No. S149752
(CA Nos. C047617, C048799)
(Yolo County Super. Ct. No. CV 01-573)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CHARLENE J. ROBY,
Plaintiff and Respondent,

v.

MCKESSON HBOC ET AL.,
Defendants and Appellants.

Appeal From Judgment Of The Superior Court
For The County Of Yolo
(Hon. Timothy L. Fall, Presiding)

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

The Court of Appeal (1) found that the trial court judgment awarded duplicative noneconomic damages and reduced the award to eliminate the duplication; (2) reversed the harassment verdict against Karen Schoener and McKesson for insufficiency of evidence; and (3) held that although the evidence was sufficient to support an award of punitive damages, a substantial reduction was required to bring the amount of punitive damages to within constitutional limits. Opinion ("Op.") 11-19, 22-32, 36-44.[1] These holdings are not in conflict with any published decision; nor do they present any important question of law warranting review by this Court.

First, the Court of Appeal applied the settled rule that the violation of a single primary right gives rise to a single cause of action and a single award of damages, regardless of the number of legal theories articulated. All three termination-related torts caused a single compensable injury requiring that two be stricken. Because the claim for failure to accommodate was the "big tent" that encompassed not only the termination but also the failure to accommodate during the months preceding termination, the court held that Plaintiff is entitled to the highest of the three awards for noneconomic damages: $800,000. Op. 18-19.

Second, the Court of Appeal followed *Reno v. Baird*, 18 Cal. 4th 640 (1998), which held that conduct within the scope of managerial duties cannot support liability for harassment. Here, the court found that most of the alleged harassing conduct by Schoener fell within the scope of her business and managerial duties and that there was not sufficient evidence that the remaining conduct was sufficiently severe or pervasive to alter the conditions of Plaintiff's employment and create a hostile work environment. (In what amounts to an alternative ground for the decision, the court also

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[1] A copy of the Court of Appeal's Opinion was not attached to the Petition for Review as required by Rule of Court 8.504(b)(4). For the Court's convenience, a copy of the Opinion is attached hereto as Exhibit A.

found no substantial evidence that Schoener's alleged harassing conduct was motivated by discriminatory animus against Plaintiff's disability.)

Third, the court rejected Defendants' argument that there was insufficient evidence to support an award of punitive damages. Reviewing the amount of that award *de novo*, the court examined the guideposts (and the reprehensibility factors) identified in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), and *Simon v. San Paolo U.S. Holding Co.*, 35 Cal. 4th 1159 (2005). It found that this case was governed by the principle, enunciated in *State Farm* and *Simon*, that where the award of compensatory damages is substantial and consists in large part of compensation for emotional distress and mental suffering that contains a punitive element, a lesser punitive damages ratio, perhaps only equal to compensatory damages, "'can reach the outermost limit of the due process guarantee.'" Op. 43 (quoting *State Farm*, 538 U.S. at 425). Viewing the record in the light most favorable to Plaintiff, the court held that a ratio of 1.4 to 1—resulting in a reduction of the punitive damages award from $15 million to $2 million—"reaches the constitutional frontier." Op. 43.

In her petition ("Pet."), Plaintiff purports to present no fewer than six issues appropriate for review. Rephrased to eliminate inappropriate rhetoric and argument, none of the issues presented merits review.

ISSUES PRESENTED

Because Plaintiff's statement of the issues presented (Pet. 4-5) is so argumentative and encumbered by rhetoric, rephrasing is necessary, as follows:

1. Did the Court of Appeal correctly interpret *Reno* to hold that a supervisor's conduct in the scope of her managerial and personnel duties—such as addressing employee complaints, making work assignments, overseeing employee attendance issues and

evaluating work performance—cannot be the basis for a claim of harassment?

2. Did the Court of Appeal hold that "*each* piece of evidence" of harassing conduct must also be shown to have been motivated by animus based on Plaintiff's disability?

3. Did the Court of Appeal correctly conclude that, in the circumstances of this case, a $2 million punitive damages award, representing a ratio of 1.4 to 1, was the constitutionally permitted maximum award and, based upon that determination, direct a reduction in the judgment?

4. Did the Court of Appeal correctly find that the three awards of damages on three overlapping theories of wrongful termination/failure to accommodate were duplicative?

STATEMENT OF FACTS

Defendant and Respondent McKesson HBOC ("McKesson"), headquartered in San Francisco, is the largest distributor of pharmaceutical, medical-surgical and health care products in North America. 9 AA 2254. Defendant and Appellant Karen Schoener ("Schoener") has worked for McKesson since 1983. She became Inventory Manager at McKesson's Sacramento distribution center—and Plaintiff's supervisor—in April 1999. 5 RT 1254-59. Plaintiff and Petitioner Charlene Roby ("Plaintiff" or "Roby") was hired by McKesson in 1974 and held the position of Customer Support Liaison at the time of her termination in 2000. 1 AA 2; 2 RT 521.

Because McKesson's business involves the delivery of life-saving medication and equipment to health care providers 365 days of the year, the company requires a dependable workforce to ensure that staffing needs can be anticipated and drug orders filled promptly. 3 RT 751; 1 AA 155-56. In 1998, in response to inconsistent application of its attendance policy, McKesson implemented a new attendance policy (the "Attendance Policy"). 4 RT 1006; 5 RT 1199, 1207-08. The new policy required employees to provide advance notice of absence to their supervisors and to provide a

physician's certification of illness or injury on request. Employees were subject to progressive discipline for excessive unscheduled absences—even where the absences were due to illness or injury—unless the absences were excused or protected by law. 8 AA 2290-91; 4 RT 1006-07; 5 RT 1307-09.

In or about late 1997, Plaintiff was diagnosed with a panic disorder and referred for treatment. The symptoms of Plaintiff's panic attacks and the side effects of medication she was taking to control the attacks included "feeling unreal," "feeling dizzy," "fear of going crazy," "losing control," excessive anxiety and worry, symptoms of post-traumatic stress disorder, profuse sweating, trembling and uncontrollable scratching. 4 RT 1037-38, 1046-50; 7 AA 2067, 2068, 2081.

Soon after McKesson implemented its new Attendance Policy, Plaintiff began having problems with unscheduled absences. She was subjected to progressive discipline under the policy, and on October 22, 1999, Schoener told Plaintiff that if she accrued two additional unscheduled, unexcused absences within a 90-day period, she would be terminated. 3 RT 610, 612, 666; 5 RT 1266-68; 7 AA 1951. Plaintiff accrued additional absences on February 25 and April 11, 2000, and on April 14, McKesson terminated her for violation of its Attendance Policy. 3 RT 605, 611; 4 RT 868-69; 5 RT 1407-08; 6 RT 1574. In response to Plaintiff's written grievance challenging her termination, McKesson conducted an investigation and ultimately affirmed its decision to terminate her. 7 AA 1978-79.

McKesson's policy was to excuse employee absences protected by the Family Medical Leave Act ("FMLA") if the employee completed FMLA paperwork. Although Plaintiff had requested and received FMLA leave on at least one prior occasion, she never requested that any of the unscheduled absences at issue be excused as FMLA leave. Nor did she dispute any of the stages of progressive discipline administered to her based upon those unscheduled absences by submitting a Request for Action under McKesson's grievance procedure or filing a written objection to the discipline in

the space provided on the Notice of Discipline form. 7 AA 1927, 1943, 1951; 8 AA 2283-84; 5 RT 1261, 1266, 1281.

At trial, Plaintiff and her witnesses testified that Schoener

- criticized Plaintiff's work performance, corrected her performance in a brusque manner (2 RT 420-22, 426-27, 530; 3 RT 600-01), did not compliment Plaintiff and ignored her during staff meetings (2 RT 507, 531), and publicly told Plaintiff that her job was a "no brainer" (2 RT 421-22, 530);
- assigned Plaintiff to cover the phones during a holiday "potluck" in December 1999 (2 RT 506, 516), once directed Plaintiff to stop making personal phone calls at work by making a slashing gesture at her, Schoener's, throat (2 RT 420), once yelled at Plaintiff to get back to her desk because the phones were ringing (2 RT 530), and required Plaintiff to document her phone calls (2 RT 426-27);
- responded unsympathetically to Plaintiff's reports of her physical problems and her severe body odor (2 RT 528, 533-34), told Plaintiff that she needed to take more showers (2 RT 533-34, 528), and told Plaintiff that her head sweats and scratching at her arms were "very disgusting" (2 RT 596)
- expressed displeasure regarding Plaintiff's frequent smoke breaks and "[got] very disgusted that [Plaintiff] was going out for a smoke break" (2 RT 536);
- occasionally brought in apple pies from McDonald's and souvenirs from trips for everyone in her department except Plaintiff (2 RT 419-20, 506), did not acknowledge Plaintiff's smile and greeting in the morning, and on several occasions turned away when Plaintiff spoke to her (2 RT 528, 530-32, 421);

- "got real upset" at a deformity on Plaintiff's toes and once told Plaintiff that the sandals Plaintiff was wearing "belonged on a car" (2 RT 528).

Plaintiff contended that McKesson failed to accommodate her disability by counting all of her unscheduled absences against her even when they were due to her panic disorder and, ultimately, by terminating her based upon those absences; that McKesson discriminated against her and wrongfully terminated her based upon her disability; and that Schoener harassed Plaintiff and created a hostile work environment based upon Plaintiff's disability.

PROCEEDINGS BELOW

Plaintiff's claims for wrongful termination in violation of public policy, disparate treatment based upon mental disability (GOV'T CODE §12940(a)), disability discrimination based on failure to accommodate (*id.* §12940(m)) and disability-based harassment based on hostile work environment (*id.* §12940(j)) were tried to a jury in March and April 2004. 4 AA 937. The jury found that McKesson had wrongfully discriminated against, failed to accommodate and terminated Plaintiff based upon her disability and that Schoener had unlawfully harassed Plaintiff and created a hostile work environment based upon her disability. *Id.*

The jury awarded Plaintiff $1,811,000 in compensatory damages against McKesson for wrongful discharge in violation of public policy, $1,611,000 in compensatory damages against McKesson for disparate treatment, $600,000 in compensatory damages against McKesson and $500,000 against Schoener for hostile work environment and harassment based upon disability and $2,111,000 in compensatory damages against McKesson for disability discrimination and failure to accommodate. *Id.* Following the punitive damages phase of the trial, on May 3, 2004, the jury awarded punitive damages in the amounts of $15,000,000 against McKesson and $3,000 against Schoener. 4 AA 950. The trial court ultimately entered judgment for $3,511,000 in compensatory damages against

McKesson and $500,000 against Schoener, and punitive damages of $15 million and $3,000, respectively.[2]

McKesson appealed. The Court of Appeal held (1) that the judgment awarded duplicative noneconomic damages on the claims for wrongful termination, disparate treatment and failure to accommodate—and reduced those damages by $800,000 (Op. 19), (2) that the trial court properly declined to offset the amount of Plaintiff's Social Security disability payments because the jury could reasonably have found that Defendants did not carry their burden of proof on the amount of the offset (Op. 20-22), (3) that the harassment verdict against Schoener and McKesson was not supported by sufficient evidence (Op. 24-32), (4) that there was sufficient evidence to support the jury's award of punitive damages, but (5) that the amount of punitive damages awarded was excessive and, based upon the record before it, that "a punitive damage award of $2 million reaches the constitutional frontier." Op. 43. Only the third of these holdings—that the harassment verdict was unsupported by substantial evidence—was in the published portion of the opinion.

The Court of Appeal denied Plaintiff's petition for rehearing and request for publication of the unpublished portions of the opinion and entered the final order on January 25, 2007.

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[2]The breakdown of damages included in the judgment is set forth in detail in the Court of Appeal's decision. Op. 10-11.

REASONS WHY REVIEW SHOULD NOT BE GRANTED

I.

THE COURT OF APPEAL'S RULING THAT THE HARASSMENT VERDICT WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE PRESENTS NO ISSUE MERITING REVIEW.

A. The Court Of Appeal Followed *Reno v. Baird* And Did Not Hold That Employers Are Immunized From Harassment Liability "Simply Because One Could Posit Even A Tenuous, Theoretical Connection To Management Duties."

The Court of Appeal found that

> most of the alleged harassment here was conduct that fell within the scope of Schoener's business and management duties. Acts such as selecting Roby's job assignments, ignoring her at staff meetings, portraying her job responsibilities in a negative light, or reprimanding her in connection with her performance, cannot be used to support a claim of hostile work environment. While these acts might, if motivated by bias, be the basis for a finding of employer *discrimination*, they cannot be deemed "harassment" within the meaning of FEHA. (Op. 28 (emphasis in original) (citing *Reno*, 18 Cal. 4th at 646))

As to the remainder of the alleged harassing conduct, the Court of Appeal found that those acts were not sufficiently "severe or pervasive" to create liability for harassment based on hostile work environment. Op. 29, 28.

Plaintiff challenges only the first part of the Opinion's holding—*i.e.*, that most of the alleged harassment in this case fell within the scope of Schoener's management duties and could not be deemed harassment. (Thus she does not seek review of the purely factual determination that the *remaining*, non-managerial acts complained of did not constitute actionable harassment.) Plaintiff argues that in so holding, the Court of Appeal misread and misapplied *Reno*. Plaintiff is mistaken.

In *Reno*, the Court held that supervisors cannot be personally liable for acts done within their management functions but can be liable for acts of harassment—acts that, by their very nature, are

outside such management functions. *See Reno*, 18 Cal. 4th at 657. Citing *Janken v. GM Hughes Electronics*, 46 Cal. App. 4th 55, 63-65 (1996), the Court contrasted harassment, which "is not conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job," with management functions:

> Making a personnel decision is conduct of a type fundamentally different from the type of conduct that constitutes harassment. Harassment claims are based on a type of conduct that is avoidable and unnecessary to job performance. No supervisory employee needs to use slurs or derogatory drawings, to physically interfere with freedom of movement, to engage in unwanted sexual advances, etc., in order to carry out the legitimate objectives of personnel management. Every supervisory employee can insulate himself or herself from claims of harassment by refraining from such conduct. An individual supervisory employee cannot, however, refrain from engaging in the type of conduct which could later give rise to a discrimination claim. Making personnel decisions is an inherent and unavoidable part of the supervisory function. Without making personnel decisions, a supervisory employee simply cannot perform his or her job duties. (*Reno*, 18 Cal. 4th at 646)

The Court explained that if supervisors could be individually liable for decisions found to be discriminatory, they would "be pressed to make whatever decision was least likely to lead to a claim of discrimination against the supervisory employee personally." *Id.* at 653. Imposing individual liability for such decisions would thus place the supervisor in the untenable position of "choosing between loyalty to the employer's lawful interests at severe risk to his or her own interests and family, versus abandoning the employer's lawful interests and protecting his or her own personal interests." *Id.*

Plaintiff argues that the Opinion "immunizes employers from liability from *verbal harassment* so long as there is even the slightest connection to what could be termed management duties" or "simply because one could posit even a tenuous, theoretical connection to management duties." Pet. 19, 4. This hyperbole mischaracterizes the Opinion. The Court of Appeal's holding is far more modest: a

substantial part of Schoener's conduct "fell within the scope of [her] business and management duties" or had, at the very least, a "reasonable relationship" to her management duties. Op. 28, 30. The legal principle is correct and the lower court's factual application of that principle to the conduct at issue does not merit review.

Nor did the Court of Appeal "eliminate[] an entire sphere of recognized disability harassment claims." Pet. 22. To be sure, an employer can be liable if, while carrying out managerial duties, a supervisor engages in conduct that is *by itself* harassing. For example, a supervisor who uses racial or disability-based epithets in directing or evaluating an employee's work may be liable for creating a hostile work environment. The use of such epithets is, by its very nature, gratuitous: one can criticize job performance without using them. But a supervisor's actions legitimately related to directing the employee's work and dealing with performance issues—no matter how distasteful or embarrassing to the employee—cannot support a harassment verdict.[3]

Plaintiff's claim that the Opinion conflicts with cases that have followed *Reno* should also be rejected. The Opinion's reading of *Reno* does not conflict with *any* California authority.[4] Nor does the Opinion conflict with later opinions of this Court.

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[3]If Plaintiff were correct that a supervisor's carrying out of management functions in a manner that the employee found objectionable—such as dealing with the employee's request for accommodation or addressing symptoms of her disability that might be embarrassing—could create liability for harassment, virtually every case of disability discrimination could be parlayed into a harassment claim, because an employer must *always* work with the disabled employee to ascertain the presence of a disability or to find possible accommodations, which requires the employer to address the disability directly.

[4]The only case cited by Plaintiff—*Adams v. FedEx Corp.*, No. C 05-3469 MJJ, 2005 WL 3371067 (N.D. Cal. Dec. 12, 2005) (Pet. 19)—is an unpublished district court decision that in any event does conflict with the Opinion. In *Adams*, the court, citing to a number of California and federal authorities, held that even after *Reno*, individual supervisors could be held liable for *retaliation*, an entirely separate FEHA cause of action from discrimination. *See id.* at *3 n.3. Contrary to Plaintiff's suggestion, the *FedEx* court did not hold that an individual or employer

(continued . . .)

In fact, the only post-*Reno* case in which the Court has discussed whether an employee's performance of management functions can constitute harassment held exactly as the Court of Appeal did—that such conduct cannot be harassment. In *Lyle v. Warner Bros. Television Productions*, 38 Cal. 4th 264 (2006), the Court found that "to the extent defendants can establish" that the allegedly harassing conduct, which on its face appeared to create a hostile work environment—including "the recounting of sexual exploits, real and imagined, the making of lewd gestures and the displaying of crude pictures denigrating women was within 'the scope of necessary job performance' and not engaged in for purely personal gratification or out of meanness or bigotry or other personal motives, defendants may be able to show their conduct should not be viewed as harassment." 38 Cal. 4th at 292 & n.14 (citing *Reno*, 18 Cal. 4th at 643, 646, and *Janken*, 46 Cal. App. 4th at 63).

Plaintiff omits any mention of *Lyle*, which directly cuts against her claim of a conflict in authority (although she cites the decision elsewhere in the Petition). Instead, she argues that this Court's decision in *Miller v. Department of Corrections*, 36 Cal. 4th 446 (2005), (decided one year before *Lyle*) suggests that harassment can be based on "personnel actions" because in that case, the Court recounted a number of problematic personnel decisions, along with numerous actions having nothing to do with management functions, in the course of ruling that the work environment could be found hostile. Pet. 18.

Plaintiff's reliance on *Miller* is misplaced. *Miller* does not even discuss the issue of whether managerial actions can support a claim for harassment. A case cannot stand for a proposition that was not decided, let alone one that was not even considered. *E.g.*, *In re Chavez*, 30 Cal. 4th 643, 656 (2003); *Palmer v. GTE California, Inc.*, 30 Cal. 4th 1265, 1278 (2003).

(. . . continued)
could be held liable for personnel actions by re-characterizing those actions as "harassment."

In any event, *Miller* recognized that a plaintiff can establish a harassment claim where she was the victim of sexual favoritism, but *only* if the favoritism is so widespread that "the demeaning message is conveyed to female employees that they are viewed by management as 'sexual playthings' or that the only way required for women to get ahead in the workplace is to engage in sexual conduct with their supervisors or the management." 36 Cal. 4th at 451. In recounting the discriminatory actions taken against the plaintiffs, the Court observed that the supervisor imposed additional duties on persons who were not his paramours. But the evidence of conduct the Court considered to have created the sexually demeaning work environment included numerous acts that—setting aside any managerial or personnel actions—were sufficient to create a hostile work environment, including the fact that the supervisor fondled his paramours in front of plaintiffs and placed his arm around another employee, that plaintiffs observed jealous scenes among the several employees the supervisor was having affairs with and that the supervisor gave one of his paramours the power to abuse plaintiffs. *Id.* at 466-67.

In a related argument, Plaintiff claims that even if an harassment claim could not be based on management-related conduct, the jury, not a judge, should determine "what acts are 'necessary management action.'" Pet. 23. But in this case, the jury was correctly instructed on the principle that managerial actions could not be considered in evaluating a harassment claim.[5] Nothing in the Opinion questioned that instruction or directed the trial judge to determine in the first instance what conduct is "managerial."

Plaintiff's real complaint is with the Court of Appeal's determination of what conduct a reasonable jury could consider to be "non-managerial." For example, she contends that Schoener's

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[5]The instruction provided, "Disability harassment consists of a type of conduct not necessary for performance of a supervisory job. Harassment is not conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job." 3 AA 880-81.

comments about Plaintiff's body odor constituted harassment, not managerial conduct. Pet. 21. But the only evidence on that issue was the testimony of Plaintiff's co-workers, each of whom testified that Schoener made these comments *in response to complaints by other employees*.[6] 2 RT 414-15, 470-71.[7] Neither this nor any of

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[6]Plaintiff argues that Schoener denied ever making comments about Plaintiff's body odor or receiving any complaints about the body odor. Pet. 25. But this entire issue rests upon the assumption that the jury disbelieved Schoener (and believed that Schoener made the comments). And the *only* evidence in the record on this issue is that Schoener's comments were made in response to other employees complaining about Plaintiff's body odor.

[7]Luan Chew testified as follows:

> Q. (By Mr. Whelan) Did you observe at some point an odor problem with Ms. Roby?
>
> A. Yes.
>
> Q. And what was this problem that you observed?
>
> A. Charlene had a very strong body odor emanated, and when I spoke to her as a friend, she told me it was because of the medication—one of the pills that she was on, and that they had recently stopped it, but it was still in her system, and they were trying it to leave her system, but it had emanated through her skin.
>
> Q. And did you hear Ms. Schoener making comments about that?
>
> A. Yes.
>
> Q. What did you hear Ms. Schoener say?
>
> *A. She approached her, had her turn her fan a different direction, so that the odor didn't blow on this certain co-worker; just those type comments.* (2 RT 415 (emphasis added))

Chew's daughter, Jamie Steckman testified as follows:

> Q. Did you ever hear Karen Schoener making in [sic] any comments about Ms. Roby's body odor?
>
> A. Yes.
>
> Q. What did you hear?
>
> A. That—it was with another employee I guess that probably was complaining—it was that maybe she should take

(continued . . .)

Plaintiff's other quarrels with the Court of Appeal's determination of no substantial evidence merits review.[8]

B. The Court Of Appeal Did Not Hold That Each Event Of Alleged Harassment Must Be Matched With Evidence That It Was Based On The Plaintiff's Disability.

In addition to holding that there was no substantial evidence of severe or pervasive harassment, the Court of Appeal held in the alternative that there was no substantial evidence that Schoener's conduct was motivated by disability-based animus. Op. 30, 31. Plaintiff contends that the court improperly required that "*each* piece

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(. . . continued)
more showers, or something to that effect.

Q. That was Ms. Schoener making that comment?

A. Yes. (2RT471)

[8]Plaintiff argues that Schoener served no "management need" in making these comments because she made the comments publicly despite the fact that "McKesson's policy (and *Reno's* language) required that she do so privately." Pet. 25. Plaintiff's only support for her characterization of McKesson's " formal policy" is the testimony of Plaintiff's co-worker Jaime Steckman regarding her "understanding" of McKesson's policy. 2 RT 472-73. Of course, an employee's understanding of corporate policy is not proof of the policy itself. And even if Schoener's manner of dealing with the problem did violate a company policy, the issue is not whether Schoener followed proper procedure in dealing with employee complaints, but instead whether her conduct was in the performance of her business and personnel management responsibilities. *See Velente-Hook v. E. Plumas Health Care*, 368 F. Supp. 2d 1084, 1103 (E.D. Cal. 2005) (plaintiff's claim that she was humiliated and intimidated in presence of her colleagues "failed to qualify as harassment" where action was taken in supervisory capacity while seeking to address plaintiff's employment situation).

Plaintiff also contends that the conclusion that Schoener's comments were supported by management need ignores the fact that Plaintiff told Schoener that she had no control over the odor; thus Schoener's suggestion that she take a shower could not have cured the problem. Pet. 25. Again, Plaintiff misses the point. The issue is not whether Schoener's suggestion would have solved the problem, but instead whether the record supported a finding that Schoener's comments were made to address a managerial concern that other employees were complaining about Plaintiff's body odor.

of evidence that supports the 'severe or pervasive' prong of the [harassment] analysis must also independently support the 'because of' prong"—*i.e.*, that the court held that conduct cannot be "because of" disability unless "*each piece* of evidence of harassment also contain[s] direct evidence of illegal animus." Pet. 27, 4 (emphases in original). This alternative holding presents no issue for review. Indeed, Plaintiff has created and attacked the proverbial straw man.

Nothing in the Opinion suggests that evidence of harassment must be disaggregated, so that *each* event of alleged harassment be matched with evidence that *it* was based on a discriminatory animus. In fact, the Opinion carefully reviewed the totality of evidence of Schoener's conduct with respect to Plaintiff, first concluding (as discussed in the previous section) that the evidence, taken as a whole, was insufficient to establish that Schoener's conduct was sufficiently severe or pervasive to constitute harassment. It then went on to conclude, in the alternative, that the evidence, again taken as a whole, was insufficient to establish that Schoener's conduct was "based on and directed towards Roby's mental" disability. Op. 29.

The court began its analysis with a statement of settled law, not challenged by Plaintiff, that "conduct [constituting actionable harassment] must not only be severe or pervasive, it must also be tinged with *discriminatory* animus" (Op. 29 (emphasis in original)), adding that "conduct cannot be deemed harassment unless it was *based on and directed towards Roby's mental disability.*" *Id.* (emphasis added). The court then reviewed the conduct attributed to Schoener, concluded "that Schoener obviously disliked Roby, shunned her, and showed no compassion for her condition," but found that "[w]ith the exception of Schoener's occasional negative comments about Roby's sweating and body odor, *none of the behavior asserted to be harassment was colored by discriminatory animus.*" *Id.* at 30-31 (emphasis added). *See Lyle*, 38 Cal. 4th at 286 (finding that in the totality of the circumstances, the alleged sexually harassing conduct did not present a triable issue that the comedy writers engaged in the challenged conduct "because of sex").

The court went on to find that when viewed in context, even Schoener's occasional comments regarding Plaintiff's sweating and body odor did not evidence discriminatory animus, because "[t]he record showed that [Plaintiff's] unpleasant body odor disturbed her fellow employees and therefore affected the work environment" and therefore "Schoener's admonitions to [Plaintiff] to take more showers or to bathe more frequently had a reasonable relationship to her management duties and cannot be classified as harassment." Op. 30. In other words, the fact that Schoener's comments were made in the course of addressing other employees' complaints about Plaintiff's body odor weighs directly against a finding that the comments were gratuitous or were made for "personal gratification" or "other personal motives." *See Janken v. GM Hughes Elecs.*, 46 Cal. App. 4th 55, 63 (1996).

Nor did the record contain other evidence that Schoener's conduct was motivated by discriminatory animus based upon Plaintiff's disability. As the court noted, there was "no evidence that Schoener ever referred to Roby's panic disorder in derogatory terms, interfered with the breaks she needed when she experienced attacks, or engaged in a regular, pervasive pattern of conduct tormenting her on account of her mental disability." Op. 30. In the absence of any such evidence of disability-based animus, neither Schoener's indifference nor her lack of sensitivity towards Plaintiff "can be alchemized into a claim of hostile work environment (Op. 31)," particularly where, as the court found, at the time Schoener first became Plaintiff's supervisor "*there was already great animosity between the two*." Op. 5 (emphasis added).

In other words, the court *did not* require that in order for a course of conduct to be "because of" the plaintiff's disability, each act in that course of conduct must evidence discriminatory animus. Indeed, the court never even reached that issue, finding instead that *none* of the acts in the challenged course of conduct "remotely approach[es]" the kind of evidence of animus present in *Weeks v. Baker & McKenzie*, 63 Cal. App. 4th 1128, 1147 (1998) (finding

evidence of harassment "based on sex" where plaintiff's supervisor "reached into [plaintiff's] breast pocket, gestured as if to cup her breasts in his hands, touched her buttocks[,] quizzed her about the wildest thing she had ever done, [and] pulled [the plaintiff's] shoulders back to 'see which breast [was] bigger"), or *Hope v. California Youth Authority*, 134 Cal. App. 4th 577, 589-90 (2005) (finding evidence of harassment "because of" sexual orientation where plaintiff's supervisor and co-workers subjected plaintiff to torrent of derogatory remarks and epithets directed at his homosexuality, including calling him a "motherfuckin' faggot," "homo," and "faggot ass motherfucker"). The court below concluded that, taken together, the totality of the circumstances did not support an inference that Schoener's challenged conduct was "because of" Plaintiff's disability. Op. 29. *See Alfano v. Costello*, 294 F.3d 365, 378 (2d Cir. 2002) (reversing judgment of hostile work environment on the basis of sex where the majority of conduct cited by the plaintiff was sex-neutral; although facially neutral incidents may be included among the "totality of the circumstances" that courts consider in reviewing a hostile work environment claim, there must be some independent evidence that the "facially sex-neutral incidents . . . were part of [a] campaign to harass [the plaintiff] *on the basis of her sex*" (emphasis added)); *cf. Williams v. Gen. Motors Corp.*, 187 F.3d 553, 560-64 (6th Cir. 1999) (where plaintiff was ostracized on multiple occasions, the use of explicit sex-specific slurs on several of those occasions justified inference that the sex-neutral acts of ostracism were also "because of sex").[9]

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[9]Plaintiff argues that the Opinion conflates the analytically separate "severe or pervasive" prong and the "because of" prong in the harassment analysis, creating a conflict with *Dee v. Vintage Petroleum, Inc.*, 106 Cal. App. 4th 30 (2003), and *Birschstein v. New United Motor Manufacturing*, 92 Cal. App. 4th 994 (2001), and inventing a novel standard for the "because of" prong. Pet. 26-27. In fact, the Opinion pointedly notes that the two requirements are distinct and that both must be met for a finding of harassment. Op. 29 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993)). To be sure, some of the (continued . . .)

For these reasons, Plaintiff's assertion that the Court of Appeal applied a legally erroneous standard on the alternative ground of discriminatory animus is meritless. Plaintiff does not seek review of the Court of Appeal's determination that, taken as a whole, the record does not show that Schoener's conduct was motivated by a disability-based animus.

II.

THE COURT OF APPEAL'S REDUCTION OF THE PUNITIVE DAMAGES AWARD PRESENTS NO ISSUE MERITING REVIEW.

The Court of Appeal would have difficulty recognizing its punitive damages analysis in Plaintiff's description of it. Contrary to Plaintiff's account, the Court of Appeal did not "replace[] traditional (five-factor) reprehensibility analysis" based on "*speculat*[*ion* that] the jury's harassment verdict tainted its assessment of punitive damages." Pet. 34 (emphasis in original). The court's punitive damages analysis, not included in the published portion of the Opinion, is conventional, in accord with *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), and *Simon v. San Paolo U.S. Holding Co.*, 35 Cal. 4th 1159 (2005), conflicts with no other California decision and does not merit review.

The Court of Appeal recognized that it was required to evaluate the ratio of punitive to compensatory damages (Op. 37) and to

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(. . . continued)
evidence (or absence of evidence) that the Court cites in support of its finding that Schoener's alleged harassing conduct was not severe or pervasive—*e.g.*, the absence of any comments about Plaintiff's panic disorder, the absence of any use of disability-related epithets, or the failure to bring Plaintiff treats or souvenirs, without more—*also* supports a finding that the alleged harassing conduct was not "because of" Plaintiff's disability. But the fact that certain conduct or lack of conduct on Schoener's part was insufficient to prove each of the two elements does not mean that the two elements were "conflated." Many types of conduct that would demonstrate "severity" of harassment, *e.g.*, using epithets related to Plaintiff's disability, would also be evidence of discriminatory animus based upon disability.

"independently determine the uppermost constitutional limit of a punitive damage award in this case, while according due deference to the findings of historical fact made by the jury." *Id.* (citing *Simon*, 35 Cal. 4th at 1172). The Opinion correctly identifies the issues *State Farm* and *Simon* requires it to examine: "(1) the reprehensibility of the defendant's conduct, (2) the relationship between the award and the harm done to the plaintiff, and (3) the relationship between the award and civil penalties authorized for comparable conduct." Op. 37-38. In addressing reprehensibility, the Opinion identified the five factors to be considered, quoting directly from *State Farm*. *Id.* at 38.

Plaintiff seizes upon the court's observation to the effect that the jury's $15 million figure "was no doubt strongly influenced by its $1.1 million dollar award for harassment" and accuses the Court of Appeal of "speculat[ing]" on the jury's verdict rather than applying the five "reprehensibility" factors. Pet. 33, 34. But that passage of the Opinion merely stated the obvious: the punitive damages award was, on its face, based on the harassment cause of action as well as the wrongful termination cause of action. Once the Court of Appeal determined that the harassment claim was not supported by the record, the only conduct that could be evaluated for "reprehensibility" was McKesson's failure to accommodate Plaintiff's disability and its termination of her employment because of absences from work found to have been protected by law. Unsurprisingly, the Court of Appeal concluded that its reversal of the harassment verdict reduced the degree of reprehensibility of McKesson's conduct. Op. 39.

Petitioner identifies no error—and certainly no conflict with any other decision—in the Court of Appeal's analysis of the "comparable penalties" prong of the *State Farm* factors. It found that violations of FEHA can be punished with an administratively imposed penalty of no more than $150,000, less the amount of damages awarded. Op. 41. This factor, the court concluded, suggests

that "the punitive damage award was disproportionately high." *Id.* Petitioner makes no complaint about this aspect of the Opinion.

The Court of Appeal also cited *State Farm*'s holding that "where the victim has already been awarded full compensation for emotional distress, humiliation and mental suffering, a hefty punitive damage award may be highly suspect, for it is likely to be duplicative" because in such cases noneconomic compensatory damages "*already contain [a] punitive element.*" Op. 40 (emphasis in original) (quoting *State Farm*, 538 U.S. at 426); *see also Simon*, 35 Cal. 4th at 1189. Plaintiff asserts that an $800,000 award of noneconomic damages couldn't possibly contain a "punitive element" (Pet. 42 n.11) but that assertion merely disagrees with *State Farm* and *Simon*; Plaintiff suggests no reason why the Court of Appeal, bound as it was by those decisions, should not have taken that factor into account.

Evaluating all of the relevant factors, the Court of Appeal concluded that the maximum punitive damages award permitted by the Constitution was $2 million. It took note of the strong suggestion in *State Farm* that where "'*compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages*, can reach the outermost limit of the due process guarantee.'" Op. 43 (emphasis in original) (quoting *State Farm*, 538 U.S. at 425). But it did not engage in "knee-jerk adherence to this mere suggestion" (Pet. 40); rather, it allowed a greater ratio, of 1.4 to 1. Op. 43. The court found that this amount was "large enough to have a deterrent effect on future conduct." *Id.* The Court of Appeal's conscientious application of the *State Farm-Simon* standards to this particular set of facts presents no issue meriting review.

Nor do Plaintiff's procedural arguments. Plaintiff contends that the Court of Appeal erred when it reduced the punitive damages rather than ordering a conditional remittitur. Pet. 34-35. Plaintiff acknowledges that in *Simon*, this Court held that an appellate court may do just that whenever it is able to determine the maximum constitutionally permitted punitive damages. *See* 35 Cal. 4th at 1187-

88. No decision questions this practice, and other appellate courts have followed it. *See Grober v. Ralphs Grocery Co.*, 137 Cal. App. 4th 204, 214-15 (2006); *Johnson v. Ford Motor Co.*, 135 Cal. App. 4th 137, 149-50 (2005). Plaintiff contends that the Court of Appeal should not have done so in this case, but offers no principled reason—other than disagreement with the court's ultimate conclusion that on this record, $2 million *is* the constitutionally permitted maximum.

Plaintiff also contends that the Court of Appeal violated the "general verdict rule." Pet. 36-37. Not so. The Court of Appeal's disposition of the punitive damages issue did not require it to speculate on how the jury might have allocated punitive damages between the reversed harassment cause of action and the affirmed wrongful termination/failure to accommodate cause of action. Rather, as its Opinion makes plain, the Court of Appeal evaluated the punitive damages award in light of the evidence that it held *supported* the finding of liability for compensatory and punitive damages on the wrongful termination/failure to accommodate cause of action, and concluded that the constitutionally permitted maximum award was $2 million. This is exactly what Plaintiff says the Court of Appeal should have done: "look[] at the affirmed claim[] and apply[] the recognized reprehensibility factors to determine the constitutional maximum they would allow." Pet. 37.

III.

THE COURT'S REDUCTION OF DUPLICATIVE DAMAGES PRESENTS NO ISSUE MERITING REVIEW.

Plaintiff says that in the unpublished portion of the Opinion dealing with duplicative damages, the Court of Appeal "assumed Roby suffered the *identical* injury during the year that she was denied her lawful accommodation rights as she later suffered from her unlawful termination." Pet. 44 (emphasis in original). It did no such thing.

The Petition fails to provide even a cursory statement of the pertinent facts relating to the duplicative damages issue. Here is how the issue arose: Plaintiff asserted three different legal theories of wrongful termination: (1) wrongful termination in violation of public policy (based on violations of FEHA, CFRA and FMLA), (2) discriminatory termination on the basis of disability and (3) failure to accommodate Plaintiff's disability (which included her termination as a result of the claimed failure to accommodate). The jury was instructed on each of these three legal theories (6 RT 1661-62, 1665-67), and the special verdict form called for separate verdicts on each of them. 4 AA 938, 940, 945. For each legal theory, the verdict form asked the jury to specify Plaintiff's damages, economic and noneconomic. *See* 4 AA 939 ¶6, 941 ¶7, 946 ¶7.

The jury awarded $500,000, $300,000 and $800,000 in noneconomic damages on these three legal theories, which the trial court then "stacked" for a total of $1.6 million. 4 AA 939, 941, 946. Because these three legal theories all involved the same "primary right," they represented a single cause of action, for which only one damages award can be rendered. *See Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996); *Tavaglione v. Billings*, 4 Cal. 4th 1150, 1158-59 (1993) ("[r]egardless of the nature or number of legal theories advanced by the plaintiff, he is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence. Double or duplicative recovery for the same items of damage amounts to overcompensation and is therefore prohibited" (citation omitted)); *Perry v. Shaw*, 88 Cal. App. 4th 658, 669-70 (2001); *Loth v. Truck-A-Way Corp.*, 60 Cal. App. 4th 757, 766 (1998) ("[s]eparate instructions on pain and suffering and loss of enjoyment of life are prohibited because they could mislead a jury to award double damages for the same injury").

Plaintiff does not quarrel with the Opinion's *legal* analysis; indeed, she now impliedly agrees that the awards of $500,000 and $300,000 of noneconomic damages for wrongful or discriminatory termination were based on a single cause of action, were therefore

duplicative, and that only the larger one may stand. *See* Respondent's Petition for Rehearing 7, 9, 10. But she asserts that, as a factual matter, the $800,000 award of noneconomic damages on the failure to accommodate theory did not duplicate any part of the noneconomic damages on the wrongful termination theory. Even if the Court of Appeal made an error in this regard, it would not warrant review: the opinion on this point announces no new principle of law and is fact-specific. But, more fundamentally, the Court of Appeal's analysis is entirely correct.

Plaintiff overlooks the fact that the failure to accommodate legal theory applied not only to the period prior to termination, but to the termination itself.[10] She likewise ignores the fact that the economic damages for the failure to accommodate included damages for the termination itself as well as damages for the pre-termination period. The failure to accommodate theory, unlike the other two theories, was the "big tent"—the greater that included the lesser—embracing both pre-termination failure to accommodate and a termination caused by a failure to accommodate.

Plaintiff ignores this fundamental fact. There can be no doubt that it is true, as the verdict itself shows. The jury awarded the same amount of *economic* damages ($706,000) for each of the wrongful discharge in violation of public policy theory, the discriminatory

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[10]In her Opposition to Defendants' Summary Judgment Motion, Plaintiff acknowledged that McKesson's alleged failure to accommodate Plaintiff's disability encompassed Plaintiff's ultimate termination: "Grover and SCHOENER had notice of ROBY's need to take days off to accommodate her disability. . . . [¶] The alleged McKESSON attendance policy, the laws of California . . . and the FMLA were violated by *ROBY being penalized for these absences necessary to accommodate her disability*. . . . [¶] Unfortunately, for ROBY her mental state was ravaged, and *she was penalized and terminated for the time she took off to accommodate and treat this disability*" (1 AA 204) (emphases added); "[*t*]*he absences that SCHOENER and McKESSON illegally characterized as 'occurrences' and then used to terminate Plaintiff* were days of FMLA/CFRA and disability accommodation leave to be treated by her doctors and to recover from panic disorder and the related symptoms that made it more difficult for Plaintiff to perform her duties." 1 AA 217 (emphasis added).

termination theory *and* the failure to accommodate theory. Op. 10-11. The damages on the last of these theories could *only* have been for the loss of future income caused by the termination: plaintiff did not even claim that she sustained any economic damages for the failure to accommodate during the pre-termination period, and there was no occasion to accommodate her disability after she was terminated.

When the jury turned to the noneconomic damages, it had before it two legal theories (wrongful discharge in violation of public policy and discriminatory termination) which dealt only with the termination itself, and the third legal theory—failure to accommodate—that covered both pre-termination conduct and the termination itself. And when the jury came to the third legal theory, for failure to accommodate, it awarded the largest sum: $800,000. Undoubtedly, this is because the jury understood that the noneconomic damages for failure to accommodate should, like the economic damages, include any damages sustained during the pre-termination period *and* damages caused by the termination itself. Having already found that the Plaintiff sustained $500,000 of noneconomic damages because of the termination itself, the jury went on to award a total of $800,000 on the third legal theory (which necessarily included the non-economic damages for the wrongful termination due to a failure to accommodate) *and* the noneconomic damages Plaintiff sustained due to a failure to accommodate in the fourteen months prior to termination.

In effect, Plaintiff's argument presumes—illogically—that on the failure to accommodate legal theory, the jury awarded *non-economic* damages *only* for the pre-termination period and awarded *no noneconomic* damages for the termination itself, even though its award of *economic* damages on the failure to accommodate theory undeniably included damages for the termination itself.

There is no reason for further review of this issue. The Court of Appeal correctly stated the governing law and Plaintiff does not contend otherwise. The court's analysis of the facts is correct: the

duplicative nature of the damages is apparent from the face of the verdict. In all events, the issue is essentially factual, on a unique record.

CONCLUSION

For the foregoing reasons, the Petition For Review should be denied.

DATED: February 23, 2007.

Respectfully,

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W03 022307-155790001/PB09/1370339/F

CERTIFICATE OF COMPLIANCE PURSUANT TO CAL. R. CT. 8.504(d)(1)

Pursuant to California Rule of Court 8.504(d)(1), and in reliance upon the word count feature of the software used, I certify that the foregoing Answer to Petition for Review contains 7,845 words, exclusive of those materials not required to be counted under Rule 8.504(d)(3).

DATED: February 23, 2007.

Linda Q. Foy

LINDA Q. FOY

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

CHARLENE J. ROBY,

Plaintiff and Respondent,

v.

McKESSON HBOC et al.,

Defendants and Appellants.

C047617, C048799

(Super. Ct. No. CV01573)

APPEAL from a judgment of the Superior Court of Yolo County, Timothy L. Fall, Judge. Affirmed as modified.

Howard Rice Nemerovski Canady Falk & Rabkin, Jerome B. Falk, Jr., Linda Q. Foy, Jason M. Habermeyer; Fitzgerald, Abbott & Beardsley and Sarah E. Robertson for Defendants and Appellants McKesson Corporation and Karen Schoener.

Riegels Campos & Kenyon and Charity Kenyon; Christopher H. Whelan; The deRubertis Law Firm and David M. deRubertis for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976 and 976.1, only the introduction, the Factual Background, the Procedural History, part III of the Discussion and the Disposition of this opinion are certified for publication.

Exhibit A

Plaintiff Charlene J. Roby was a stellar employee of defendant McKesson HBOC, Inc. (McKesson)[1] for 25 years until she developed panic disorder in 1998, which caused her to start missing substantial time from work. Two years later, McKesson fired Roby for abusing its attendance policy, although many of her absences were attributable to her psychiatric disability.

The jury "threw the book" at McKesson. It awarded Roby millions of dollars in compensatory damages for wrongful discharge in violation of public policy, as well as harassment, disparate treatment, and discrimination/failure to accommodate under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.).[2] The jury rendered a separate verdict finding Roby's supervisor, Karen Schoener, liable for harassment. In a second phase of the trial, the jury levied a $15 million punitive damage award against McKesson and $3,000 against Schoener.

McKesson does not challenge the verdict insofar as the jury found it liable for wrongful termination, disability discrimination, and disparate treatment. McKesson and Schoener do challenge the harassment verdict as unsupported by substantial evidence. Both defendants also claim that

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[1] McKesson HBOC changed its name to McKesson Corporation during the pendency of this litigation. McKesson is a Delaware corporation doing business in California.

[2] Undesignated statutory references are to the Government Code.

reductions in the compensatory damage award are necessary and that the punitive damage award should be stricken or reduced.[3]

We shall conclude that the judgment awards duplicative noneconomic damages based on alternative theories of liability for the same wrong, requiring a downward adjustment. We shall also strike the harassment awards against McKesson and Schoener for insufficiency of the evidence. Finally, while we find the evidence sufficient to support punitive damages, we conclude that a substantial reduction in the size of the award is necessary to comport with constitutional constraints.

We shall thus reduce both the compensatory and punitive damage awards and affirm the judgment as modified.

FACTUAL BACKGROUND

In accordance with well-settled principles of appellate review, we summarize the facts in the light most favorable to the prevailing party (respondent herein), resolving all conflicts in the evidence and all legitimate and reasonable inferences that may arise therefrom in favor of the judgment. (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1137-1138 (*Weeks*).)

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[3] McKesson filed a separate appeal (C048799) from the trial court's postjudgment award to Roby of $728,668.75 for attorney fees. We ordered the two appeals consolidated on June 22, 2005. However, McKesson's briefs do not raise any challenge to the attorney fee award. Based on this implicit concession that the postjudgment order is free from reversible error, we shall affirm it.

McKesson is a large corporation involved in the worldwide distribution of pharmaceuticals and other health care products. Roby worked as a customer service support liaison for McKesson's West Sacramento Distribution Center. She had been an employee of McKesson for 25 years, with good attendance and an excellent performance record until she developed panic disorder in early 1998.

Panic disorder is a psychiatric condition that puts the patient in an extreme state of fear, which seems to come from "out of the blue." Symptoms can include extreme discomfort, heart palpitations, shortness of breath, dizziness, and feelings of unreality or depersonalization. The first time Roby experienced one of these episodes, she thought she was having a heart attack and was rushed to the emergency room. She ultimately learned it was a psychiatric problem and she was put under the care of Kaiser psychiatrist Dr. Joseph Schnitzler on January 6, 1998.

When Roby had a panic attack, she would experience physical symptoms such as difficulty breathing, uncontrollable shaking, and scratching or picking at her arms until they bled. She would also experience head sweating to the point where her hair was "wringing wet." Moreover, the medications she was taking for her condition caused her to develop an unpleasant body odor that embarrassed her.

When Roby had a panic attack, her symptoms were "very obvious" to fellow workers. Her supervisor Alan Grover would

typically send her outside on a break and try to calm her down. He would send a coworker out to check on Roby and make sure she was all right.

Grover manifested awareness that Roby was suffering from panic disorder. He and McKesson employee Luan Chew frequently discussed Roby's condition and the medications that were being used to address it. On four or five occasions, Chew informed Grover that Roby had stayed home because of a panic attack. Grover became concerned that it was affecting her job.

In April 1999, Karen Schoener became Roby's supervisor, replacing Grover, who received a promotion. Grover told Chew he was greatly concerned about Schoener becoming Roby's supervisor because there was already great animosity between the two.

In late 1998, McKesson instituted a new, stricter "90-day rolling" attendance policy, which caused a great deal of confusion among employees. Under the policy, an employee could be terminated if she accumulated too many "occasions" within a specified period. Absences without 24-hour advance notice were considered occasions. Thus, if an employee woke up ill and called in sick, that could be counted as an occasion, even if she was entitled to take the day off as sick leave or vacation. Tardiness was counted as a half-occasion. However, if an employee had a clean record with no occasions for the next 30 days following the 90-day period, the first occasion would "drop off" and not be counted against her.

If an employee received two occasions within a 90-day period, she would receive an oral warning on the third occasion. Another three occasions during a rolling 90-day period within six months would result in a written warning. One more occasion within 30 days would generate a second written warning. Two more occasions after the written warnings would result in termination.

Although McKesson allowed employees to take excused time off under the federal Family and Medical Leave Act of 1993 (the FMLA) (29 U.S.C. §§ 2601-2654; 29 C.F.R. §§ 825.100 to 825.800), absences were counted as occasions unless the employee specifically requested FMLA paperwork. McKesson's employee handbook contained no explanation of an employee's FMLA rights.

Except for one five-day absence for which she filled out FMLA paperwork, Roby's absences were always treated as occasions, regardless of the reason. On the other hand, McKesson treated other employees far more leniently. Jamie Steckman, for example, had asthma. When she had asthma attacks, she was rarely able to give 24 hours' advance notice of absence. Yet when she missed 15 to 20 days from work due to asthma attacks, they were all treated as one occasion. Luan Chew took off several weeks after suffering a hand injury, yet was never charged with an occasion. Roby's complaints to her supervisors that she was not being treated the same as other sick and injured employees were met with indifference.

Schoener made no effort to conceal her dislike of Roby. She did not return Roby's greetings and would sometimes turn her back on her. She referred to Roby's job as a "no-brainer." Once a month she would put a McDonald's apple pie on all of her subordinates' desks except Roby's. She would bring back trinkets from her vacations and give them to every coworker except Roby. She made Roby cover the phones during the office Christmas party. She would loudly reprimand Roby in front of her colleagues. Schoener made negative comments about Roby's body odor and sometimes showed a look of disgust as Roby walked by.

In 1999, Roby was absent on January 19, February 8 and March 31 and received a disciplinary warning on April 2, signed by supervisor Diane Saamer. Roby told Saamer the absences were related to her panic disorder, and that she was trying to get it stabilized. Saamer appeared sympathetic, but retired from McKesson soon thereafter.

In response to concerns from coworkers, Roby brought in a note from Dr. Schnitzler dated April 28, 1999, stating that panic disorder was not contagious. She continued to take days off to see Dr. Schnitzler and for therapy sessions. On June 8, 1999, Roby had a panic attack in the parking lot and took the day off as vacation. The same day she received a written warning signed by Schoener for accumulating four more absences within a 90-day period. Roby received a final written warning on October 22, after she took days off on July 27 to 28 and

October 18, even though the July absences were accompanied by a note from Dr. Schnitzler verifying that she was ill and unable to work.

Despite the October 22 notice, Schoener told Roby that if she could make it to January 18, 2000, without any occasions, her attendance record would be cleared and she would gain a new start. Roby reached the January target date without any occasions. But when she displayed delight that she had "made it" and was not going to be fired, Schoener just looked at her without responding.

After unscheduled absences on February 25 and April 11, 2000, Roby was called into Grover's office on April 13. McKesson supervisors Christopher Rafter and Grover told Roby she was subject to termination for abuse of the absence program. Roby expressed surprise, recounting Schoener's assurances that if she made it until January, she would get a new start. Schoener advised Rafter and Grover that her remarks had been misinterpreted. Roby also complained that the absence policy was not being applied fairly since other employees suffering from medical conditions were given more leeway. She noted that fellow worker Bobbe Schenken had all her absences counted as one occasion when she had gall bladder surgery. Roby was suspended with pay and told that her supervisors would investigate the facts and let her know their final decision.

On April 14, Rafter and Grover telephoned Roby to tell her she was terminated. Roby protested that her April 11 absence

was related to her panic disorder and again complained that she was not treated the same as other employees when it came to the absence policy. Roby filed a written grievance setting forth the same complaints and asserting that her absences during the last 12 months were all related to "[her] illness on file." Grover confirmed Roby's termination in a letter of April 17, 2000.

McKesson's "investigation" consisted of nothing more than counting up the number of Roby's absences and reaffirming its decision to fire her. In upholding the termination, McKesson did not consider whether Roby's absences would be excused under the FMLA, since she had filled out FMLA paperwork in only one instance.

Roby was financially and emotionally devastated as a result of the termination. She depleted her savings, lost her medical insurance, went without treatment for months, became suicidal and developed agoraphobia. In July 2001, the Social Security Administration declared her totally disabled. She now lives on disability payments from Social Security.

PROCEDURAL HISTORY

The case was tried to a jury in March and April of 2004 on causes of action for common law wrongful discharge in violation of public policy, as well as FEHA statutory claims for disparate treatment based on mental disability (§ 12940, subd. (a)), disability discrimination/failure to accommodate (§ 12940, subd.

(m)) and hostile work environment/harassment (§ 12940, subd. (j)). The chart below summarizes the special verdicts:

Wrongful Discharge--McKesson

	Damages
Past economic loss	$605,000
Future economic loss	706,000
Past noneconomic loss	250,000
Future noneconomic loss	250,000
Total:	**$1,811,000**

Disparate Treatment--McKesson

	Damages
Past economic loss	$605,000
Future economic loss	706,000
Past noneconomic loss	200,000
Future noneconomic loss	100,000
Total:	**$1,611,000**

Hostile Work Environment/Harassment--McKesson

	Damages
Past noneconomic loss	$300,000
Future noneconomic loss	300,000
Total:	**$600,000**

Hostile Work Environment/Harassment--Karen Schoener

	Damages
Past noneconomic loss	$250,000
Future noneconomic loss	250,000
Total:	**$500,000**

Disability Discrimination/Reasonable Accommodation--McKesson

	Damages
Past economic loss	$605,000
Future economic loss	706,000
Past noneconomic loss	400,000
Future noneconomic loss	400,000
Total:	**$2,111,000**

Because the jury also found that Schoener and McKesson were guilty of malice, oppression or fraud, the case proceeded to a punitive damage phase, wherein the jury awarded $15 million in punitive damages against McKesson and $3,000 against Schoener.

The trial court entered judgment for $3,511,000 in compensatory damages against McKesson and $500,000 against Schoener. Defendants' motions for new trial and for judgment notwithstanding the verdict were denied. However, owing to Roby's concession that the jury's award for past economic damages included the future value of the same loss, the order denying defendants' posttrial motions included a $706,000 reduction in the verdict "[b]y stipulation of the parties."

DISCUSSION*

I. Duplicative Noneconomic Damage Awards

The case was submitted to the jury on three tort theories arising from Roby's termination from employment at McKesson: wrongful discharge, disability discrimination/reasonable

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* See footnote at page 1, *ante*.

accommodation and disparate treatment. As can be seen from the above table, the jury awarded separate sums for past economic, future economic, past noneconomic, and future noneconomic damages for each of these causes of action.

The trial court entered a compensatory damage judgment for $3,511,000 against McKesson, a figure that cannot be calculated by simply adding up the figures appearing in the special verdicts. The trial court could have arrived at the judgment figure only by consolidating Roby's damages for *past economic* ($605,000) and *future economic* ($706,000) loss into unitary awards, even though these figures are duplicated for each cause of action on the special verdict forms.

When the trial court's redaction of duplicative economic damage awards is taken into account, the composition of the judgment against McKesson looks like this:

Verdict Computation

	Amount
Past economic loss (W/D, D/T, DD/RA)*	$605,000
Future economic loss (W/D, D/T, DD/RA)*	706,000
Past & future noneconomic loss (W/D)*	500,000
Past & future noneconomic loss (D/T)*	300,000
Past & future noneconomic loss (DD/RA)*	800,000
Harassment	600,000
Total Judgment:	**$3,511,000**
* Legend: Wrongful discharge (W/D); Disparate treatment (D/T); Disability discrimination/Reasonable accommodation (DD/RA).	

Our analysis above shows that, although the trial court consolidated the multiple *economic* damage awards into single

figures, it did not treat any of the noneconomic damage awards as duplicative; instead it "stacked" these three awards, such that Roby was awarded a total of $1.6 million in noneconomic damages for the three termination-related torts.[4]

McKesson argues that by adding the three noneconomic damage awards together, the trial court improperly allowed Roby to recover treble damages based upon a single legal wrong. It contends the court should have accepted the highest noneconomic award (i.e., $800,000) and stricken the two lower awards as duplicative. We agree.

"Regardless of the nature or number of legal theories advanced by the plaintiff, he is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence. [Citation.] Double or duplicative recovery for the same items of damage amounts to overcompensation and is therefore prohibited. [Citation.] [¶] Thus, for example, in a case in which the plaintiff's only item of damage was loss of commissions, two awards of damages identical in amount--one for breach of contract and the other for bad faith denial of the same contract--could not be added together in computing the judgment. Plaintiff was entitled to only *one* of the awards. [Citations.] [¶] In contrast, where

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[4] Because McKesson concedes that harassment in the workplace is a qualitatively different tort for which damages may be independently awarded, the harassment verdict is not implicated in the present analysis.

separate items of compensable damage are shown by distinct and independent evidence, the plaintiff is entitled to recover the entire amount of his damages, whether that amount is expressed by the jury in a single verdict or multiple verdicts referring to different claims or legal theories." (*Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1158-1159 (*Tavaglione*).)

In *Finch v. Brenda Raceway Corp.* (1994) 22 Cal.App.4th 547 (*Finch*), an employer induced the plaintiff to relocate to a different city based on assurances of "permanent" employment. She was fired a few months later. (*Id.* at pp. 551-552.) The case was submitted to the jury on three legal theories: violation of Labor Code section 970 (persuading a person to change work by means of false representations concerning the length of employment), breach of contract, and negligent misrepresentation. (*Finch*, at pp. 552-553.) The verdict forms permitted the jury to allocate her damages among the theories and did not inform them that the plaintiff was entitled to be compensated once, regardless of the number of theories. (*Id.* at pp. 555-556.) Citing *Tavaglione*, the appellate court held that the plaintiff was entitled to only one award of damages arising from the same conduct, regardless of the number of legal theories upon which the case was tried. (*Ibid.*)

These precepts apply here. "'California has consistently applied the "primary rights" theory, under which the invasion of one primary right gives rise to a single cause of action.'" (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.*

(1993) 5 Cal.4th 854, 860.) Roby's right to recovery is based on *harm suffered*, regardless of the number of theories of relief alleged or found true by the fact finder. (*Slater v. Blackwood* (1975) 15 Cal.3d 791, 795.) Whether viewed as wrongful discharge in violation of public policy, disability discrimination, or disparate treatment, the evidence showed that, with the exception of the harassment cause of action (see fn. 4, *ante*), all of Roby's damages--*economic as well as noneconomic*--were based on the violation of her primary right to continued employment despite her mental disability. It is improper to allocate damages for a single compensable injury among alternative legal theories of liability (*Finch, supra*, 22 Cal.App.4th at pp. 555-556) and any judgment that duplicates an item of damage in this manner constitutes overcompensation (*Tavaglione, supra*, 4 Cal.4th at pp. 1158-1159).

Roby does not contest the correctness of the above principles. Instead, she claims that multiple noneconomic damage awards were proper *in this case* because splitting up the damages among the three alternative legal theories was expressly authorized by the trial court's instructions. According to Roby, the jury simply followed the court's instructions to decide on a single sum for noneconomic compensation and work backwards, apportioning the damages among three different theories of recovery. We reject the argument.

Roby focuses on the trial court's charge to the jury that followed the initial reading of the verdict. After reciting

special findings in favor of Roby on all elements of her wrongful discharge claim, the court began reading the damage awards, as reflected in the following chart:

Damage Awards

	Amount
Past economic loss, including earnings and benefits	$1.5 million
Future economic loss, including lost earnings, benefits and lost earning capacity	$1.5 million
Past noneconomic loss, including past mental suffering	$1.5 million
Future noneconomic loss, including future mental suffering, loss of enjoyment of life, grief, anxiety and emotional distress	$1.5 million
Total damages:	**(*sic*) $1.5 million**

The judge immediately stopped reading, and asked the jurors if they had understood that the four items of damage would be added together, so that the total verdict would be $6 million. The foreperson replied that they had not. The judge announced that he would send the verdict form back to the jury to continue deliberations. He asked the jurors to arrive at an independent damage figure for each wrong that was committed. "Now it may coincident[al]ly be the same number, but it is not necessarily the same number, and it will be somewhere between zero and whatever you think it might be at the top end . . . ." The court continued, "[I]f you find she's entitled to recovery for past economic loss, mental suffering, etc., you need to decide for that particular wrong, wrong[ful] discharge and violation of public policy, how much the mental suffering was and what's it

worth, and put a number in there. [¶] And for future economic loss and future mental suffering, those types of things, how much will she suffer and there's a dollar amount that goes along with that. *Then you put that in there, then you actually give me a total of those four items.* Now, you need to do that for each of them." (Italics added.)

The trial judge added that the *economic* damage figure on all the verdict forms should always be the same: "[A] wage loss is a wage loss. If there was a wrong done that led to a wage loss, then that's what it is." The economic loss number on one form would therefore transfer over to all the others. On the other hand, with respect to noneconomic loss, the court urged the jury independently to arrive at a figure for each theory of relief. The court suggested, for example, that the amount Roby deserved to be compensated for mental suffering caused by the wrongful discharge might be different from that attributable to McKesson's failure to accommodate her disability. The important thing, however, was that they independently consider and assign a value for *each line item of noneconomic loss* appearing on the forms.

Although not a model of consistency and clarity, the court's supplemental instructions conveyed two basic concepts: First, the jury should independently assign a value for each item of noneconomic loss on each verdict form. Second, the figures on the line items of each verdict should be added together to yield a total damage award for each cause of action.

From all appearances, the jurors dutifully followed the court's instructions. Indeed, they appeared to go out of their way to demonstrate that they had independently evaluated each past and future noneconomic claim, as shown by the vastly unequal figures they inserted for each termination-related cause of action: $500,000 in noneconomic damages for wrongful discharge, $800,000 for failure to accommodate, and $300,000 for disparate treatment.

But the fact that the jurors followed the court's direction to separately consider and assign a value for each item of noneconomic damage does *not* support the inference that they *first* determined the entire amount of Roby's noneconomic damages and then chopped that figure into three unequal parts, apportioning the sum among three different legal theories. And no amount of speculation as to the effect of the court's instructions on the jurors' subjective reasoning process can provide a legal basis for "stacking" noneconomic damage awards in derogation of the core principle that a plaintiff "is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence," regardless of the number of legal theories asserted in the pleadings or submitted to the jury. (*Tayaglione, supra*, 4 Cal.4th at p. 1158.)

As Roby implicitly concedes, all three termination-related torts represented a single compensable injury. Just as it struck duplicative economic loss awards for the three

termination-related torts, the trial court should not have permitted the judgment to contain more than one noneconomic award. Roby is entitled to the highest noneconomic damage figure awarded by the jury--$800,000. By stacking the three noneconomic awards, the trial court allowed Roby to be overcompensated by $800,000. Because the two lower awards--$500,000 and $300,000 respectively--compensated Roby for the same injury, they were subsumed within the higher award and should have been omitted from the judgment as duplicative.

II. Offset for Social Security Disability Payments

Roby's economic expert Dr. Charles Mahla testified that the present value of Roby's economic loss as a result of her premature termination from McKesson was $604,657. He acknowledged that at the time of trial Roby was receiving $1,106 per month in Social Security disability payments. However, he did not consider disability benefits as an offset to her economic damages, explaining: "I was asked to assume that Social Security Disability is a collateral [source,] that's a legal issue, so it's not relevant for my analysis."

Before the case was submitted to the jury, the parties debated the issue of whether Roby's disability payments should be offset against damages or were protected from offset under the collateral source rule. They submitted conflicting proposed instructions on the issue.

The trial court adopted a modified version of defendants' instruction and instructed the jury as follows: "If plaintiff

received compensation in the form of disability benefits during any period that you determine she is also entitled to a damage award[,] [it] must be reduced by the amount of disability benefits received by plaintiff. *Defendants have the burden of proving . . . this issue to be more likely true or not true.*" (Italics added.)

The jury awarded Roby $605,000 for her past economic loss, thereby adopting Dr. Mahla's damage figure without offset. McKesson contends that the judgment must now be reduced by $150,416 since, by failing to offset disability benefits Roby will have received at the time of her retirement, the jury "ignored" the quoted instruction.

In their briefs, the parties resume their debate over whether the collateral source rule applies to Social Security disability benefits. Apparently, the issue is still unsettled in California. (See Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2006) ¶ 17:192, p. 17-22 (Chin).) We need not delve into this dispute however because, on this record, the jury could reasonably have concluded that defendants did not carry their burden of proof.

In his testimony, Dr. Mahla set out his method of calculating the present value of each of the components of Roby's economic loss. On cross-examination, Dr. Mahla testified that Roby told him she was receiving $1,106 in monthly Social Security disability payments and that he "assumed" the figure

might be adjusted upward in the future due to cost of living allowances.

The instructions told the jury that defendants bore the burden of proving an offset for disability payments. This instruction must be construed as applying not merely to the *fact* of the offset but its amount.

McKesson presented no evidence, through Dr. Mahla or otherwise, on how the jury should calculate an offset of the present value of Roby's Social Security disability benefits against her projected economic loss. In closing argument, defense counsel commented only that "[y]ou can subtract her social security benefits that were listed on her tax forms, and that her expert Dr. Mahla said, now run about eleven hundred dollars a month." Roby's counsel pounced on defense counsel's statement in his rebuttal: "That is a duty--the defendants have to put on sufficient evidence where you're not having to speculate . . . . [¶] Remember all the different steps and computations Dr. Mahla did to get to [his figure]. If they wanted to have somebody come in and give you the evidence on this issue of the economic damages, and if there should be an offset, and how it should be computed other than just speculating and picking figures out of the sky, they should have brought in somebody. They should have brought an expert in. They should have asked those questions of Dr. Mahla. They didn't."

On appeal, the verdict is presumed correct and the reviewing court must consider the evidence in the light most favorable to the prevailing party, giving her the benefit of every reasonable inference. (*Bardis v. Oates* (2004) 119 Cal.App.4th 1, 10 (*Bardis*).) Applying this standard, the jury could reasonably have determined that defendants had not presented a sufficient evidentiary basis for calculating a disability offset.

In its reply brief, McKesson weakly responds that there was "sufficient" evidence for the jury to calculate an offset, and offers its own method. But jurors are not mathematicians and post-hoc computations by appellate attorneys are no substitute for competent expert testimony at trial. The question is not whether the jury could have cobbled together a method for calculating an offset. It is whether they could rationally have concluded that McKesson failed to carry its burden of proving an offset figure for disability payments. The trial court did not err in refusing to order the claimed offset.

III. Sufficiency of the Evidence to Support the Harassment Verdict*

The jury found both defendants liable for hostile work environment/harassment, awarding $600,000 against McKesson and $500,000 against Schoener. Defendants contend these verdicts are not supported by substantial evidence. For the reasons that follow, we agree.

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* See footnote at page 1, *ante*.

A. Standard of Review

Defendants suggest the standard of review is de novo because this is a case in which the "'"historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant legal] standard . . . ."'" (*People v. Louis* (1986) 42 Cal.3d 969, 984.) However, both the cases they cite (*Louis* and *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 284) were those in which the court was called upon to *interpret a statute.* Obviously, where the facts are undisputed and the question turns upon statutory interpretation, the issue is one of law, calling for de novo review. (E.g., *International Federation of Professional & Technical Engineers v. City and County of San Francisco* (1999) 76 Cal.App.4th 213, 224.)

This case does not require us to interpret a statute. The question with which we are confronted is whether the evidence supports a *factual* finding by the jury that Schoener and McKesson were guilty of unlawful harassment based upon a hostile work environment. Hence, the standard of review is that of substantial evidence. (See *Hope v. California Youth Authority* (2005) 134 Cal.App.4th 577, 589 (*Hope*).)

In applying the substantial evidence test, "'"the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact."'" (*Franck v. Polaris E-Z Go Div. of Textron, Inc.* (1984)

157 Cal.App.3d 1107, 1114, quoting *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) However, "'[s]ubstantial evidence . . . is not synonymous with "any" evidence.' Instead, it is "'"substantial" proof of the essentials which the law requires.'" [Citations.] The focus is on the quality, rather than the quantity, of the evidence. 'Very little solid evidence may be "substantial," while a lot of extremely weak evidence might be "insubstantial."' [Citation.] Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.)

B. Harassment--Legal Principles

The FEHA states that "[i]t shall be an unlawful employment practice . . . [¶] . . . [¶] . . . [f]or an employer, . . . or any other person, because of . . . mental disability, [or] medical condition, . . . to harass an employee." (§ 12940, subd. (j)(1).)

Although the *Hope* case dealt with a claim of harassment based on sexual orientation rather than mental disability, the principles set forth in *Hope* are equally applicable here. (*Hope, supra*, 134 Cal.App.4th at p. 588.)

"'[A]n employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough *or* sufficiently pervasive to alter the conditions of employment and create a work environment that

qualifies as hostile or abusive to employees because of their [mental disability]. . . . The working environment must be evaluated in light of the totality of the circumstances: "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."' (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 462 . . . .) [¶] 'In determining what constitutes "sufficiently pervasive" harassment, the courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial, rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature.' (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 610 . . . .) [¶] The harassment must satisfy an objective and a subjective standard. '"[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.' . . ."' (*Miller v. Department of Corrections*, *supra*, 36 Cal.4th at p. 462.) . . . Put another way, '[t]he plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's work performance and would have seriously affected the psychological well-being of a reasonable employee and that [he] was actually offended.' (*Fisher v. San Pedro*

Peninsula Hospital, *supra*, 214 Cal.App.3d at pp. 609-610, fn. omitted.)" (*Hope*, *supra*, 134 Cal.App.4th at p. 588.)

C. Application

Where the harassment is perpetrated by a supervisor, the employer is vicariously liable, regardless of whether the employer was aware, or should have been aware of it. (Chin, *supra*, ¶ 10:60.5, p. 10-9.) In this case, Roby's only alleged harasser was her supervisor, Karen Schoener.

Our review of the record yields the following behavior by Schoener which could conceivably support a claim of disability harassment: (1) she sometimes placed apple pies and small gifts on every subordinate's desk except Roby's; (2) she made Roby document all of her phone calls and made her cover the phones during the office Christmas party; (3) Schoener would often snub her at staff meetings and did not return her "good morning" greetings; (4) she once made a "throat slash" gesture when Roby was on the phone with a client and then loudly reprimanded Roby in front of her coworkers; (5) she referred to Roby's job as a "no-brainer"; (6) she once told Roby her arm digging and heavy sweating was "disgusting"; (7) even though Roby advised her that the unpleasant body odor was related to the medication she was taking for her condition, Schoener showed "no compassion," telling her instead that she needed to bathe and shower more frequently; and (8) Roby came to work one morning to find soaps, shampoos and deodorants had been placed on her desk. Roby was "crushed," but Schoener did nothing.

In *Reno v. Baird* (1998) 18 Cal.4th 640, 657 (*Reno*), the state Supreme Court relied on the distinction between discrimination and harassment under the FEHA in concluding that supervisory employees may be held liable for the latter, but not the former. Quoting from *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 63-65, the court explained: "'[H]arassment consists of a type of conduct not necessary for performance of a supervisory job. Instead, harassment consists of conduct *outside the scope of necessary job performance*, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives. Harassment is not conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job. [Citations.]" [¶] . . . [¶] We conclude, therefore, that the Legislature intended that commonly necessary personnel management actions such as hiring and firing, job or project assignments, office or work station assignments, promotion or demotion, performance evaluations, the provision of support, the assignment or nonassignment of supervisory functions, deciding who will and who will not attend meetings, deciding who will be laid off, and the like, *do not come within the meaning of harassment*. These are actions of a type necessary to carry out the duties of business and personnel management. These actions may retrospectively be found discriminatory if based on improper motives, but in that event the remedies provided by the FEHA are those for discrimination, not harassment. Harassment, by contrast, consists of actions *outside the scope of job duties*

which are not of a type necessary to business and personnel management.'" (*Reno, supra*, 18 Cal.4th at pp. 645-647, italics added.)

Application of these principles mandates the conclusion that most of the alleged harassment here was conduct that fell within the scope of Schoener's business and management duties. Acts such as selecting Roby's job assignments, ignoring her at staff meetings, portraying her job responsibilities in a negative light, or reprimanding her in connection with her performance, cannot be used to support a claim of hostile work environment. While these acts might, if motivated by bias, be the basis for a finding of employer *discrimination*, they cannot be deemed "harassment" within the meaning of the FEHA. (*Reno, supra*, 18 Cal.4th at p. 646.)

When *Reno*-protected conduct is sifted out, what we have left is evidence that Schoener treated Roby with general scorn and contempt and failed to show any sympathy for her disability. This is not sufficient to create liability for harassment based on a hostile work environment.

The FEHA is not intended to protect employees from rude, boorish, or obnoxious behavior by their supervisors. In order to constitute actionable harassment, the evidence must show that "'the workplace is permeated with "*discriminatory* intimidation, ridicule, and insult" . . . that is "sufficiently severe *or* pervasive to alter the conditions of the victim's employment" . . . .'" (*Birschtein v. New United Motor Manufacturing, Inc.*

(2001) 92 Cal.App.4th 994, 1000, quoting *Harris v. Forklift* Systems, Inc. (1993) 510 U.S. 17, 21 [126 L.Ed.2d 295, 301] (*Harris*), italics added.)

Thus, no matter how unpleasantly Schoener may have behaved toward Roby, her conduct cannot be deemed harassment unless it was based on and directed towards Roby's mental disability. The conduct must not only be severe or pervasive, it must also be tinged with *discriminatory* animus. (See *Harris*, *supra*, 510 U.S. at p. 22 [126 L.Ed.2d at p. 302]; see also *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 279 (*Lyle*).)

For example, in *Weeks*, *supra*, 63 Cal.App.4th 1128, the court found substantial evidence of sexual harassment where the plaintiff's supervisor "reached into [her] breast pocket, gestured as if to cup her breasts in his hands, touched her buttocks[,] quizzed her about the wildest thing she had ever done, [and] pulled [the plaintiff's] shoulders back to 'see which breast [wa]s bigger.'" (*Id.* at p. 1147.) In *Hope*, a sexual orientation harassment case, the court upheld a jury finding of harassment where the plaintiff's supervisor and coworkers regularly subjected him to a torrent of derogatory remarks and epithets directed toward his homosexuality, calling him a "motherfuckin' faggot," "homo," and "faggot ass motherfucker," while committing deliberate acts of cruelty and mistreatment on the job. (*Hope*, *supra*, 134 Cal.App.4th at pp. 589-591.)

There is nothing remotely approaching that type of conduct here. With the exception of Schoener's occasional negative comments about Roby's sweating and body odor, none of the behavior asserted to be harassment was colored by discriminatory animus. But even those comments must be viewed in context. The record showed that Roby's unpleasant body odor disturbed her fellow employees and therefore affected the work environment. Accordingly, Schoener's admonitions to Roby to take more showers or to bathe more frequently had a reasonable relationship to her management duties and cannot be classified as harassment. (*Reno, supra*, 18 Cal.4th at p. 647.)

Nor can Schoener's occasional comments that Roby's sweating and arm digging were "disgusting" be deemed substantial evidence of harassment. "'[M]ore than an episodic pattern of [disability] antipathy must be proven to obtain statutory relief. A hostile working environment is shown when the incidents of harassment occur in concert or with a regularity that can reasonably be termed pervasive.'" (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 463, quoting *Lopez v. S.B. Thomas, Inc.* (2d Cir. 1987) 831 F.2d 1184, 1189, cited with approval in *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 786, fn. 1 [141 L.Ed.2d 662, 676].) There is no evidence that Schoener ever referred to Roby's panic disorder in derogatory terms, interfered with the breaks she needed when she experienced attacks, or engaged in a regular, pervasive pattern of conduct tormenting her on account of her mental disability.

While the evidence showed that Schoener obviously disliked Roby, shunned her, and showed no compassion for her condition, neither cold indifference nor lack of sensitivity toward a disabled employee can be alchemized into a claim of hostile work environment. If such were the case, virtually every case of disability discrimination could be parlayed into a supplementary damage claim for harassment.

Roby points to evidence that Schoener's behavior aggravated her symptoms and left her emotionally ravaged. But Roby, already emotionally frail from the severe effects of her psychological disorder, was highly susceptible to even the slightest display of antipathy. To be actionable an "'objectionable environment must be both *objectively* and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' [Citations.] That means *a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception.*" (*Lyle, supra,* 38 Cal.4th at p. 284, italics added.) The "reasonable person" test is necessary to protect employers against claims that are frivolous or brought by hypersensitive employees. (See *Andrews v. Philadelphia* (3d Cir. 1990) 895 F.2d 1469, 1483.)

We conclude there is insufficient evidence to support the finding that Schoener engaged in discriminatory harassment

within the meaning of the FEHA. Thus, the harassment verdict against McKesson also fails. Because it must be stricken entirely, we need not reach defendants' remaining arguments directed at the harassment verdicts. ***(END OF PUBLISHED PART III.)***

IV. Punitive Damages

Against the backdrop of a $3.5 million compensatory damage verdict, the jury awarded punitive damages of $15 million against McKesson and $3,000 against Schoener. Our vacation of the $500,000 harassment award against Schoener also requires vacation of the companion punitive damage award against her.

We thus address McKesson's two-pronged attack on the punitive damage verdict against it. McKesson first claims that its conduct did not reach the evidentiary threshold sufficient to sustain a punitive damage award. Second, even if punitive damages were appropriate, the $15 million figure must be greatly reduced. We reject the first contention, but agree with the second.

A. Propriety of Punitive Damages

McKesson first argues that its conceded liability for disability discrimination cannot support an award of punitive damages. It insists that its conduct consisted of no more than a failure to "connect the dots" by not investigating the reasons behind Roby's frequent absences and failing to grant her special dispensation such as FMLA status on account of her disability. McKesson argues that such conduct, while negligent, cannot be

characterized as "despicable" within the statutory definition because it was not "base, vile or contemptible." (See *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725.)

Civil Code section 3294, subdivision (a) provides that punitive damages are available "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice . . . ." "Malice" is defined as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (§ 3294, subd. (c)(1).) "Oppression" is defined as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (§ 3294, subd. (c)(2).) "In the ordinary ex delicto action . . . involving intentionally wrongful conduct, the evidence sufficient to establish the tort is usually sufficient to support punitive damages." (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1286.)

The evidence refutes McKesson's predicate claim that it was guilty of nothing more than a negligent failure to discover that Roby suffered from a severe case of panic disorder that caused her to miss frequent time from work. Grover, Roby's former supervisor, was not only aware that Roby suffered from panic disorder, but would send her outside on breaks during her attacks and sent other employees out to check on her. Chew kept Grover informed about the progress of Roby's condition and the

medications that were prescribed to address it. On several occasions, Chew specifically told Grover that Roby's absences were due to her panic disorder.

When Schoener became Roby's supervisor, she became equally cognizant of Roby's condition. She witnessed Roby's panic attacks and made comments about her body odor, even though she knew the smell was caused by the medication Roby was taking. Roby informed Schoener in advance about upcoming medical appointments and she submitted absence verification slips signed by her psychiatrist, Dr. Schnitzler. Schoener commented that people were concerned Roby's condition might be contagious. At Grover's request, Roby even brought in a note from Dr. Schnitzler verifying that her condition was not contagious. When Roby called in absences, Schoener would announce to other employees with a tone of derision, "Charlene's absent again."

After instituting its strict and confusing attendance policy, McKesson showed great leniency to other employees by counting their multiple absences due to medical reasons as a single "occasion." By contrast, Roby was treated far more harshly and her complaints to Schoener about unfair treatment fell on deaf ears. Despite its awareness of her disabling condition, McKesson never explained to Roby her rights under the

FMLA or the California Family Rights Act (the CFRA)[5] (§§ 12945.2, 19702.3) prior to her termination.

The jury could also find that Schoener engaged in fraudulent behavior by telling Roby after her "final warning" in October 1999 that if she made it until January 2000 without any occasions, her record would be cleared and she would gain a new start. Roby succeeded in making it to the deadline. Yet McKesson proceeded to terminate her for incurring single absences in February and April 2000. When Roby filed a grievance after her termination complaining that she was terminated on account of her disability, McKesson did no investigation, but simply counted up her absences and reaffirmed its decision.[6]

The jury could also conclude McKesson's management was fully aware that Roby was emotionally fragile and vulnerable due to her psychological condition. The evidence supports the inference that McKesson saw Roby as an easy target, who could be forced out of the company by enforcing an inflexible attendance

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[5] The CFRA is also known as the Moore-Brown-Roberti Family Rights Act. (§ 12945.1; see also *Stevens v. Department of Corrections* (2003) 107 Cal.App.4th 285, 287.)

[6] Schoener's fraudulent representation could form the basis for a punitive damage award against McKesson because the evidence supports a factual finding that she had "discretionary authority over decisions that ultimately determine corporate policy." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 577.)

policy and failing to advise her about her right to have disability-related absences excused.[7]

Based on the foregoing and our review of the entire record, a reasonable jury could find that McKesson's conduct consisted of more than a careless failure to investigate absences, and was rather a deliberate plan to rid itself of the inconvenience of accommodating a mentally disabled employee. The imposition of punitive damages is supported by substantial evidence.

B. Excessiveness of the Punitive Damage Award

A thornier question is the propriety of the amount of punitive damages. "[T]he United States Supreme Court has determined that the due process clause of the Fourteenth Amendment to the United States Constitution places limits on state courts' awards of punitive damages, limits appellate courts are required to enforce in their review of jury awards. [Citations.] The imposition of 'grossly excessive or arbitrary' awards is constitutionally prohibited . . . ." (*Simon v. San*

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[7] The fact that McKesson had procedures and forms in place for excusing employee absences under the FMLA and the Americans With Disabilities Act does not, as McKesson suggests, compel the conclusion that its motives were pure. The same evidence permits the inference that McKesson *knew* it was violating Roby's legal rights and nevertheless acted with conscious disregard of them. As the United States Supreme Court has observed in the context of federal employment discrimination law, malice ultimately focuses on the employer's state of mind. (*Kolstad v. American Dental Assn.* (1999) 527 U.S. 526, 535 [144 L.Ed.2d 494, 505].) Thus, an employer who continues on a course of action with the knowledge that it may be in violation of the law acts with malice or reckless indifference, for purposes of awarding punitive damages. (*Ibid.*)

Paolo U.S. Holding Co., Inc. (2005) 35 Cal.4th 1159, 1171 (*Simon*).)

Obviously, the mammoth $15 million punitive damage verdict cannot stand in light of the fact that the compensatory damage award must be reduced by more than half. From the original $3,511,000 verdict against McKesson, we will deduct $800,000 on account of duplicative noneconomic damages and another $600,000 because of our reversal of the harassment verdict. That reduces the compensatory damage verdict to $2,111,000. After the stipulated $706,000 reduction is taken into account, the net compensatory damage verdict against McKesson will be $1,405,000, comprised of $605,000 in economic damage and $800,000 in noneconomic loss.

We cannot fulfill our appellate duties by the mechanical act of reducing the punitive damages sum so that the postmodification award bears the same ratio to compensatory damages as did the premodification award. We must still independently determine the uppermost constitutional limit of a punitive damage award in this case, while according due deference to the findings of historical fact made by the jury. (*Simon, supra,* 35 Cal.4th at p. 1172.)

Decisions handed down by the United States Supreme Court and our state's highest court have developed three guideposts for evaluating the excessiveness of a punitive damage award. We must review the award de novo, making an independent assessment of (1) the reprehensibility of the defendant's conduct, (2) the

relationship between the award and the harm done to the plaintiff, and (3) the relationship between the award and civil penalties authorized for comparable conduct. (*Simon, supra*, 35 Cal.4th at p. 1172; see *State Farm Mut. Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408, 418 [155 L.Ed.2d 585, 601] (*State Farm*).) This "'[e]xacting appellate review'" is intended to ensure punitive damages are the product of the "'"'application of law, rather than a decisionmaker's caprice.'"'" (*Simon*, at p. 1172, quoting *State Farm*, at p. 418 [155 L.Ed.2d at p. 601].) We consider these three factors below:

1. Reprehensibility of the conduct

In evaluating the reprehensibility of the conduct, we must consider the following five subfactors, i.e., whether, "[a.] the harm caused was physical as opposed to economic; [b.] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [c.] the target of the conduct had financial vulnerability; [d.] the conduct involved repeated actions or was an isolated incident; and [e.] the harm was the result of intentional malice, trickery, or deceit, or mere accident." (*State Farm, supra*, 538 U.S. at p. 419 [155 L.Ed.2d at p. 602].)

With regard to these five subfactors, in this case, McKesson did not cause physical harm, although it did inflict significant psychological harm; there was no evidence that McKesson evinced reckless disregard of the health and safety of others; the victim was financially vulnerable; the wrongful

activity consisted of a single course of conduct rather than a series of repeated actions; and finally, the conduct contained elements of trickery and deceit.

Since these subfactors basically offset each other, we would normally consider the reprehensibility factor as neutral in our analysis. However, in this case we must account for the fact that the jury's *harassment verdicts* of $1.1 million (nearly one-third of the entire compensatory damage award), must be vacated. (See pp. 22-32, *ante.*) Because the $15 million figure chosen by the jury to punish McKesson was no doubt strongly influenced by its $1.1 million dollar award for harassment, the reprehensibility factor favors a sharp reduction in the punitive damage award.

2. Disparity between actual harm and size of punitive damage verdict

In *State Farm*, the federal Supreme Court, while declining to impose any "bright-line ratio" above which a punitive damage award cannot stand, noted that, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." (*State Farm, supra*, 538 U.S. at p. 425 [155 L.Ed.2d at pp. 605-606].) But the inverse is not necessarily true: "Multipliers *less* than nine or 10 are not, however, presumptively *valid* under *State Farm*. Especially when the compensatory damages are substantial or already contain a punitive element, lesser ratios 'can reach the outermost limit of the due process guarantee.'" (*Simon, supra*, 35 Cal.4th at p. 1182, quoting *State Farm, supra*,

538 U.S. at p. 425 [155 L.Ed.2d at p. 606].) Here, even after our reduction, the compensatory damages Roby will receive must be considered generous by any standard. Therefore, the fact that the jury kept the ratio within the single-digit range does not insulate the punitive award from further scrutiny.

Indeed, *State Farm* also points out that where the victim has already been awarded full compensation for emotional distress, humiliation and mental suffering, a hefty punitive damage award may be highly suspect, for it is likely to be duplicative. Said the court: "The compensatory damages for the injury suffered here, . . . likely were based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation the [plaintiffs] suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. *Compensatory damages, however, already contain this punitive element.*" (*State Farm, supra*, 538 U.S. at p. 426 [155 L.Ed.2d at p. 606], italics added.) California courts follow this principle. (*Simon, supra*, 35 Cal.4th at p. 1189; *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 762 (*Romo*) [drastically reducing punitive damage award where plaintiffs received a sizeable noneconomic damage award].)

3. Civil penalties for similar conduct

The California Fair Employment and Housing Commission (the Commission) (§ 12903) has jurisdiction along with the civil courts to remedy violations of the FEHA. (Chin, *supra*, ¶ 7:1030

et seq., pp. 7-148 to 7-157.) The Commission has the authority to investigate complaints, issue accusations and cease-and-desist orders, and award money damages. (*Id.* at ¶¶ 7:1033 to 7:1079, pp. 7-148 to 7-154.) While the agency has authority to award full compensation for wage loss, there is a $150,000 cap on damages it can award for emotional distress and other nonpecuniary harm. (§ 12970, subd. (a)(3).) The Commission is prohibited altogether from awarding punitive damages. (Chin, *supra*, ¶ 7:1068, p. 7-153; § 12970, subd. (d).) It may levy a fine on an employer that it finds was guilty of oppression, fraud or malice, but the amount of the fine is subsumed within the $150,000 maximum penalty for noneconomic damage awards. (§ 12970, subds. (a)(4), (c), (d).)

In this case, the jury slapped McKesson with $15 million in punitive damages on top of a multimillion dollar compensatory award for emotional distress and other noneconomic harm. These figures make civil penalties that our Legislature has authorized for the same conduct seem pale by comparison. Thus, consideration of this third factor also leads us to conclude that the punitive damage award was disproportionately high.

C. Determination of Maximum Award

The original verdict of $3.511 million in compensatory damages and $15 million in punitive damages yields a premodification ratio of 4.272 to 1. If we simply applied an automatic proportionate reduction of the punitive damage award to reflect this same ratio after our modifications to the

compensatory damages (now a total of $1,405,000), it would yield a punitive damage award of $6,002,160. However, we do not feel that a 4-to-1 ratio falls within constitutional limits in this case because (1) the original punitive damage award was based on the jury's determination that McKesson was guilty of harassment, a qualitatively different tort, and one for which we have failed to find evidentiary support in the record; (2) more than half of the compensatory damage award--$800,000--represents compensation for emotional distress, humiliation and mental suffering, "outrage" components that are, to a large extent, duplicated by the punitive damage verdict; in other words, the compensatory damage verdict in this case, even after our reductions, is so large that it already reflects "indignation at the defendant's act and [is] so large as to serve, itself, as a deterrent" (*Simon, supra*, 35 Cal.4th at p. 1189, citing *State Farm, supra*, 538 U.S. at pp. 425-426 [155 L.Ed.2d at pp. 605-606); and finally (3) the magnitude of the punitive damage award dwarfs the maximum civil FEHA penalties for the same wrongful conduct.

We are therefore convinced that a pro tanto reduction of the punitive damage award to reflect the same ratio as the jury originally arrived at in this case would not comport with due process. Instead, we feel that this case falls into the class of cases identified by Justice Kennedy in *State Farm*, wherein he observed that while ratios greater than single digits "may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages[,]' . . .

[t]*he converse is also true . . . . When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages*, can reach the outermost limit of the due process guarantee." (*State Farm, supra*, 538 U.S. at p. 425 [155 L.Ed.2d at p. 606], italics added, citations omitted.) In this case, a ratio slightly higher than 1 to 1 is justified because the evidence showed that McKesson is an exceptionally wealthy corporation whose conduct wreaked havoc on a vulnerable victim's life.

Considering the shifting, complex mosaic of elements at play in this case, we conclude that a punitive damage award of $2 million reaches the constitutional frontier. Such a sum yields a ratio of compensatory to punitive damages of approximately 1.42 to 1 or about one-third of the original ratio. Our figure comports with Supreme Court jurisprudence on the subject yet is large enough to have a deterrent effect on future conduct.

Roby claims that preservation of a 4.272-to-1 ratio is necessary to serve the twin goals of deterrence and prevention of future unlawful conduct. She suggests that a lower ratio would amount to a mere "slap on the wrist" for a huge corporation such as McKesson, which ranks 16th on the list of Fortune 500 companies and whose net worth in 2004 was $5.165 billion.

Regardless of whether "[a]n award that can simply be written off as part of the cost of doing business" does not

adequately serve the goal of punitive damages, and "'"the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort"'" (*Bardis, supra,* 119 Cal.App.4th at p. 25), we do not believe a $2 million punitive damage award, tacked onto a $1,405,000 compensatory damage verdict and almost three quarters of a million dollars in attorney fees[8] that the trial court has awarded Roby in this case, amounts to a penalty of the wrist-slapping variety. A $4.133 million liability arising from a single case of disability discrimination will certainly stand out on any company's balance sheet and, we are reasonably sure, is likely to deter similar conduct in the future.

V. Appellate Reduction Versus Remittitur

As an appellate court, we have the power to order a conditional remittitur--that is, we may conditionally order a new trial on the issue of punitive damages unless the plaintiff consents to a reduced figure. (See, e.g., *Romo, supra,* 113 Cal.App.4th at pp. 763-764.)

However, the California Supreme Court has strongly indicated that where a punitive damage award is reduced to the constitutional maximum by the appellate court, giving the plaintiff the option of a new trial on that issue serves no useful purpose. "'If, on a new trial, the plaintiff was awarded punitive damages *less* than the constitutional maximum, he would

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[8] See footnote 3, *ante.*

have lost. If the plaintiff obtained *more* than the constitutional maximum, the award could not be sustained. Thus, a new trial provides only a "heads the defendant wins; tails the plaintiff loses" option.'" (*Simon, supra*, 35 Cal.4th at p. 1188, quoting *Johansen v. Combustion Engineering, Inc.* (11th Cir. 1999) 170 F.3d 1320, 1332, fn. 19.)

We shall therefore order modifications of both the compensatory and punitive damage awards, and affirm the judgment as modified.

DISPOSITION*

The judgment in case No. C047617 is vacated. The trial court is directed to enter a new judgment in favor of defendant Schoener against Roby and in favor of Roby and against defendant McKesson in the sum of $1,405,000 in compensatory damages and $2 million in punitive damages. So modified, the judgment is affirmed, with each party bearing its own costs on this appeal.

The postjudgment order awarding Roby her attorney fees in case No. C048799 is affirmed. (See fn. 3, *ante*.) Roby is also awarded her costs on that appeal. (Cal. Rules of Court, rule 27(a).) ***(CERTIFIED FOR PARTIAL PUBLICATION.)***

BUTZ, J.

We concur:

NICHOLSON, Acting P. J.

ROBIE, J.

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* See footnote at page 1, *ante*.

PROOF OF SERVICE

I, Sherry K. Longley, declare:

I am a resident of the State of California and over the age of eighteen years and not a party to the within-entitled action; my business address is Three Embarcadero Center, Seventh Floor, San Francisco, California 94111-4024. On February 23, 2007, I served the following document(s) described as **ANSWER TO PETITION FOR REVIEW**:

☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below.

☐ by transmitting via email the document(s) listed above to the email address(es) set forth below on this date before 5:00 p.m.

☐ by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for delivery.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed at San Francisco, California on February 23, 2007.

Sherry K. Longley