The Court pointed out that biased personnel actions can play a role in harassment claims in at least two ways: (1) contributing to harassment by communicating a hostile message, and (2) evidencing discriminatory animus on the part of those engaging in offensive behavior. Thus, although the FEHA treats discrimination and harassment claims as distinct, the Court found that in a claim for harassment there is no basis for necessarily excluding evidence of biased personnel management actions.

On this basis the Court found sufficient evidence for the jury verdict of harassment, and reinstated the harassment awards against McKesson and Schoener, as well as the punitive damages award against Schoener. Because the harassment awards against McKesson and Schoener were redundant, the Court combined them into a single harassment award of \$500,000 jointly against McKesson and Schoener.

### *b. Revising the Punitive Damages Award.*

On appeal, McKesson argued that the amount of punitive damages awarded violated the due process clause of the Fourteenth Amendment. In *State Farm v. Campbell*, the U.S. Supreme Court held that imposing grossly excessive or arbitrary awards is unconstitutional, and established three “guideposts” for courts to follow in reviewing a punitive damages award: (1) the degree of reprehensibility of the conduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Regarding the reprehensibility of the conduct, the Court concluded that McKesson’s conduct showed a reckless disregard of the health and safety of others, that McKesson’s conduct toward Roby was “physical” in that it affected her mental and emotional well-being, and that Roby was financially vulnerable. As mitigating factors, the Court noted that McKesson’s conduct was not repetitive and that the record only weakly supported the finding that a “managing agent” of McKesson knew of the harassment. (Schoener was not a “managing agent” because she lacked discretionary authority over policies that affected a substantial portion of the company.) The Court concluded that because McKesson had not acted with intentional malice, but with merely “managerial malfeasance,” its conduct was at the low end of the range of wrongdoing that could justify punitive damages.

Regarding the disparity between the actual or potential harm suffered and the punitive damages award, the Court reasoned that where there is a substantial noneconomic award and a relatively smaller award for economic damages, the jury already has included a punitive component in the award. Because there was relatively low reprehensibility here, and a substantial award of noneconomic damages, a lower ratio was warranted. The Court held that the amount of punitive damages awarded should not exceed the amount of compensatory damages.

Finally, the Court examined what civil penalties may have been awarded against McKesson administratively. Since a fine under the FEHA could not have exceeded \$150,000, this factor also supported a lower award of punitive damages.

The Supreme Court thus reduced punitive damages to an amount equal to compensatory damages: \$1,905,000.

## **What *Roby* Means for Employers**

*Roby* makes it easier to establish harassment claims, and will encourage those claims even in cases where a supervisor has engaged in relatively little personally abusive conduct. Plaintiffs already strain to bring harassment claims against individual supervisors, especially when doing so will prevent removal of a case to federal court, and we expect that phenomenon to continue with even greater vigor. Employers, for their part, now have an even greater incentive to promote and enforce non-discrimination and harassment policies, and should continue to engage employees in the interactive process on potential medical leave or discrimination issues. A clear message from *Roby* is that employers who attempt to treat employees fairly will thereby reduce their exposure to punitive damages.

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