

## In This Issue:

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In its recent decision in *Roby v. McKesson*, the California Supreme Court issued two principal holdings: (1) the court concluded that a supervisor's "business and management" actions may be properly considered in determining whether a plaintiff was subject to a hostile work environment; and (2) the court affirmed the right of an appellate court to review and determine the constitutional maximum amount of a punitive damages award (rather than remanding to the trial court for further determination) and, in fact, engaged in its own analysis to further reduce the punitive damage

## California Supreme Court Blurs Discrimination-Harassment Distinction While Limiting Punitive Damages Liability

By Helene Wasserman and Matthew J. Sharbaugh

The California Supreme Court in its recent decision in *Roby v. McKesson*, No. S149752 (Nov. 30, 2009), concluded that a supervisor's "business and management" actions may be properly considered in determining whether a plaintiff was subject to hostile work environment harassment. The court also affirmed the right of an appellate court to review and determine the constitutional maximum amount of a punitive damages award and, in fact, engaged in its own analysis to further reduce the punitive damage amount recalculated by the court of appeal.

### Factual and Procedural Background

The facts of the case center around the termination of plaintiff Charlene J. Roby from her employment at McKesson Corporation. In 1997, Roby began suffering from panic attacks that temporarily restricted her ability to adequately perform her job, and caused various symptoms, including heart palpitations, shortness of breath, dizziness, and excessive sweating. Roby's medication also caused her body to produce an unpleasant odor. Roby's supervisors were aware of her condition, and although they allowed her to take breaks upon the onset of a panic attack and generally granted Roby other accommodations, based on the evidence presented, the court found that her immediate supervisor generally mistreated Roby as a result of her condition. In this regard, Roby's supervisor made negative comments about Roby's body odor in front of coworkers, reprimanded her in front of coworkers, and effectively excluded her from office parties by requiring her to cover the telephones, among other things.

In addition, McKesson instituted a revised attendance policy in 1998, which generally required 24-hour advance notice for all absences, including medical absences. An absence without such advance notice was deemed an "occasion," and if an employee accrued three occasions within a 90-day period, he or she would be subject to discipline, even if the occasion related to a medical condition. Further "occasions" within a specified period would result in further, more serious discipline, up to and including termination.

By the end of 1999, Roby had accrued a number of “occasions” and received numerous forms of discipline—most significantly, a final written warning. According to the policy, if Roby generated two further “occasions” within a 90-day period, she would be terminated. Subsequently, Roby experienced two additional absences, and as a result, her employment was terminated.

Roby then filed suit against McKesson and her former supervisor, asserting claims for wrongful termination in violation of public policy, harassment, disability discrimination and failure to accommodate. Roby’s claims were ultimately tried to a jury, which found for Roby on all causes of action. The defendants appealed.

The California Court of Appeal evaluated the evidence in support of the harassment verdict and, based upon its interpretation of the California Supreme Court’s decision in *Reno v. Baird*,<sup>1</sup> excluded all “personnel management” actions from the harassment evaluation. Thus, the court found that in evaluating the harassment claim, the jury should not have been permitted to consider Roby’s job assignments, her supervisor’s ignoring her at staff meetings, or reprimanding her in connection with job performance. Taking into account only the remaining acts, the court found insufficient evidence to support the harassment verdict and reduced the compensatory damage award accordingly. In turn, the court also sought to reduce the punitive damage award imposed against the defendants. Rather than remand the case to the trial court for a new determination of punitive damages, the court of appeal engaged in its own analysis to find what it deemed the maximum constitutional amount, and ordered a reduced punitive award.

## The California Supreme Court’s Analysis

In its analysis of the harassment claim, the California Supreme Court began by examining the differences between harassment and discrimination claims arising under California’s Fair Employment and Housing Act (FEHA). The court reasoned that discrimination, on the one hand, arises from explicit changes in the “terms, conditions, or privileges of employment,” whereas harassment claims arise from interpersonal relations in the workplace. Quoting from its decision in *Reno*, the court reaffirmed the test of “delegable authority” in determining whether conduct is generally actionable as discrimination versus harassment, explaining that discrimination arises from bias in the exercise of a supervisor’s *official actions* delegated by the employer, whereas harassment arises from bias expressed through conduct *outside the scope* of necessary job performance and not delegated by the employer. In this sense, the court reaffirmed its decision in *Reno*.

However, the court declined to impose an artificial line between evidence that can be used to support a discrimination claim versus evidence that can be used to support a harassment claim. The court relied upon its decision in *Miller v. Department of Corrections*<sup>2</sup> to highlight the propriety of overlapping proof on these distinct claims. Recognizing that the hostile message giving rise to a harassment claim may be conveyed to the employee through official actions of the employer, the court found that the “personnel management evidence” underlying Roby’s discrimination claim may be properly considered with regard to her harassment allegations. Thus, the various pieces of evidence excluded by the court of appeal — including Roby’s job assignments, being ignored by her supervisor, and being reprimanded in front of coworkers — could be validly considered in assessing the validity of Roby’s harassment claim.

In sum, the court concluded that “[t]he critical inquiry . . . is whether the evidence indicates violations of both FEHA prohibitions, but nothing prevents a plaintiff from proving these two violations with the same (or overlapping) evidentiary presentations.”

On the punitive damages issue, the court did not directly address the propriety of the appellate court’s re-determination of the punitive damages award following its reduction of the compensatory award, instead of remanding to the trial court for a new determination. Rather, the court tacitly accepted the court of appeal’s procedure, and further engaged in its own analysis of the maximum constitutionally permissible punitive award pursuant to the *State Farm*<sup>3</sup> factors, including: (1) the degree of reprehensibility of the defendants’ conduct; (2) the disparity between actual harm and punitive damages; and (3) the civil penalties authorized in comparable cases.

Through its analysis, the court determined that the jury’s \$15 million punitive damages award far exceeded the constitutional maximum, and instead concluded that, based on the facts presented in this case, a one-to-one ratio between compensatory and punitive damages

was the federal constitutional limit based on the facts, or approximately \$1.9 million. In engaging in such reduction, the court highlighted the low degree of reprehensibility of the employer, particularly given the lack of repeated misconduct and the absence of “intentional malice.” Accordingly, the court declined to order a retrial on the punitive damages question, and instead directed a reduction of the punitive award to its re-determined constitutional maximum.

## Implications of Roby

Although *Roby* addresses important issues concerning purported FEHA violations and punitive damages issues, the decision essentially centers on how discrimination and harassment claims are litigated and proven, and how punitive damages awards will be reviewed by California appellate courts. As such, *Roby* should have little practical impact on employers in terms of preventing and avoiding liability for claims arising under the FEHA. Nevertheless, the court’s ruling that personnel-related actions may be properly considered when assessing the viability of a harassment claim confirms the broad range of evidence potentially available to plaintiffs in support of their claims. As a result, *Roby* will likely render the dismissal of harassment claims on summary judgment more difficult for employers.

More fundamentally, *Roby* further clarifies the importance of employers continuing to ensure that supervisors perform their duties — including any and all personnel and management responsibilities — based on legitimate and lawful reasons, without regard to any discriminatory or harassing motive.

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Helene Wasserman is a Shareholder and Matthew J. Sharbaugh is an Associate in Littler Mendelson’s Los Angeles office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Ms. Wasserman at hwasserman@littler.com, or Mr. Sharbaugh at msharbaugh@littler.com.

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<sup>1</sup> 18 Cal. 4th 640 (1998).

<sup>2</sup> 36 Cal. 4th 446 (2005).

<sup>3</sup> State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).