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California Supreme Court Rules on Harassment and Punitive Damages Issues

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Every The state Supreme Court ruled on two thorny issues facing employers last month in Roby v. McKesson Corporation. The case addressed an important distinction between what is unlawful harassment and discrimination under state law, overlapping damages, and the constitutional limits of punitive damages. The Court's opinion provided new authority on two of the issues, harassment and punitive damages.

The Facts

McKesson is a major company in the pharmaceutical distribution business. Charlene Roby was a 25-year employee of McKesson. By 2000, she was working in the customer service department, processing forms and responding to customer's delivery problems.

Around 1997, Roby began experiencing panic attacks, which came on suddenly and interfered with her ability to perform her job. The panic attacks caused heart palpitations, shortness of breath, dizziness, trembling, and sweating. An unfortunate side effect of the medication Roby took for the panic attacks was an unusual amount of body odor. Her panic disorder also caused her to nervously dig her fingernails into her skin, causing scabs and sores. Roby's supervisors were aware her body odor, the appearance of her skin, and her need for leave were related to the panic disorder.

Around 1998, McKesson adopted a weighted attendance policy, which imposed discipline on employees who took too many unscheduled absences. Roby's medical conditions caused her to take numerous unscheduled absences, leading to discipline and, ultimately, her discharge.

The Supreme Court in its opinion relies on the facts that most favor the jury's award, as it must. Roby's supervisor may have denied all the offensive conduct in her sworn testimony, but the jury clearly sided with Roby. Therefore, the facts presented here and relied on by the Supreme Court generally represent Roby's side of the story.

Roby's direct supervisor reprimanded her and made negative comments about her in front of other staff, calling her "disgusting" because of the scabs, sweating, and body odor. The supervisor shunned Roby, refusing to acknowledge her greetings, and turning away when Roby tried to ask her questions. The supervisor ignored Roby during staff meetings and skipped over her when distributing certain promotional materials and food. The supervisor scheduled Roby to work answering the telephones during office parties. Roby's supervisor also belittled Roby's job, calling it a "no-brainer."

Roby complained up the chain of command, but McKesson apparently took no action towards to improve her relationship with the supervisor.

Roby was finally terminated in April 2000 based on excessive absences, based on the weighted attendance policy. Although her supervisor told her she would get a "new start" if she had no unscheduled absences for the last two months of 1999, she missed two days on February 25 and April 11, 2000. She requested protected FMLA leave for those absences, but it was denied. Following the termination, she was "devastated," depleted her savings, developed agoraphobia and became suicidal.

Roby sued McKesson and her supervisor personally for harassment and employment discrimination based on her disability. A Yolo County jury heard the case and gave Roby a generous verdict, \$1.3 million in lost earnings, between \$500,000 and \$2 million for emotional distress, including \$500,000 against the supervisor as an individual, and \$15 million in punitive damages.

Blowing up the Boxes for Discrimination and Harassment

Although federal law considers harassment to be a form of discrimination, California state law contains two separate statutory sections, one forbidding discrimination, and another forbidding harassment. Employees may believe personnel actions like write-ups and performance improvement plans are "harassing." But the state courts previously have made a distinction between official acts—like promotions, demotions,

and raises—which could support a discrimination lawsuit, and “social” acts—like name-calling, groping, and displaying offensive pictures—which could support a harassment claim.

Although both are illegal, up to now, California employment lawyers have pigeonholed complaints as harassment or discrimination. The distinction can be significant, because individual employees cannot be held personally liable for discrimination, but they can be for harassment.

In Roby, the Court recognized it had previously gone along with the same distinction. But the Court explained that the test for whether conduct amounts to harassment is whether the employer conveyed an “abusive message.” Further, it concluded that because official employment actions may be used to convey an abusive message, they can be admitted as evidence of harassment.

Many of the things Roby complained about—having to work through office parties, not getting her questions answered, being disciplined in front of other staff, and having her absences mocked—were official acts too insignificant to be actionable as discrimination. The Supreme Court held these actions had the effect of altering the terms and conditions of Roby’s employment, similar to when a supervisor tells a subordinate he expects sexual favors if she wants a promotion. The promotion would be an official act, but the sexual message could support a harassment claim.

The Court’s ruling blurs the neat categories for keeping track of evidence in harassment cases. The overlap between discrimination and harassment is not entirely unprecedented, because evidence of

unofficial action, such as racially offensive comments, is often used to strengthen a discrimination claim, even if the offensive conduct is not strong enough to support a harassment claim by itself. The Court’s explanation certainly invites more litigation over whether a personnel action serves the dual evidentiary role in support of both a discrimination and harassment claim.

Constitutional Limit on Punitive Damages for Managerial Malfeasance

As discussed in our recent column on punitive damages, the U.S. Constitution prohibits a court from imposing excessive punitive damages. Among other factors, the courts consider the “degree of reprehensibility” of the misconduct, and the ratio of compensatory damages to punitive damages. Although financial worth is a factor in determining whether punitive damages will be large enough to get the defendant’s attention, “punitive damages must not punish a defendant simply for being wealthy” and “cannot justify an otherwise unconstitutional punitive damages award.”

Moreover, punitive damages can be awarded against a corporation only if an officer, director, or managing agent engages in “despicable” conduct, or ratifies such conduct by lower level employees. The law does not allow punitive damages to be awarded for “the isolated actions of a single supervisor.”

The Supreme Court in Roby found that Roby’s supervisor was not a managing agent, because she oversaw only four employees in a corporation of 20,000 employees. In addition, the “record only weakly support[ed] the jury’s finding that a ‘managing agent’ was” aware of the

supervisor’s unlawful conduct or ratified it.

In the Court’s view, McKesson’s mistake was that it “continued to employ . . . Roby’s supervisor without taking any corrective measures.” Attempting to enforce the company’s attendance policy as written was not “intentional malice,” because the policy was merely intended to ensure adequate staffing. The Court even seemed sympathetic to the company’s misclassification of Roby’s FMLA leave. Because Roby did not request FMLA protected leave in advance and her personnel file did not make her need for protected leave obvious, the Court did not believe McKesson’s actions were intentionally malicious. The only action that possibly supported a punitive damages award was McKesson’s failure to act more quickly in response to Roby’s complaints about her supervisor. Even this failure, the court concluded, was not an indication of “a corporate purpose to cause injury,” but instead, is “better characterized as managerial malfeasance.”

The Court of Appeal had already found the jury’s award of \$15 million was unconstitutionally large, and reduced it to \$2 million. The Supreme Court noted that \$15 million is closer to the amount awarded when the despicable conduct results in multiple deaths. It noted that a prior case in the employment law context, permitting ongoing sexual harassment that included unwelcome fondling of an employee’s breasts and buttocks, resulted in only a \$3.5 million punitive damages award. As a further point of comparison, at the same time the Court was deciding Roby, the Kentucky Court of Appeal upheld a \$1 million punitive damages award for an employee who was strip-searched, held naked in a

manager's officer for hours, and sexually assaulted. Next to that conduct, McKesson's failure to respond to Roby's inarticulate harassment complaint does not seem as grave, and definitely not fifteen times worse.

The Supreme Court found that McKesson's reprehensibility was low and Roby's compensatory damages award was substantial. "When compensatory damages are substantial, the lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." On these facts, the Roby court found the maximum punitive damages award is a one-to-one ratio to

compensatory damages, reducing the punitive damages slightly even from what the Court of Appeal awarded.

Guidance for Employers

Roby v. McKesson is a mixed bag for employers facing future litigation. On the one hand, harassment cases may be harder to defend under the "abusive message" standard, particularly if employees are allowed to argue that otherwise routine personnel actions are harassing. To avoid liability for harassment under this standard, supervisors delivering negative actions must take care regarding how they do so. Employers should ensure management training include proper techniques for imposing

discipline and other negative official actions.

On the plus side for employers, the case may limit exposure for punitive damages. The "managerial malfeasance" standard can give employers some relief from otherwise disastrous consequences by limiting punitive damages to no more than the amount of compensatory damages. The Supreme Court barely found McKesson could be held liable for punitive damages at all. In similar cases, corporate employers may be able to avoid punitive damages entirely by responding quickly to employee concerns of harassment.

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