PAYNE & FEARS LLP

IRVINE · LAS VEGAS · LOS ANGELES · SAN FRANCISCO

CALIFORNIA EMPLOYMENT LAW UPDATE

DECEMBER 2009

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

On November 30, 2009, in *Roby v. McKesson Corporation*, the California Supreme Court ruled on two significant issues for California employers: (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 Court's ruling blurs the distinction between conduct traditionally thought to support a discrimination claim on the one hand (written warnings, termination, etc.), and conduct traditionally thought to support a harassment claim on the other (discriminatory slurs, inappropriate physical contact, etc.). On the punitive damages question, the Court ruled that the jury's $15 million punitive damages award was constitutionally excessive, and further held that, in the case before it, any amount of punitive damages in excess of the amount of compensatory damages ($1.9 million) would violate due process.

The Trial Court Decision

The plaintiff, Charlene Roby, had worked for McKesson as a customer service liaison for twenty-five years. She developed a panic disorder that required medical treatment and caused her to miss work. Roby's supervisor, Karen Schoener, disciplined and ultimately dismissed Roby for excessive absenteeism. Roby filed suit against McKesson, and the case was tried before a jury on the following 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 several complaints about Schoener. Roby alleged that her supervisor did not return her greetings; referred to the plaintiff's job as "a no-brainer;" gave all of the other employees gifts but excluded plaintiff; assigned the plaintiff to answer phones during the company holiday party; frequently reprimanded the plaintiff in front of her co-workers; and made negative comments about the plaintiff's body odor.

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. McKesson and Schoener appealed.

The Appeal

At the trial court level, evidence of the supervisor's conduct all came in together, which the jury considered as a whole and used to find McKesson liable for discrimination, and both McKesson and Schoener liable for harassment.

The Court of Appeal "sifted out" the management activities from the rest of Schoener's conduct. What remained was evidence that Schoener treated Roby with general scorn and contempt and failed to show sympathy for her disability. According to the court, that evidence was not sufficient to create liability for harassment based on a hostile work environment. The court emphasized that evidence of discrimination was one thing (the management activities), and evidence of harassment something altogether different (i.e., non-management conduct). Accordingly, the court reviewed the harassment award based only on the non-management conduct, determined it to be insufficient to uphold a harassment verdict against Schoener, and vacated it.

The Court of Appeal also reduced the compensatory damages award to $1.4 million, and further concluded that the $15 million punitive damages award was excessive under the federal Due Process Clause. The court determined that the maximum permissible punitive damages award, based on the facts of the case and the size of the compensatory damages award, was $2 million, or 1.4 times the amount of compensatory damages.

The Supreme Court Opinion

The California Supreme Court rejected the Court of Appeal's determination that the record was insufficient to support the harassment verdict. On the issue of punitive damages, the Court agreed that the punitive damages exceeded the federal constitutional limit, but disagreed with the limit set by the Court of Appeal, and reduced the amount even further.

Management Conduct May Evidence Harassment

With regard to management conduct, the Supreme Court disagreed with the Court of Appeal's premise that the same conduct couldn't constitute both discrimination and harassment. While the Court distinguished between discrimination and harassment, it noted that proof of each can overlap. Some managerial activities can also be considered "hostile social interactions in the workplace" (such as shunning an employee at staff meetings, or reprimanding the employee in front of others), and therefore should be considered when evaluating a supervisor's potential individual liability for harassment.

In other words, when evaluating whether a supervisor had engaged in unlawful workplace harassment, the fact-finder should consider all of the supervisor's conduct, even conduct that would otherwise be considered "official" acts made on behalf of the company under his or her managerial obligations. 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 sending a hostile message; and (2) evidencing discriminatory animus on the part of those engaging in offensive behavior. Thus, although 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 in support of both types of claims.

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.

Punitive Damages Award

The second significant issue addressed by the Court deals with the constitutionality of punitive damages. While the Court of Appeals had reduced the punitive damages award, the Supreme Court reduced the punitive damages ratio even further.

The Court found three circumstances particularly significant in determining that a one-to-one ratio was the federal constitutional limit in this case. First, Schoener was relatively low in the chain of command. She supervised only four of McKesson's 20,000 employees. Second, while there was some evidence that more senior supervisors of McKesson knew, or had reason to know, that Schoener was harassing or discriminating against the plaintiff, the evidence was not strong. It was, according to the Court, "at the low end of the range of wrongdoing that can support an award of punitive damages under California law." Finally, the non-economic damages awarded to Roby were already somewhat punitive in nature. As the Court noted, the non-economic damages "may have reflected the jury's indignation at McKesson's conduct, thus including a punitive component."

The Court also noted that while a defendant's wealth is a factor in determining the deterrent effect of the award, "the punitive damages award must not punish the defendant simply for being wealthy."

As a result of its analysis, the Court ordered a reduction of the punitive damages to a $1.9 million maximum, without affording the plaintiff the option of a new trial. Even though the Court concluded a one-to-one ratio is the federal constitutional limit, it noted that it based its conclusion on the specific facts of the case.

What is in Store For Employers Post-Roby?

Roby makes it easier for a plaintiff to establish harassment claims, and will likely encourage those claims even in cases where a supervisor has engaged in relatively little personally abusive conduct. California employers can expect to see managerial acts undertaken by supervisors on behalf of the company -- which previously only supported a discrimination claim against the employer -- to be used by plaintiffs to support individual harassment liability against the acting manager. The *Roby* decision will likely make it more difficult for employers and individual supervisors defending claims of harassment under FEHA to obtain summary judgment.

The good news for employers post-*Roby* is that the Court may be signaling disenchantment with high punitive damages, particularly in cases involving high non-economic damages where there is little evidence that upper management knew about the bad conduct.

Rodney B. Sorensen is Chair of the San Francisco office and a partner in the Employment Law Group of Payne & Fears LLP, where he represents employers in all types of employment-related litigation, including wrongful termination, discrimination, sexual harassment, unfair competition and wage and hour class actions in state and federal court proceedings, administrative hearings, mediation and arbitration. Mr. Sorensen can be reached at (415) 277-2255.

Leila S. Narvid is an associate in the San Francisco office of Payne & Fears LLP, where she focuses on the representation of employers in all aspects of labor and employment law, including discrimination, sexual harassment, wrongful termination, retaliation, disability and wage and hour violations. Ms. Narvid can be reached at (415) 277-2253.

If you would like further information, please contact your Payne & Fears LLP attorney.