No. S149752

Supreme Court Co[illegible]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CHARLENE J. ROBY,
Plaintiff, Respondent & Petitioner

vs.

McKESSON HBOC and KAREN SCHOENER,
Defendants and Appellants.

Court of Appeal, Third Appellate District
Case Nos.: C047617 (Consol.: C048799)

PETITION FOR REVIEW

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INTRODUCTION

This partially-published Opinion raises issues fundamentally important to the effective and consistent enforcement of California's workplace harassment laws. These issues recur in virtually every harassment case, and the conflict in published authority created by this case cannot be tolerated. Additionally, this case raises important punitive damages issues.

The published harassment decision misconstrues *Reno v. Baird (Reno)* (1998) 18 Cal.4th 640 as having created a sweeping new immunity. This interpretation of *Reno* would repeal a major portion of existing protections against harassment by insulating employers (not merely individuals) from liability if one could posit *any theoretical connection*—no matter how strained—between the harassment and so-called "management need."

The Opinion also makes this new immunity a question of law, denying harassment victims the right to have juries decide whether or not harassing conduct was legitimately undertaken as a matter of managerial necessity. In creating this new employer immunity, the Opinion conflicts with: (a) language in *Reno*; (b) other published authority; and, (c) the approved jury instruction defining harassment.

Perhaps worse, the Opinion's blanket "managerial" immunity for employers will close the courthouse doors to most victims of disability harassment. Disability harassment (unlike other forms of harassment) often manifests itself in a supervisor's frustration at an employee's accommodation needs. Because a supervisor's response to accommodation needs can always be forced into the amorphous box of management duties or alleged managerial need, the Opinion eliminates this entire category of harassment cases. This result cannot be squared with California's emphatic protection of employees with disabilities.

Other significant problems arise from the Opinion's illogical conflation of two distinct elements of harassment law. In direct conflict with published California authority, the Opinion requires that *every piece* of evidence supporting the "severe or pervasive" prong must, simultaneously, also contain *direct* evidence that it occurred "because of" a protected trait. Under other published authority, showing that the perpetrator uttered a racial (or other) slur against the plaintiff permits the reasonable *inference* that other harassing conduct by the same perpetrator was "because of" the plaintiff's status—even if the other harassing conduct was not accompanied by a contemporaneous discriminatory slur. But the Opinion holds that unless the other harassment was accompanied by direct, identifiable proof

of discriminatory animus, the jury could not infer animus from the perpetrator's other explicitly-discriminatory words or actions.

Additionally, this case presents unresolved issues regarding punitive damages appellate review, some of which are similar to those pending before this Court in *Bullock v. Philip Morris*, (S143850). But our case presents these questions in a civil rights context, which this Court has not yet considered. As the result here illustrates, without guidance from this Court, lower courts will continue to ignore the fundamental public policies behind our discrimination laws when conducting punitive damage review. Here, the appellate court somehow concluded that intentional discrimination directed at a vulnerable target (financially and emotionally) was low enough on the reprehensibility scale to slash punitive damages from a reasonable 4.272:1 ratio to a meager 1.4:1 ratio.

Moreover, ignoring the "general verdict rule," the court insisted that this "sharp reduction" was necessary because it *speculated* that the jury's disability discrimination and wrongful termination verdicts were inflated by the harassment verdict, which the court reversed. Based on that impermissible speculation, the court denied plaintiff a conditional new trial right, which would have obviated any need to speculate.

Finally, the Opinion's holding that the separate discrimination claims were actually a single cause of action that could not support separate damage awards obliterates the statutory distinctions the Legislature created between separate unlawful employment practices. It also raises questions concerning the respective roles of the appellate court versus a properly-instructed jury to decide "duplicative damages" issues.

ISSUES PRESENTED

1. Does *Reno* automatically insulate an employer from harassment liability simply because one could posit even a tenuous, theoretical connection to management duties?
2. Can a jury infer that a pattern of harassing conduct was "because of" the protected trait if *some* of the harassment clearly was so motivated or, must *each piece* of evidence of harassment also contain direct evidence of illegal animus?
3. May an appellate court deny a conditional new trial right when it reduces punitive damages because it reverses one of multiple substantive claims that supported punitive damages?

4. Do "substantial" compensatory damages necessarily require courts to impose a bright-line 1:1 ratio between compensatory and punitive damages and, if so, how is "substantial" defined?

5. Have appellate courts confused the difference between the punitive amount they would have selected (sitting as trier of fact) versus the "constitutionally-permitted maximum" that can be tolerated?

6. Where different claims of discrimination are involved, is a duplicative damage challenge reviewed as a matter of law or under the substantial evidence rule?

SUMMARY OF FACTS

A. Charlene Roby, a 25-Year "Stellar Employee," Is Denied Accommodations and Mercilessly Harassed by Her Supervisor Due to Roby's Recognized Disability

1. McKesson Fails to Accommodate Roby's Disability, Treating Absences Caused Thereby More Harshly than Absences of Employees Without Any Disability

McKesson is a worldwide pharmaceutical distributor, ranking 16th on the Fortune 500. (Opinion, 4&43.) Charlene Roby "was a stellar employee" of McKesson with "an excellent performance record" for 25 years.[1] (Opinion, 2&4.)

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[1] Roby was supervised by Dianne Saamer and Alan Grover (who became the Distribution Center Manager) and, beginning April 1999, Karen

In early-1998, Roby developed panic disorder, a psychiatric condition causing extreme fear, heart palpitations, shortness of breath and dizziness. Roby's panic attacks caused "physical symptoms such as difficulty breathing, uncontrollable shaking, and scratching or picking at her arms until they bled." Medication prescribed by her psychiatrist (Dr. Schnitzler) produced an embarrassing body odor. (Opinion, 4.)

McKesson's management (including Schoener) knew of Roby's panic disorder and related symptoms. (Opinion, 5&33-34.) Despite knowledge of Roby's disorder, Schoener punished her for absences caused by her condition.[2] For example, on October 22, 1999, Roby received a final written warning for missing July 27 and 28, despite Dr. Schnitzler's note excusing these absences. (Opinion, 7-8.) By contrast, McKesson "showed great leniency to other employees by counting their multiple absences due to medical reasons as a single 'occasion.'." (Opinion,6,8&34.)

Schoener. (Opinion, 4-5;RT1537-1538.) Christopher Rafter and Beverly Chilton were human resource personnel. (RT865&932.)

[2] Under McKesson's 90-day rolling attendance policy, employees were given a limited number of "occasions," *i.e.*, absences without 24-hours notice. Multiple "occasions" led to increasingly severe discipline. (Opinion, 4-5.) As discussed in the text, this policy was applied quite more harshly to Roby than to others.

2. McKesson's Ongoing Failure to Accommodate Roby's Disability Caused Her Emotional Harm Totally Separate from that Caused by Her Subsequent Termination

McKesson's failure to accommodate Roby (penalizing her disability-related absences much more strictly than others' absences) spanned from April 1999 until Roby's April 2000 termination. (AA1927&1978.) Testimony from Roby, her coworkers and her psychiatrist Dr. Schnitzler demonstrated the emotional distress Roby suffered from the failure to accommodate her disability. This distress, which occurred *before* her termination, was separate and distinct from the distress caused by her temporally-distinct termination, and included increased panic attacks, uncontrollable spontaneous crying, progressively worse digging at her arms until they bled and other increased symptoms. (RT472;529-530;533;536-537;549-551;572-573;591;632;1014-1015;1051-1054;1057;1066-1068;1110-1111; AA1929;1943;1951;2020-2108.)

3. Schoener Mercilessly Harassed Roby Because of Her Disability and Accommodation Needs

During the year she supervised Roby, not only did Schoener deny her accommodation rights, she also repeatedly and cruelly harassed Roby because of her disability and accommodation needs.

Schoener frequently made derisive insults (often publicly) about Roby's condition and accommodation needs. (RT418;420-421; 424;426;472;474;530-531;536;576-577;595-596;600-601; Opinion, 7, 26&30.) For example, Schoener knew that Roby's sweating, arm digging, "terrible sores" and body odor were manifestations of her panic disorder and resulting medication. (RT532-536;1015; Opinion, 26.) Nonetheless, Schoener "told Roby her arm digging and heavy sweating was 'disgusting'," "made negative comments about Roby's body odor," and humiliatingly told Roby to take more baths and showers, despite knowing that Roby's body odor was a medication side-effect, beyond Roby's control.[3] (RT414-415;420-422;470-471;527-528;533-534; Opinion, 7, 24&26.)

McKesson's policy required *private* correction of subordinates. (RT472-473.) Yet, "Schoener often loudly reprimanded Roby in front of her coworkers." (Opinion, 7&26.) Schoener leveled public insults at Roby, such as calling "Roby's job...a 'no-brainer," even though she admitted that Roby's job was *not* a "no-brainer," but took "years to know what she's doing." (RT472-473;530;1275; Opinion, 7&26.)

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[3] Schoener's overt attacks upon Roby's condition support an inference that she was the anonymous person who left "soaps, shampoos and deodorants" on Roby's desk to publicly shame her. (Opinion, 26.)

Schoener's *constant* public insults and yelling at Roby "appalled" Roby's coworkers. (RT420-422;472;474-475;530-531;595-596;600-601.) Despite Roby's plea to upper management that Schoener stop the abuse or "at least take [her] behind closed doors and say something" so that "[i]t wouldn't be as humiliating and upsetting to [Roby]," nothing put an end to Schoener's harassment. (RT595-596.)

Schoener displayed visible disgust at Roby's accommodation need of breaks when she suffered panic attacks. Roby needed breaks almost daily and, as Schoener's harassment intensified, "*at least* once a day." (RT423-424;484-485;529-530;536-537;576-577;1014-1015.) To take breaks, Roby had to "walk past [Schoener's] desk." When she did, Schoener *publicly* displayed "general disgust" and "upset with the breaks." (RT412;418;536.) Similarly, "[w]hen Roby called in absences, Schoener would announce to other employees *with a tone of derision*, 'Charlene's absent again.'" (Opinion, 34) (italics added.)

Schoener's harassment included public shunning and ostracism. *Every* morning Schoener publicly ignored Roby's smile and "hellos"—or worse—responded with public displays of disgust. This happened approximately 220 times in a year! And it sent a clear message to Roby's

coworkers that management viewed her as an object of disgust. (RT421;473;493;531-532.)

Every week (approximately 52 times), Schoener publicly shunned Roby by placing pastries on the desks of all her subordinates—except for Roby. (RT419-420;455;471-472.) Likewise, upon return from her many trips, Schoener publicly distributed gifts "to all her coworkers" while "always" "skipping Charlene's desk." (RT419-420;471-472.) Additionally, Schoener gave all her subordinates Christmas gifts—except for Roby. (RT420). Schoener also had a practice of giving "anniversary pies" to her subordinates to celebrate their McKesson anniversary. (RT1256-1257; 1259-1260;1270.) But Schoener *publicly excluded* Roby from this recognition. (RT506.) *Whenever* there were office parties, "it was *always* Charlene" who was ordered to cover the phones and excluded from participation. (RT506.)

At monthly staff meetings, Schoener praised *every single employee* for what they did that month—*except for Roby*—even though Roby was admittedly an "excellent" employee. (RT420;531;615-616;723;817-818;1272.) On those few occasions when Schoener let Roby speak, Schoener made it "quite apparent [to others in the room] that what [Roby] was saying really doesn't matter." (RT517.)

Schoener often publicly turned her back on Roby when Roby tried to ask her questions. (RT473;483-484;530-531.) This public shunning was a "constant thing." (RT419-420;455;471-472.) Schoener's pattern of exclusion reinforced the message that Roby was an inferior "second class citizen" despite the fact that she was one of the "longest term employees" and an "excellent performer." (RT534-535;723-725;817-818;826-827; Opinion, 4).

"Schoener's behavior aggravated [Roby's] symptoms and left her *emotionally ravaged*." (Opinion, 31) (italics added.) And Roby was not alone in feeling offended by Schoener's abuse. Her coworkers testified that they too were "embarrassed," "concerned" and "appalled" by Schoener's harassment of Roby. (RT416-422;423-424;471-473;475;484;490;493;496;506-507;517.)

One coworker observed Roby "in tears there at her desk ... countless times." (RT496.) Another saw that after interaction with Schoener, "Roby would go into the severe head sweats and the tremors." With time her arms became "a real bad scabby mess," the majority of them "covered in nothing but scabs" as she self-mutilated in response to Schoener's attacks. (RT469-470;484;496.) Still another observed that what began as "light" scratching

on Roby's arms evolved into arms "terribly scratched up" with "terrible sores." (RT1014-1015.)

4. Schoener Fraudulently Tricks Roby, Setting in Motion Roby's Unlawful Termination

After the October 22, 1999 final written warning, "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 managed to do so. But when she excitedly reported to Schoener that she had "made it," Schoener ignored her, turning away without responding. (Opinion, 8.) The appellate court observed "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." (Opinion, 35.)

Thinking that she had a "clean slate" as of January 18, 2000, Roby missed work on February 25 and April 11, 2000. On April 13, 2000, Grover and Rafter told Roby she was subject to termination for the new "occasions." Roby responded that Schoener assured her she had a "new start" and complained about the leniency given to others under the same policy. (Opinion, 8-9.)

Nonetheless, McKesson fired Roby for these absences. "The jury could...conclude McKesson's management was fully aware that Roby was emotionally fragile and vulnerable due to her psychological condition" and "saw Roby as an easy target, who could be forced out of the company by enforcing the inflexible attendance policy and failing to advise her about her right to have disability-related absences excused." (Opinion, 35-36.)

In short, McKesson and Schoener engaged in "a deliberate plan to rid itself of the inconvenience of accommodating a mentally disabled employee." (Opinion, 36.)

B. Roby Is Financially and Emotionally Devastated

Roby's termination after 25 years devastated her. She is totally disabled for the rest of her life. She lost her medical insurance and went months without treatment. She developed agoraphobia and her life became the four walls of her bedroom. She became suicidal, depleted her retirement, and relocated to Oregon to live with her family who support her. (RT616-620;626-627;680-682;1065-1066;1080-1081; Opinion, 9.)

PROCEDURAL HISTORY

A properly-instructed jury found: that McKesson wrongfully terminated Roby, discriminated against her and failed to accommodate her; that Schoener harassed her due to her disability; and that McKesson engaged in malicious conduct. (AA937-947.) It awarded non-economic damages ($4,011,000) and punitive damages ($15,003,000). (AA937-950.) McKesson moved for new trial and JNOV. (AA955-959.) Roby stipulated to reduce economic damages by $705,000 and the trial court denied McKesson's new trial and JNOV motions. (AA1797-1799.)

The Third District Court issued a *partially published decision*. In the published portion, it reversed the harassment judgment, finding—based on its interpretation of *Reno*—that the judgment lacked substantial evidence. (Opinion, 24-32.) In the unpublished portions, it found that Roby's damages on the wrongful termination, disparate treatment and accommodations claims were duplicative, reducing non-economic damages on these claims from $1,600,000 to $800,000. (Opinion, 11-19.)

The court concluded that substantial evidence did support punitive damages, but it slashed the amount from $15,000,000 to $2,000,000. This left a ratio of 1.4:1 of the *reduced* compensatory damages (and less than

.5:1 between the jury's original compensatory award and the reduced punitive award). (Opinion, 32-45.)

Although the primary basis for this massive reduction was the court's assumption that "the $15 million figure chosen by the jury to punish McKesson was no doubt strongly influenced by its $1.1 million award for harassment" that the court reversed, it denied Roby a conditional new trial on the amount of punitive damages, instead speculating on the effect the harassment claim may have had on the total punitive damages verdict. (Opinion, 39.)

Roby filed a timely Petition for Rehearing, which was denied.

WHY REVIEW SHOULD BE GRANTED

I. REVIEW IS NEEDED TO RESOLVE A CONFLICT IN PUBLISHED AUTHORITY AND TO SETTLE AN IMPORTANT QUESTION THAT FLOWS FROM CONFUSION ABOUT LANGUAGE IN THIS COURT'S *RENO* DECISION

The Opinion is the first published California decision addressing the substantive requirements of disability harassment claims under California's FEHA.[4] As the first published decision in this area, the Opinion erects an

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[4] *Muller v. Automobile Club of Southern California* (1998) 61 Cal.App.4th 431, 446-447, discussed disability harassment in dicta because it found no disability (a holding overruled in *Colmenares v. Braemar*

impenetrable bar that will preclude all but the most extreme disability harassment cases. Moreover, it creates a conflict in published authority concerning fundamental issues of harassment analysis.

A. This Court Should Make Clear that *Reno* Does Not Automatically Insulate Employers from Harassment Liability Simply Because One Can Posit a Theoretical Connection to "Necessary Management" Duties

1. This Court should clarify language from *Reno*, which the Opinion misconstrues to create a sweeping immunity from harassment liability for both individuals *and their employer*

In *Reno v. Baird* (1998) 18 Cal.4th 640, 643-647, this Court addressed "whether persons claiming discrimination may sue their supervisors *individually*" for discrimination. (Italics added). In doing so, it relied on *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, in which the court (also considering *individual supervisor* liability for *discrimination*), stated that "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" and "is not conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job."

Country Club, Inc. (2003) 29 Cal.4th 1019, 1031 fn. 6).

(*Janken*, 46 Cal.App.4th at 63.) According to *Janken*, "commonly necessary personnel management actions ... do not come within the meaning of harassment" because they "are actions of a type necessary to carry out the duties of business and personnel management." (*Id.* at 64-65.)

Reno liberally quoted from *Janken*'s differentiation between harassment and discrimination to hold *individual* supervisors are not liable for discrimination under the FEHA. (*Reno*, 18 Cal.4th at 645-647, 663.) But it clearly stated: "[W]e express *no opinion* on the scope of *employer* liability under the FEHA for either discrimination or harassment." (*Reno*, 18 Cal.4th at 658) (italics in original and added.)

The distinction so carefully drawn in *Reno* has now been blown apart by the Opinion. The Opinion expressly relies on *Reno* to define the scope of *employer* liability for harassment, reasoning that "[a]pplication of [*Reno*'s] 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." (Opinion, 28.)

This Court should grant review to clarify whether *Reno* prohibits inclusion of certain types of conduct (so-called "necessary management duties") within the "totality of circumstances" that supports a harassment claim. This case presents a recurring issue that plagues trial and appellate

courts daily. It is not confined to post-verdict review, but applies equally to harassment summary judgments or demurrers litigated daily in the lower courts. (*See Lyle v. Warner Bros. Television Production* (2006) 38 Cal.4th 264, 292 & n. 13 [summary judgment case where appellate court had similarly interpreted *Reno*].)

This case presents an opportunity both to settle this important and recurring question and to eliminate the conflict in decisions (and conflict between decisions and the approved jury instructions) on this issue. For example, the Opinion's view of *Reno* conflicts with this Court's recent decision in *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, a sexual favoritism hostile environment case. There, this Court allowed plaintiffs to base harassment claims on many acts that, under the Opinion's interpretation of *Reno*, are non-actionable "personnel action." These acts included: a supervisor's discriminatory promotions and assignments favoring those who were sexually involved with him; "imposing additional onerous duties on" the plaintiff and "making unjustified criticisms of her work" while "threatening her with reprisals;" "unannounced inspections," withdrawing accommodations, reducing pay structure, "reducing...responsibilities and den[ying] access to the work experience ... needed in order to be promoted." (*Id.* at 452-457; 466-467.)

The lower courts have struggled with whether *Reno* meant to insulate *employers* from harassment liability for so-called management action. (*Compare Adams v. FedEx Corp.* (N.D. Cal. 2005) 2005 WL 3371067, at *3 fn. 3 [reasoning because *Reno* addressed individual liability for discrimination, "nowhere did the court hold that a plaintiff fails to state a claim for...harassment...when he alleges conduct constituting 'personnel management action.'"]; *with Valente-Hook v. Eastern Plumas Health Care* (E.D. Cal. 2005) 368 F.Supp.2d 1084, 1103 [using *Reno* to dismiss a disability harassment claim because "the incidents she complains of fall within the scope of job duties of a type necessary to business and personnel management."].)

The Opinion immunizes employers from liability for *verbal harassment* directed at protected traits so long as there is even the slightest connection to what could be termed management duties. (Opinion, 30-31 [Schoener's derogatory comments about Roby's body odor, such as that it was "disgusting," and "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"].) This misapplication of *Reno* creates a direct conflict with the approved jury instruction (and the interpretative regulation) defining harassment. Under the Judicial Council

approved jury instructions, "[h]arassing conduct may include...[v]erbal harassment, such as...*demeaning comments, slurs*...[or] [*other form[s] of verbal harassment.*" (*California Approved Civil Instructions*, Instr. No. 2523 (italics added); 2 Cal.Code of Regs.§7287.6(b)(1).)

We believe that this Court never intended that *Reno*'s differentiation between harassment and discrimination (in the context of limiting *individual* liability for discrimination) would fundamentally change the contours of harassment law and employer liability under it. Language within *Reno* supports our view. For example, the Opinion immunizes Schoener's frequent public insults about Roby's disability and need for accommodations and "loudly reprimand[ing] Roby in front of her coworkers" as allegedly "within the scope of Schoener's business and management duties," and thus "*Reno*-protected." (Opinion, 26&28.) But *Reno* creates no such blanket immunity. Indeed, it stated the opposite, noting that publicly berating a subordinate cannot be cloaked under the rubric of a protected personnel action: "Shouting out loud, however, as distinct from making personnel decisions, might be deemed actionable harassment." (*Reno*, 18 Cal.4th at 657.)

Janken, too, supports our view that the Opinion has created unduly broad and unwarranted immunity. *Janken* drew the critical distinction

obliterated by the Opinion here: "No supervisory employee needs to use slurs...in order to carry out the legitimate objective of personnel management." (*Janken*, 46 Cal.App.4th at 64.) Thus, both *Janken* and *Reno* contradict the Opinion's core holding that McKesson is insulated from harassment liability for Schoener's derogatory slurs and insults about Roby's body odor, sweating and compulsive arm digging.

This case presents a particularly useful analytic vehicle for this Court to revisit or clarify the scope of its language in *Reno*. Unlike other types of harassments (*e.g.*, race, sex, etc.), disability harassment often manifests itself in supervisorial animus at the claimed inconvenience of accommodating the disability. (*See e.g. Fox v. General Motors Corp.* (4th Cir. 2001) 247 F.3d 169, 178 [supervisors made public comments about disability and restrictions, encouraged ostracism of disabled employees and required working against medical restrictions].)

The Opinion implies that harassment law need not prohibit this type of conduct because it is prohibited by the disability discrimination and/or accommodation laws. (Opinion, 28, 30&31.) But that is incorrect and this holding has left a gaping hole in the FEHA's protection of workers with disabilities. Consider what happened when Roby took breaks (which were never explicitly denied) to control her panic attacks. Where, like here, the

employer *reluctantly* grants the accommodation and the supervisor berates the employee for needing it, the Opinion's interpretation of *Reno* deprives the employee of a remedy for the supervisor's verbal or visual abuse directed at the accommodation.

The bottom line is this: applying *Reno* as the Opinion does eliminates an entire sphere of recognized disability harassment claims—that based on a supervisor berating or badgering an employee about a needed accommodation. (*See e.g. E.E.O.C. Enforcement Guidance: Workers' Compensation and the ADA* (EEOC Notice No. 915.002), Question 8 ["Excessive questioning [of an employee's restrictions or accommodation needs] may constitute disability-based harassment which is prohibited by the ADA."].) This result is incompatible with California's emphatically-strong pledge to protect the rights of workers with disabilities. (*Colmenares*, 29 Cal.4th at 1030; *Gov. Code* §12926.1.) Because disability harassment so often manifests itself in a supervisor's frustration over the need to accommodate or berating an employee for that need, the Opinion's view of *Reno* will disparately harm disability harassment plaintiffs compared to all others protected under the FEHA. This result cannot be squared with California's emphatic legislative protection of employees with disabilities.

2. Even if *Reno* does protect employers from harassment liability based on "necessary management action," review is still required to settle an important legal question: Is the determination of what acts are "necessary management" a question of fact for the jury or one of law for a reviewing court to decide?

Even if *Reno* insulates employers from harassment liability for "necessary management action," review is still needed to settle an important issue of law: Is it not a fact question for the jury to decide what acts are "necessary management action" versus gratuitous harassment "engaged in for personal gratification, because of meanness or bigotry, or for other personal motives"? (*Reno*, 18 Cal.4th at 657.)

No prior published decision has decided this issue. Unfortunately, the Opinion (the first published decision to reach it) creates more confusion than guidance. First, it does *not* even address this question expressly. Second, the result it reaches is internally-inconsistent.

The Opinion seemed to agree that sufficiency of the evidence supporting a harassment verdict is a question of fact, accorded substantial evidence review. (Opinion, 23-24.) But then, as a pure matter of law—without any deference to the implied finding that the arguably management action was not "necessary" but instead gratuitous—the reviewing court stripped from the record any act that *it viewed as conceivably bearing* "a

reasonable relationship to...management duties" as not properly "classified as harassment." (Opinion, 30.)

Which is it? Here, McKesson was allowed a special instruction tracking *Reno*: "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." (AA880-881) (italics added.)

The jury is presumed to have followed this instruction. (*People v. Duncan* (1960) 53 Cal.2d 803, 818.) Moreover, a wealth of substantial evidence supports the implied finding that Schoener's abuse was not "necessary management action."

Consider Schoener's derogatory "comments about Roby's sweating and body odor" and telling Roby she needed "to take more showers or bathe more frequently." (Opinion, 30.) The Opinion immunized this conduct as "necessary management action." This sweeping immunity was created by noting that Roby's coworkers had complained about the odor and, therefore, all this conduct bore "a reasonable relationship to [Schoener's] management duties..." (Opinion, 30.)

But substantial evidence supports the opposite conclusion and should, therefore, have barred the appellate court from substituting its view for the jury's.

- Schoener denied making these statements. (RT1282;1291-1292.) The court thus inferred a "management need" that the manager never articulated.
- Schoener testified that Roby's body odor never posed a problem during her supervision of Roby.[5] (RT816-817.)
- The so-called "management need" is also defeated by the fact that Schoener made these comments *publicly* (embarrassing Roby in front of others) when McKesson's policy (and *Reno*'s language) required that she do so privately. (RT414-415;470-471;527-528.)
- The conclusion that telling Roby to take more baths or showers was supported by "management need" ignores that Roby told Schoener that "she had no control over" the odor and her "doctor assured [her] it would go away." (RT533.) What good would another shower do if nothing could control the odor? (Opinion, 34.)

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[5] The only complaints occurred when Saamer supervised Roby. Saamer, *not Schoener*, addressed them. (RT840-841.)

Review is needed to settle this important question of law.[6]

B. The Opinion Creates a Conflict Among Published Appellate Decisions by Conflating the "Because Of" and "Severe or Pervasive" Elements.

Review is also warranted because the Opinion conflates two separate elements of a harassment claim, creating a conflict in published authority. Actionable harassment exists if the plaintiff: (1) was exposed to unwanted comments or conduct; (2) that were made "because of" a protected trait; and (3) were so severe *or* pervasive as to alter the conditions of employment and create an abusive working environment. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608.)

When evidence shows that *some* of the harassing conduct was directed at the plaintiff's protected trait, the trier of fact may reasonably

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[6] The Opinion's interpretation of *Reno* will produce absurd results. Simply consider the allegations from the recent sex harassment case of *Department of Health Services v. Superior Court* (2003) 31 Cal.4th 1026. There, the plaintiff alleged her supervisor offered to excuse her attendance problems if he could touch her vagina. (*Id.* at 1035.) According to the Opinion, regardless of *how she did so,* Schoener's addressing Roby's so-called attendance problem "fell within the scope of Schoener's business and management duties" and "had a reasonable relationship to her management duties." (Opinion, 28&30.) Can the same be said—as a matter of law—of the express quid pro quo in *Department of Health Services*? Of course not. Allowing the jury to decide what is "necessary management action" versus gratuitous harassment will avoid the absurd consequences that this quid pro quo example illustrates.

infer that the other (seemingly ambiguous) treatment was likewise caused by similar animus. (*See e.g., Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30, 36-37; *Birschtein v. New United Motor Manufacturing* (2001) 92 Cal.App.4th 994, 1001-1002.)

There is simply no reason that *each* piece of evidence that supports the "severe or pervasive" prong of the analysis must also independently support the "because of" prong. But this is precisely what the Opinion requires, conflating these two analytically separate elements, creating conflict with *Dee* and *Birschstein*, and inventing a novel standard.

In particular, the Opinion observes that Schoener made "negative comments about Roby's sweating and body odor" and stated that "Roby's sweating and arm digging were 'disgusting'." (Opinion, pp. 28 & 30.) Given Schoener's knowledge that these conditions were caused by Roby's disability, these direct, and derogatory, statements about symptoms of Roby's disability should suffice as evidence of "discriminatory animus" towards Roby's condition. (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 54, fn. 14. ["a plaintiff need only show 'animus' directed at the disability."].)

The Opinion frankly acknowledges this. (Opinion, 30 ["Schoener's occasional negative comments about Roby's sweating and body odor" could

be viewed as "colored by discriminatory animus"].) But it then dismisses this evidence as merely "episodic" and not occurring "in concert or with a regularity that can reasonably be termed pervasive." (Opinion, 30&34.)

This conflation of the "because of" and "severe or pervasive" elements creates havoc in California harassment law. Courts have long-cautioned that a hostile environment analysis requires looking at the "totality of the circumstances," not a compartmentalized evaluation of each incident separately. As one court has stated in the context of sexual harassment: "[C]ourts should avoid disaggregating a hostile work environment claim, dividing conduct into instances of sexually oriented conduct and instances of unequal treatment, then discounting the latter category of conduct, thereby robbing instances of gender-based harassment of their cumulative effect." (*Berry v. Delta Airlines, Inc.* (7th Cir. 2001) 260 F.3d 803, 810-811.)

This Court has similarly observed that "harassment ... that in isolation may seem trivial can assume greater significance and constitute a greater injury when viewed as one of a series of [harassing conduct]." (*Richards v. CH2M Hill* (2001) 26 Cal.4th 798, 822.)

Thus, the Opinion conflicts with other published authority in two respects. First, it invites trial courts to engage in the long-condemned

practice of disaggregating harassing conduct into discrete and isolated pieces. Second, it conflicts with *Dee*, *Birschstein* and other published authority.[7]

Dee forcefully illustrates this conflict. There, the appellate court held that a single ethnic slur ["Well, is it your Filipino understanding versus mine?"] when "combined with other evidence established a triable issue of fact on the issue of a hostile work environment." (*Dee*, 106 Cal.App.4th at 35.) The Court reasoned that "[a] reasonable trier of fact could infer that the racial slur was not an isolated event because it explained Strickland's motivation for creating an abusive working environment for Dee." (*Id.* at 36-37.)

Birschtein is similarly instructive. There, after initially making overt sexual advances, the defendant stopped doing so. (*Birschstein*, 92 Cal.App.4th at 997-998.) The harasser then began to regularly stare at the plaintiff. (*Id.* at 998-999.) The court held that the subsequent staring, itself, was actionable harassment and that the prior campaign of overtly sexual conduct allowed the inference that the staring was "because of" gender. (*Id.* at 1001-1002.)

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[7] The Opinion's view of *Reno* contributes to this problem. By "sift[ing] out" the so-called "*Reno*-protected conduct" as non-actionable, the Opinion ignores the "totality of circumstances" test. (Opinion, 28.)

Dee and *Birschstein* demonstrate the serious conflict which the Opinion has now injected into California law. In *Dee*, a single racially-derogatory epithet allowed the inference that the general pattern of seemingly-neutral hostility was "because of" race. (*Dee*, 106 Cal.App.4th at 36-37.) In *Birschstein*, the earlier overtly-sexual conduct allowed the inference that the later ambiguous conduct (staring) was "because of" sex. (*Birschstein*, 92 Cal.App.4th at 1001-1002.)

By contrast, the Opinion declares that Schoener's many directly-derogatory comments about Roby's condition or accommodation needs, plus her publicly-displayed "*tone of derision*" at Roby's unanticipated absences, plus her public expressions of "disgust" at Roby's need for breaks, were still insufficient to establish that Schoener's pattern of "general scorn and contempt" (*e.g.*, ignoring, shunning, excluding, etc.) was "because of" Roby's disability.

The need to resolve this conflict—alone—cries out for review. But there is an independent reason as well. The Opinion's treatment of the "because of" element *also* conflicts with *Lyle*, where this Court held that "it is the disparate treatment of an employee on the basis of [a protected trait] ... that is the essence of a ... harassment claim." (*Lyle*, 38 Cal.4th at 280.)

That is precisely our case! In affirming punitive damages, the Opinion found there was substantial evidence that Schoener discriminated against Roby "because of" her disability, including showing "great leniency to other employees by counting their multiple absences due to medical reasons as a single 'occasion,'" while "Roby was treated far more harshly." The court also found that "Schoener engaged in fraudulent behavior by *falsely* 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." The Opinion concluded that the evidence supported that this "was a deliberate plan to rid [McKesson] of the inconvenience of accommodating a mentally disabled employee." (Opinion, 34-36) (italics added.)

Under the standard recognized in *Lyle*, our court's own words show that its harassment analysis is illogical. The court admitted there was substantial evidence that Schoener treated Roby *more harshly* than others *without* a mental disability and "participated in a *deliberate plan to rid* [McKesson] of the *inconvenience* of accommodating a *mentally disabled employee.*" (Italics added.) These statements establish that Schoener "exposed [Roby] to disadvantageous terms or conditions of employment to which [those not belonging to the protected class were] not exposed."

(*Lyle*, 38 Cal.4th 279-280.) By ignoring this evidence in determining whether Schoener's harassment was "because of" Roby's disability—as opposed to merely non-discriminatory "rude, boorish, or obnoxious behavior" (Opinion, 28)—the Opinion conflicts with *Lyle*.

The bottom line is this: the Opinion confirms that "Schoener treated Roby with general scorn and contempt," "failed to show any sympathy for her disability," "shunned her[8]," "ignored her at staff meetings," publicly excluded her from rewards or praise given to others, insulted her "job responsibilities," publicly called her condition "disgusting" and embarrassed her by telling her to take more baths and showers. (Opinion, 7, 26, 28, 30-31.) As to those acts of harassment that are quantifiable, the record supports a finding of almost 300 separate acts. As to other acts that were not explicitly quantified, the record shows that they were "constant," "always," "every time" or that Schoener "never" did the positive things for Roby that she did for *all of her other subordinates*.

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[8] The Opinion implies that shunning and ostracism are not enough to support a disability harassment claim. (Opinion, 28-29.) But a leading California treatise confirms that a "hostile environment [disability] harassment claim" can consist of evidence of "*insults*, profanity, *ostracism* by coworkers." (*Chin, et al. Cal. Practice Guide: Employment Litigation* (The Rutter Group 2006), ¶9:1058, p. 9-88.)

The record also shows that Schoener made numerous derogatory remarks about Roby's skin condition, arm digging, sweating or need for accommodations.[9] Yet in the first published California decision substantively addressing disability harassment, the court found this plethora of evidence insufficient.

Review is needed to address this conflict of published authority.

II. REVIEW IS NEEDED TO SETTLE IMPORTANT QUESTIONS ABOUT PUNITIVE DAMAGE REVIEW

A. When a Reviewing Court Reverses One of Multiple Substantive Claims Supporting Punitive Damages, May It Speculate Upon the Effect the Reversed Claim Had on the Total Award or Should It Be Required to Give Plaintiff the Option of a Conditional New Trial?

This case presents important procedural questions regarding appellate review of punitive damage awards. Here, the appellate court did not truly determine the constitutional maximum that could *ever* be allowed on these facts. Instead, its reversal of the harassment verdict caused it to speculate about how the jury arrived at the punitive damages amount and

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[9] This alone should support the verdict. A single seriously derogatory epithet uttered by a supervisor among subordinates can sustain a hostile environment claim. (*See e.g., Rodgers v. Western Southern Life Ins.* (7th Cir. 1993) 12 F.3d 668, 675.) To someone with Roby's disability—a disability that caused her skin to become a bloody mass of scabs—calling her skin "disgusting" is tantamount to calling an African-American the "n-word."

then to arbitrarily reduce that amount to compensate for that *presumed* figure.

In discussing reprehensibility, the Opinion states that "the $15 million figure chosen by the jury to punish McKesson was no doubt *strongly influenced* by its $1.1 million award for harassment." (Opinion, 39) (italics added.) Because the court *speculated* the jury's harassment verdict tainted its assessment of punitive damages, it then replaced traditional (five-factor) reprehensibility analysis with this sweeping conclusion: "[T]he reprehensibility factor favors a sharp reduction in the punitive damage award." (*Id.*) It then rejected a 4-to-1 ratio as unconstitutional, in part, because it assumed "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." (*Id.*, p. 42.)

This case thus raises important, and unsettled, procedural issues regarding appellate review of punitive damages:

- Can an appellate court reduce punitive damages without affording a conditional new trial right when the basis for the reduction is the court's speculation that the punitive damages were heavily influenced by a claim the court later reversed?

- Do the "general verdict rule" and Evidence Code section 1150(a) preclude a reviewing court from reducing punitive damages based on speculation that the jury punished for a claim the court reversed?

The Opinion acknowledges that it could have ordered a conditional remittitur instead of an absolute appellate reduction. (Opinion, p. 44; *see also Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 763-764.) But then it declined to do so, reasoning that *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 "strongly indicates 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." (Opinion, 44.)

Simon allowed an appellate reduction of punitive damages (without permitting a conditional new trial) where the plaintiff could never be expected to do any better at the re-trial. (*Simon*, 35 Cal.4th at 1188.) There, a new trial on punitive damages would be futile because, regardless of what occurred, nothing could increase the constitutionally-maximum allowable result. (*Id.*)

The Opinion's reliance on *Simon* demonstrates residual confusion concerning the appropriate circumstances for an appellate reduction versus

a conditional new trial with remittitur. *Simon* does not support—much less require—an appellate reduction instead of a conditional remittitur here. Unlike *Simon*, a re-trial here *can produce* a different, and constitutionally-sound, result. If another jury awards more than $2 million in punitive damages, the reviewing court can conduct a reprehensibility analysis that does not start from the limiting premise that a major reduction is necessarily required because of a reversed claim. This could certainly lead to a higher constitutionally-acceptable maximum than the $2 million permitted (a mere 1.4-to-1 ratio where a vulnerable plaintiff was turned from a productive employee into an agoraphobic shell of her former self, forced to live off the charity of others).

This case raises yet another important (and unsettled) question: Do the "general verdict rule" and the prohibition against speculating about the jury's reasoning apply to constitutional punitive damages review?

Although the jury decided liability and compensatory damages by special verdict (AA937-947), it decided the amount of punitive damages—*without objection by McKesson*—by general verdict (AA949-950). This is key because the Opinion reduces the punitive damages amount, in part, because it assumes that the amount assessed "to punish

McKesson was no doubt strongly influenced by its $1.1 million award for harassment," which it reversed. (Opinion, 39&42.)

Evidence Code section 1150(a) prohibits second-guessing the "mental processes by which [the verdict] was obtained." And, the "general verdict rule" "provides that where several counts are tried, a general verdict will be sustained *if any one* count is supported by substantial evidence and is unaffected by error, despite possible insufficiency of evidence as to the remaining count." (*Tavaglione v. Billings* (1993) 4 Cal. 4th 1150, 1157) (italics added.)

The Opinion found substantial evidence supporting punitive damages on the affirmed claims. (Opinion, 32-36.) But it disregarded the "general verdict rule" and, instead, speculated about the jury's reasoning by using the reversal of one claim to drastically reduce the punitive damages. (Opinion, 39&42.) Proper application of the "general verdict rule" required only looking at the affirmed claims and applying the recognized reprehensibility factors to determine the constitutional maximum they would allow. (*Tavaglione*, 4 Cal.4th at 1157.)

Review is needed to settle these important questions so that lower courts have clear guidance as they struggle to implement recent decisions regarding constitutional review of punitive damages.

B. This Case Presents a Golden Opportunity to Settle Recurring Issues that Confuse Constitutional Punitive Damage Review—Especially in the Context of Civil Rights Violations

This case presents issues regarding punitive damage review like those pending in *Bullock v. Philip Morris*,(S143850) (briefing deferred pending *Philip Morris USA v. Williams* (Or. 2005) 127 P.3d 1165, *cert. granted* 126 S.Ct. 2329). At a minimum, a grant and hold order should issue. But there are independently important questions warranting review.

First, since *State Farm Mutual Automobile Ins. v. Campbell* (2003) 538 U.S. 408, this Court has not considered constitutional punitive damage review in the context of civil rights violations. The FEHA makes freedom from discrimination a fundamental public policy and civil right. (*Gov. Code* §§12920; 12920.5.) Nonetheless, the civil rights and public policy nature of these cases is not finding its way into lower courts' assessment of the reprehensibility factor.

For example, in *Gober v. Ralphs Grocery Co.* (2006) 137 Cal.App.4th 204, the court found that the employer's conduct was only "modestly reprehensible" despite that managing agents had (and ignored) advance knowledge of the harasser's pattern of abuse towards females. (*Id.* at 216-219, 222.) By contrast, in non-public policy based commercial or consumer disputes, appellate courts frequently deem conduct highly

reprehensible. (*See e.g. Bardis v. Oates* (3rd Dist. 2004) 119 Cal.App.4th 1, 22 [business fraud against sophisticated investors highly reprehensible]; *Johnson v. Ford Motor Co.* (5th Dist. 2005) 135 Cal.App.4th 137, 150 [lemon law violations highly reprehensible]; *Century Sur. Co. v. Polisso* (3rd Dist. 2006) 139 Cal.App.4th 922, 965 [insurer's failure to defend moderately high in reprehensibility].)

Here, despite evidence supporting *all five* reprehensibility sub-factors (Petition for Rehearing, 49-59), the court held that these sub-factors "basically offset each other." It then used the reversal of the harassment claim to produce "a sharp reduction in the punitive damage award." (Opinion, 39.) How can that be when the appellate court itself found that McKesson engaged in "a deliberate plan to rid itself of the inconvenience of accommodating a mentally disabled employee"? (Opinion, 36.)

These findings of *intentional civil rights violations* to a vulnerable target cannot be squared with the end result: a diminutive 1.4:1 ratio. This case illustrates that without strong—indeed emphatic—guidance from this Court, civil rights cases will continue *not* to receive the necessary high placement on the reprehensibility scale.[10]

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[10] To illustrate how serious this problem is, consider the Opinion's use of the statutory fee award to justify reducing punitive damages. The Opinion rejects Roby's argument that a sizable punitive damage award is

Review is also needed to resolve continued confusion regarding *Campbell*'s suggestion that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." (*Campbell*, 538 U.S. at 425.) Some courts have (properly we think) rejected knee-jerk adherence to this mere suggestion. (*See e.g., Hayes Sight & Sound, Inc. v. ONEOK, Inc.* (Kan. 2006) 136 P.3d 428, 448-449 [rejecting argument that "[b]ecause 'compensatory damages are substantial,' *Campbell* dictates that a 1-to-1 punitive-to-compensatory damages ratio represents the 'outermost limit of the due process guarantee'" as "distort[ing] what the Supreme Court actually said in *Campbell.*"]; *Campbell v. State Farm Mutual Auto. Ins. Co.* (Ut. 2005) 98 P.3d 409, 418 [on remand: applying 9:1 ratio because "[t]he 1-to-1 ratio between compensatory and punitive damages is most applicable

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needed to deter McKesson (16th on the Fortune 500 with a $5.165 billion net worth) because the court did "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 attorneys fees that the trial court has awarded Roby in this case,* amounts to a penalty of the wrist-slapping variety." (Opinion, 44.) "The purpose of a fee award is not to punish the defendant, but to ensure that the plaintiff will be fully compensated and will not have to bear the expense of litigation." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1176.) And, the *fee award belongs to the attorney* (not the client). (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 590.) Using a fee award to reduce punitive damages places the attorney in an ethical bind of competing interests. What is the attorney to do—protect her fee interest or the client's punitive damages recovery?

where a sizeable compensatory damages award for economic injury is coupled with conduct of unremarkable reprehensibility."].)

The Opinion here misreads *Simon* as endorsing this 1:1 ratio straight-jacket. (Opinion, 40.) In reality, *Simon* approved a ratio "exceeding the largest-single-digit ratio amount." (*Simon*, 35 Cal.4th at 1189.) This Court should resolve for lower courts the weight that they should place on this language from *Campbell.*

But even if this Court did interpret *Campbell* to somehow hold a 1:1 ratio is the maximum when compensatory damages are "substantial," review is still needed to resolve a key question. What does "substantial" mean in this context? No California published decision has addressed this question. Here the Opinion *presumes* that Roby's actual wage replacement economic award ($605,000) and a mere $800,000 in non-economic

damages was "substantial," calling it "generous by any standard."[11] (Opinion, 40.)

Roby was 54 years-old when McKesson illegally terminated her. She had a life expectancy of another 28 years. (RT, 618&1134.) Is an award that merely restores her *actual economic loss* and allows $33,333.33 per year (significantly less than her modest salary) "substantial" compensation when intentional discrimination causes total destruction (financial, emotional and even physical) of a human being who was a "stellar employee" for a quarter century?

This Court is no doubt aware of the lower courts' ongoing struggles to grapple with *Campbell*. This case painfully illustrates the unfairness that can result from the lack of complete and thorough guidance on these issues. It also illustrates that lower courts feel free to conduct punitive damages review without considering the fundamental public policies that drive our

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[11] The Opinion's discussion of the non-economic award underscores that further guidance from this Court is needed. It states 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." (Opinion, 40.) But this same Third District held that courts cannot presume "there is a significant overlap between the compensatory and the punitive damages" unless the party challenging the judgment proved there was overlap. (*Century Surety*, 139 Cal.App.4th at 966.) Here, McKesson did not prove any overlap, not even making an excessiveness challenge.

anti-discrimination laws. The jury's verdict here reflected a ratio of approximately 4.27:1—well within the "single-digit presumption." (*Simon*, 35 Cal.4th at 1183.) Chopping it to a 1.4:1 ratio sends a disturbing message about the lack-of-importance some attribute to our civil rights laws.

III. THIS CASE PRESENTS CERTAIN-TO-RECUR ISSUES ABOUT DUPLICATIVE DAMAGES UNDER SEPARATE STATUTORY DISCRIMINATION CLAIMS.

In *Tavaglione,* this Court held that "where 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 the amount is expressed by the jury in a single verdict or multiple verdicts referring to different claims or legal theories." (*Tavaglione*, 4 Cal.4th at 1159.)

Ignoring *Tavaglione*'s instruction that duplicative damages challenges are reviewed under the substantial evidence rule, the Opinion does not try to determine if Roby's claims are supported by separate evidence. Instead, it holds—*as a pure matter of law*—that Roby's reasonable accommodation, disparate treatment and wrongful termination claims were "three termination-related torts" that were all "based upon a single legal wrong," and thus cannot support separate damage awards.

(Opinion, 11-13&15.) Thus, the court 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.

This holding obliterates the express distinctions the FEHA draws between separate unlawful employment practices, such as failure to accommodate versus disparate treatment discrimination. Parenthetically, it also turns the substantial evidence rule on its head.

This issue is likely to recur given that the Judicial Council approved verdict forms require separate damage awards for the different claims. (*California Approved Jury Instructions, VF 2500, 2504, 2507.*) This Court should grant review to settle these important questions concerning review of a claim of duplicative damages following a jury's verdict finding that an employer committed multiple, separate violations of FEHA's protections.

CONCLUSION

Petitioner urges this Court to grant review to settle these important issues of law and resolve the conflict in published decision that the Opinion creates.

DATED: February 5, 2007

Respectfully submitted,

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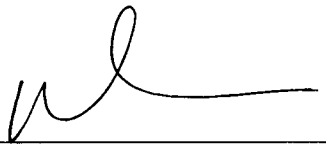
CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.520

Pursuant to California Rules of Court, Rule 8.520(c)(1), and in reliance on the word count feature of the Word Perfect software used to prepare this document, I certify that this Petition for Review contains 8,396 words, excluding those items identified in Rule 8.520(c)(3).

DATED: February 5, 2007



David M. deRubertis, Esq.

PROOF OF SERVICE

Case Name: Roby v. McKesson, et al.
Court of Appeal Case Number: C047617 (Consol.: C048799)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed by the office of a member of the court in this action at whose direction the within service was made. My business address is 21800 Oxnard Street Suite 1180, Woodland Hills, California 91367. I am over the age of 18 and not a party to the within action. On the below executed date, I served upon the interested parties in this action the following described document(s): **PETITION FOR REVIEW**

/___/ MAIL: by placing a true copy thereof enclosed in a sealed envelope with First Class prepaid postage thereon in the United States mail at Woodland Hills, California address(es) as set forth below, pursuant to Code of Civil Procedure Section 1013a(1):

/XXX/ OVERNIGHT DELIVERY: by causing it to be mailed by a method of overnight delivery with instructions for delivery the next business day with delivery fees paid or provided for in the United States mail at Woodland Hills, California address(es) as set forth below, pursuant to Code of Civil Procedure Section 1013(c):

/____/ PERSONAL SERVICE: by delivering a true copy thereof by hand to the person or office, indicated, at the address(es) set forth below:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 5, 2007 at Woodland Hills, California.

Katie Schmidt

Roby v. McKesson, et al.
Third District Court of Appeal Case Number: C047617 (Consol.: C048799)
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