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Unpleasant Work Assignments Can Lead to Harassment Claim, Calif. Supreme Court Holds

By Cari A. Cohorn

The California Supreme Court's November 2009 decision in *Roby v. McKesson Corporation* has received extensive media attention because it strictly limited the punitive damages available to the plaintiff in a lawsuit alleging workplace harassment and discrimination. However, a potentially far more important holding in *Roby* has gone relatively unnoticed. Specifically, the court announced a new rule that will significantly impact employers and human resources professionals: the same evidence used to prove a claim of discrimination can now also be used as evidence of workplace harassment. For example, personnel actions such as poor performance reviews or unpleasant work assignments—if motivated by bias—can support allegations of both harassment and discrimination. Thus, it is now easier for plaintiffs to prove their claims, and employers may face expanded liability.

Evidence of adverse "personnel management actions," such as promotion decisions, negative performance reviews, and unfavorable work assignments, have typically been viewed by California courts and lawyers as relevant only to proving a claim for employment discrimination—not to claims of harassment. However, the California Supreme Court announced on Nov. 30, 2009, in *Roby* that evidence of adverse personnel management actions can also be used to support a claim for unlawful harassment. The court acknowledged that the California Fair Employment and Housing Act (FEHA) —which prohibits harassment and discrimination based on, for example, sex, race, age and disability —and the case law applying it distinguish between discrimination and harassment. Discrimination by definition involves some type of official personnel action, such as hiring, firing, assignment of job duties or promotions. By contrast, harassment relates to the social environment of the workplace and involves an offensive message being communicated to an employee, and it often does not involve any exercise of official power by the employer.

Despite this traditional distinction between the two types of unlawful conduct, in *Roby*, the state Supreme Court held that personnel actions can be a way of communicating the offensive message, and therefore those actions can be evidence of harassment. This decision made California law on this issue consistent with that of a few other states, most notably New York.

Harassment and Discrimination Often Intertwined, High Court Concludes

Plaintiff Charlene Roby had worked for McKesson since 1975. She had successfully performed her duties and consistently received positive performance evaluations. Roby began experiencing panic attacks in 1997. These attacks occurred unexpectedly and with little notice, and they temporarily impaired her ability to perform her job. Roby's condition caused other problems as well. Her medication caused an unpleasant body odor, and she developed a nervous disorder that caused her to dig into the skin of her arms, producing open sores. Despite knowing that these problems were related to a medical condition, Roby's supervisor frequently belittled her for them. For example, the supervisor told Roby in front of other employees that she was "disgusting." The supervisor ignored Roby at staff meetings, refused to answer her questions, and excluded her from office parties by requiring her to answer the office phones during such events. She routinely made faces and expressed disapproval when Roby needed to take breaks due to panic attacks or was absent from work because of her condition. In addition, the supervisor often reprimanded Roby in the presence of other employees so severely that one co-worker described the conduct as "degrading." Roby's complaints to more senior managers were ignored.

In 1998, McKesson implemented an attendance policy that required employees to provide 24-hour advance notice for all absences, including those for medical reasons. Repeated failures to provide the required notice within a 90-day period resulted in progressive discipline and ultimately in termination. Due to her medical condition, Roby failed to provide the required notice many times in a short time period. On more than one occasion, Roby informed her supervisors that the absences were due to her panic attacks and related symptoms, and she explained that she simply could not predict 24 hours in advance when her condition would prevent her from working.

Although her supervisors knew of Roby's disabling medical condition, and knew that most (if not all) of her absences were because of that condition, they terminated Roby's employment for violating the attendance policy. (Notably, before addressing Roby's harassment and discrimination claims, the California Supreme Court pointed out in its opinion that this type of attendance policy disadvantages employees with conditions that require multiple unexpected absences within a short period of time. Employers with similar policies should protect themselves from liability by ensuring that the policy makes exceptions for unanticipated, medically necessary absences.)

After being fired, Roby filed a lawsuit seeking damages for harassment, discrimination and wrongful termination in violation of the FEHA. The jury found in her favor on each claim. Defendants appealed, and the Court of Appeal concluded that evidence of the discrimination claim could not also be used to support the harassment claim. That is, in the court's view, earlier decisions held that necessary personnel management actions, even if unfair or unfavorable, are not normally considered to constitute harassment. Therefore, the court drew a sharp distinction between the concepts of harassment and discrimination. As such, it ruled that evidence that the supervisor discriminated against Roby by assigning her unpleasant job duties or giving her negative performance reviews was not relevant to the issue of whether she had been harassed. On that basis, the court held that there was insufficient evidence to support the jury's verdict on the harassment

claim.

The Supreme Court disagreed, and it reinstated the jury's verdict in Roby's favor. Although the court noted that harassment often does not involve any official exercise of power, this is not always the case. Further, harassment and discrimination—and the proof relating to each—are often intertwined and overlapping. In sum, if official employment actions are used as a means of conveying an offensive and unlawful message, those actions can be used by an employee as proof of harassment.

Ruling May Expand Employers' Harassment Liability

The court's decision in *Roby* may significantly expand employers' potential liability for harassment claims. That is, an employer who in the past was liable only for discrimination may now also be liable for harassment based on essentially the same wrongful conduct. This rule will significantly increase employers' exposure in lawsuits brought by current and former employees, because different damages will be available for claims for harassment and discrimination—even if those claims are proved by evidence of the same wrongful actions. For example, damages in a discrimination claim are intended to compensate for harm caused by the biased personnel actions, such as lost pay resulting from being passed over for a promotion or raise. Damages in a harassment claim are aimed at making up for the harm, such as emotional distress, resulting from the offensive message communicated to the employee through hostile social interactions. Thus, employers may now find themselves liable for both categories of damages based on evidence of the same conduct.

However, the *Roby* opinion suggests that personnel actions will support a harassment claim only where there is evidence of other hostile interactions. The court observed that Roby's supervisor communicated a hostile message to Roby in numerous ways that were not directly related to official personnel actions. For example, the supervisor refused to respond when Roby greeted her, she habitually gave small gifts to everyone in the office except Roby, and she made numerous demeaning comments about Roby's body odor. None of these actions was related in any way to the supervisor's official managerial duties. In the court's view, then, there was ample evidence of biased and harassing conduct that was outside the scope of the supervisor's necessary job duties.

It thus appears likely that, without evidence of such a pattern of bias, the personnel actions alone could not support a claim of harassment. Nonetheless, employers must ensure that supervisors' actions—whether involving official management decisions or more informal social interactions—are not motivated by bias against an employee. Moreover, employers may further protect themselves from harassment and discrimination claims by carefully documenting the legitimate business reasons for personnel decisions.

Punitive Damages Limited

In addition to announcing this important new rule regarding workplace harassment, the court also severely limited the punitive damages available to plaintiffs in circumstances similar to Roby's—and the limitation will apply far beyond the employment context. Specifically, the court held that where three conditions are met, an award of punitive

damages (i.e., those awarded to punish the defendant and to deter others from engaging in the same harmful conduct) that exceeds the award of compensatory damages (i.e., those awarded to compensate for the economic, physical and emotional harm plaintiff sustained) violates the due process clause of the 14th Amendment to the United States Constitution. Thus, the court significantly reduced defendants' potential exposure in cases where (1) the defendant's conduct is "at the low end of the range of wrongdoing that can support an award of punitive damages," (2) compensatory damages are substantial, and (3) the civil penalties that could be imposed in comparable cases are relatively low.

The *Roby* court concluded that all three conditions were met. First, the conduct of McKesson—as opposed to that of the supervisor—was not particularly reprehensible. The company's only wrongful conduct involved adopting an attendance policy that disadvantaged individuals with certain medical conditions and failing to act on Roby's complaints regarding her supervisor. The company had not implemented the attendance policy in an effort to deliberately discriminate against disabled employees. Further, the court explained that when Roby complained to higher-level managers, she did not link her complaints to her medical condition, and the managers could reasonably have concluded that the complaints resulted from a simple personality clash, rather than from unlawful harassment. In short, the employer had not acted with the intentional malice required to support a large punitive damages award.

Second, Roby was awarded compensatory damages of more than $1.9 million. Third, the court noted that the maximum civil penalty that could be imposed by the California Fair Employment and Housing Commission, had Roby chosen to pursue her claims administratively rather than in court, is $150,000—far less than the $15 million in punitive damages the jury initially awarded. After analyzing each of these three factors, the court ruled that an award of punitive damages that exceeded the compensatory damages awarded to Roby would violate the Constitution.

The court's imposition of a "1-to-1 ratio" of punitive damages to compensatory damages is truly significant. Although courts throughout the country, including the United States Supreme Court, have held that unduly large punitive damages awards are unconstitutional, the typical rule of thumb has been that a ratio of about 9-to-1 likely satisfies constitutional requirements. Courts had hinted that a stricter limit may apply in appropriate cases, but the strict limit imposed in *Roby* is groundbreaking.

Professional Pointer: The *Roby* opinion will undoubtedly impact litigation over workplace harassment and discrimination, as well as other lawsuits seeking punitive damages, throughout California, and likely elsewhere. As noted above, some other states already allowed plaintiffs to use evidence of personnel actions to help prove their claims for harassment. It remains to be seen whether the *Roby* opinion will influence other states to follow suit. In any event, employers and human resources professionals are advised to proactively work to avoid instances of both harassment and discriminatory personnel actions—lest they find themselves liable for both.

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