No. S149752

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)

RESPONDENT'S OPENING BRIEF ON THE MERITS

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INTRODUCTION

This case forcefully illustrates why our Legislature emphatically declared that our anti-discrimination laws must be construed to provide "effective remedies that will both prevent and deter unlawful employment practices...." (*Government Code* §12920.5). Here, McKesson's systematic violation of Charlene Roby's civil rights reduced a formerly exceptional 25 year employee into a hollow shell of the person she once was—transformed into a suicidal, agoraphobic woman whose life literally became the four walls of her bedroom.

The jury found that Roby's supervisor harassed her because of her disability, and that McKesson authorized and ratified that supervisor's conduct, failed to accommodate Roby's known disability and, finally, wrongfully terminated her. Besides reasonable compensatory damages, the jury also imposed proportionate punitive damages, which represented less than .3% of McKesson's $5.165 billion net worth. After voluminous post-trial papers were filed, an experienced trial judge carefully affirmed each aspect of the jury's verdict.

But whereas the trial court that did have the right to re-weigh the evidence fully concurred with the jury's assessment, the appellate court that did *not* have that right chose, nonetheless, to exercise it. In so doing, it

improperly substituted its view of the facts or various issues, *e.g.*, harassment, duplicative damages, etc.

In addition, it also re-wrote key aspects of California substantive law. For instance, misapplying certain descriptive language found in *Reno v. Baird* (1998) 18 Cal.4th 640, the appellate court fashioned a sweeping, and novel, immunity. Not only did this pervert *Reno*'s rationale, but it created a holding that *Reno* expressly stated it did not decide. The court's interpretation of *Reno* suffers other egregious mistakes and must be repudiated.

If allowed to stand, this novel interpretation of *Reno* would repeal a major portion of California's existing protections against harassment by insulating employers (not merely individuals) from liability as long as one could posit any *theoretical* connection—no matter how strained—between the harassment and so-called "managerial duties." This result is contrary to: (1) the Legislature's decision to provide especially vigorous protections against supervisor harassment; (2) numerous critical and established principles of harassment analysis; and, (3) this Court's post-*Reno* harassment jurisprudence.

But, even if this Court fully disagrees with our interpretation of *Reno*, the jury's harassment judgment must still be affirmed. Here, the jury

was given McKesson's requested *Reno* instruction that harassment is conduct not necessary for performance of a supervisory job or the employer's business. Therefore, even if the appellate court's interpretation of *Reno* was entirely correct, no basis would exist to overturn the jury's *factual determination* that the objectionable conduct was *not* necessary to supervisory duties versus harassment committed for gratuitous reasons (such as bigotry). Likewise, the jury's finding of severe or pervasive harassment "because of" disability is well-supported by the evidentiary record, which included multiple witnesses testifying that the harassment was "daily," "constant," etc.

Once the harassment verdict is reinstated, McKesson's duplicative compensatory damages argument must be rejected for the reasons we fully detail below. These include the fact that the appellate court violated the substantial evidence rule in contradiction to this Court's holding in *Tavaglione v. Billings* (1993) 4 Cal.4th 1150.

Another fundamental error exists. The appellate court's drastic reduction of the punitive damage verdict (from $15,000,000 to a mere $2,000,000 [leaving a ratio between compensatory and punitive damages of slightly more than 1:1]), defies this Court's recent mandate that an appellate court's "constitutional mission is only to find a level higher than which an

award *may not* go; it is not to find the 'right' level in the court's own view." (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1188.) Here, the appellate court forgot that it "does not sit as a replacement for the jury but only as a check on arbitrary awards." (*Id.)*

Substituting its view of the "right" level, the appellate court overlooked the evidence establishing each of the five reprehensibility subfactors. When the reprehensibility subfactors are properly analyzed, the high reprehensibility fully supports a mid-range, single-digit ratio.

Finally, assuming *arguendo* that this Court was not to reinstate the harassment claim and was not to overturn the appellate court's drastic resultant reduction in the punitive damage amount, the present judgment still could not stand as is. This Court's *Simon* decision requires that—at a minimum—Roby is entitled to a conditional new trial, not an improper adjusted punitive damages amount.

ISSUES

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?

FACTUAL SUMMARY

A. Charlene Roby (a stellar, 25-year McKesson employee) is struck with a severe panic disorder.

Charlene Roby began working for McKesson in 1975. (AA1982;RT826-827.) She received consistently excellent performance reviews and was "[h]ighly respected." (AA2002-2018;RT401;615-616.) Roby was "an excellent employee," "very energetic, very conscientious," and a "wonderful worker." (RT401;468-469;491-494;723.)

In 1997, Roby was rushed to the hospital with severe chest pressure and difficulty breathing. Psychiatrist Dr. Schnitzler later diagnosed her with panic disorder and panic attacks. (RT524-525;1045-1047.)

Panic disorder is a condition in which the patient initially suffers panic attacks, which are accompanied by constant worrying about having future attacks. This process results in physiologic symptoms (increased heart palpitations, shortness of breath, dizziness, etc.). (RT1036-1037.) Panic attacks are a physiologic response, beyond the victim's ability to prevent. However, the more the patient worries about them, the greater their attacks will be—in frequency and severity. (RT1041-1045.)

B. Roby's superiors are fully aware of her panic disorder and need for reasonable accommodations.

Roby's panic disorder was no secret. It produced symptoms *visible* to the untrained eye, such as sweats, trembling and shaking. (RT402;413-414;469-470;473-474;476;484;491;494-495;1014-1015;1326.) Another striking symptom—self-mutilation—led to Roby picking, scratching and digging at her arms until they became a bloody mass of scabs. (RT413-414;469-470;491;494-495;526;1014-1015.) Within seconds of the onset of an attack, her "hair would be dripping wet, just like [she] walked out of the shower." (RT529;1037-1039.) Another symptom—resulting from her necessary medication—was an embarrassing body odor. (RT526.)

Roby's direct supervisor (Karen Schoener) knew that Roby suffered from panic disorder, which required accommodations. (RT413-414;528-529;531-538;542;544-545;549-550;574;590-592;702-704;Opinion33-34.) So did Alan Grover (Schoener's supervisor). (RT402-414;475-476;494-497;525-528;535;539;574-576;581-582;595-596;Opinion33-34.)

But Roby did not let her disorder compromise her excellent work. (RT419.) As a coworker described: "Charlene did not want her disability to get the best of her. She had a lot of pride in her work." (RT419.) In short, despite her condition, Roby continued to perform her duties with enthusiasm and success. (RT536.)

C. Meanwhile, McKesson implements a new attendance policy, which displays complete indifference (or hostility) to the rights of disabled workers or those statutorily entitled to medical leave.

1. The policy violates the rights of the disabled.

In 1998, McKesson implemented a new nationwide attendance policy. (RT1006;1199-1201.) Previously, attendance rules were applied unfairly, treating similarly-situated employees differently. (RT1552-1555;1557-1559.) Thus, one *express* purpose of the new policy was "[t]o provide uniform and consistent attendance guidelines." (AA1997-1998;RT1557-1559.)

Progressive levels of discipline, based on the number of "occasions" accrued in a given time period, were established.[1] (AA2291;2379;RT 791-792;1202-1204;1309.) An "occasion" meant any absence from work *without* twenty-four hours notice. (RT433-434;801.)

Unfortunately, McKesson's policy encouraged, indeed required, management to violate the rights of disabled employees. Although such employees were entitled to reasonable accommodations, the policy did *not* recognize that right, *e.g,* by excusing disability-related "occasions." If an employee missed work without twenty-four hours notice *because of a*

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[1] Three "occasions" in a six month period resulted in disciplinary action. (RT433-434;801.)

disability, the employee received an "occasion" unless coverage was granted under the Family & Medical Leave Act (FMLA) pursuant to the artificial barriers McKesson created. (RT435-436;835-836.) McKesson's policy actually treated employees better if they missed work for "vacation" or "personal days" than if they had disability-related "sick days." In precisely the same circumstances, the employee who used a "sick day" received an "occasion" when the employee who used a "vacation" or "personal day" did not. (RT1581-1583.)

Likewise, McKesson's treatment of employees entitled to statutory medical leave was similar in its disregard of their legal rights. The attendance policy manufactured artificial barriers to employees needing leave, shifting the burden of complying with the leave laws away from the employer and onto the unsophisticated rank-and-file employee. For example, to receive FMLA leave, McKesson employees needed to specifically "request FMLA paperwork" or "ask for FMLA leave." If an employee did not use the "magic words" of "I want FMLA paperwork," McKesson management would *not* make any inquiry concerning whether the employee was entitled to FMLA coverage. (RT771-772;788-789;1356-1357;1437-1439.) This was true even if the employee who missed work was known to have a chronic medical condition. (RT1349-1350.) Even

worse, these were secret "magic words," not stated or published anywhere for the employees. (AA2269;RT788-789.)

None of these illegal policies resulted from mere accident or negligence. Even at trial—four years after Roby's termination—the policy still refused to provide any accommodation for the needs of disabled employees who suffered unplanned disability-related absences. (RT1009-1010;1297-1298.) Likewise, McKesson's illegal policies concerning FMLA leave remained in effect at trial—long after McKesson had notice of their illegality. (RT771;1438-1439.)

2. McKesson ignores its duty to train its management about the rights of workers with disabilities and the medical leave laws.

McKesson never explained rights under FMLA or the California Family Rights Act (CFRA) to its employees. (RT439;482-483;502-503;1016.) McKesson's employee handbook did not even mention the CFRA or disability accommodation rights. The same handbook barely mentioned FMLA, and did *not* explain how or when employees could use such leave. (AA2269;RT439-440;483;503;911-912;982;1016.)

McKesson compounded these failures by not meaningfully training managers who were charged with ensuring compliance with these laws and

given discretion to terminate employees under the attendance policy. Alan Grover—the head management person in charge of 170 employees whose duties included evaluating if employees should be terminated under the attendance policy—knew *literally nothing* about: (1) what types of conditions might qualify as disabilities under the FEHA; (2) whether excusing absences caused by a disability was a form of accommodation; or (3) any law in California that provided rights to disabled workers. Even more telling, at trial (four years after Roby's unlawful termination), Grover still had no intention of learning anything about any of these laws—laws with which he was charged with complying. (RT755-756;758;767-768.)

McKesson's training of Grover regarding FMLA or CFRA rights was equally suspect. McKesson trained Grover that an employee must *specifically ask for* FMLA or CFRA leave for McKesson to designate time off as covered by those laws. (RT753-754;788-789.) HR trained Grover to deny leave unless the employee used "the magic words that they, specifically, requested FMLA leave....." (RT788-789.) McKesson also trained Grover that McKesson had no responsibility to inform its employees about FMLA rights. (RT773.)

Other managers were likewise not trained—or trained of illegal practices—concerning rights of disabled workers or those entitled to

statutory medical leave, *e.g.*, HR employee Deborah Steele (RT1340;1347-1351); Schoener (RT825-826;834-836;840;1297-1297).

D. McKesson systematically violates Roby's accommodation rights by treating unscheduled absences caused by her disability more harshly than absences of employees without any disability.

Roby had good attendance throughout her years of service at McKesson. (RT829.) But, beginning in 1999, her panic disorder caused her to miss occasional days or sometimes arrive late.

In early-1999, Roby missed work on January 19th, February 8th and March 31st because of her panic disorder. Roby provided absence forms for each of these dates listing the reason as "sick self."[2] Roby also *told* her supervisors that these absences were because of her panic disorder. (AA1921;1923;1925;RT554-558.)

Nonetheless, on April 2, 1999, McKesson put Roby on an oral warning for these absences. Roby explained her condition and attempts to treat it to her then-supervisor (Dianne Saamer), but to no avail. (AA1927;RT571-572.)

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[2] By signing these absence forms and requesting sick pay, Roby specifically authorized McKesson to verify the medical reason for her absence with her health care provider. (RT573.)

Thereafter, Roby missed three additional days of work (April 12th, May 10th, May 27th) all due to her panic disorder. She listed "sick self" as the reason on her absence forms and *advised management* of the reason for these absences. (AA1929;1935;1937;RT572-574;579-581.) Moreover, on May 28th, Roby provided Grover, Schoener and HR a medical certification from Dr. Schnitzler specifically excusing the May 27th absence. (AA1939; RT 581-582.) Roby also missed June 8th because she suffered a massive panic attack upon arrival at the McKesson parking lot. (AA1941;RT582-583;702-704.)

Schoener gave Roby a written warning for the days missed between April 12th and June 8th. (AA1943;RT583.) Roby protested that this write-up was false and discriminatory. Schoener discouraged Roby from putting her complaints on the form, telling her: "it's really not going to do any good...." (RT583-585.) (Roby had no idea how truly prophetic those words were!)

On July 27 and 28, 1999, Roby missed work because of her panic disorder. Roby gave Schoener an absence form explaining that her absence was caused by the illness for which she was under Dr. Schnitzler's care. She provided Dr. Schnitzler's telephone number so management could verify her illness. (AA1945;RT585-586;622.)

Most importantly, Roby supplied Grover, Schoener and the HR department with a medical certification from Dr. Schnitzler excusing these absences. (AA1933;1947;RT547-548;578-579;585-588.) Roby then missed October 18th. (AA1949;RT589-590.)

On October 22nd, Schoener placed Roby on final written warning due to the July 27-28th and October 18th absences. Roby again protested that *all* of these absences were related to her panic disorder (or related migraines) and that she was being discriminated against. (AA1951;RT590-592.) Schoener's curt response was "sign the form and leave my office;" writing any protest was "a waste of time." (RT591;666.) Schoener did *not* ask Roby for any other medical documentation about the absences, did not mention possible FMLA coverage and treated disability-related absences as if Roby had just gone fishing.[3] (RT592;684-685.)

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[3] Because Roby did not know what FMLA was, and no one at McKesson had explained it to her, she did not use McKesson's "magic words" for any of these absences. (RT599;684-685.)

E. Roby is harassed unmercifully because of her disability, repeatedly complains to management, yet is ignored.

1. Schoener's cruel harassment is constant, thereby compounding Roby's symptoms.

Schoener's supervision of Roby was marked by rampant harassment and abuse. Much of the abuse was *directly and unambiguously targeted* at Roby's disability or its manifestations.

Schoener frequently made derisive insults (often publicly) about Roby's condition and its physical manifestations. For example, knowing that Roby's sweating, arm digging, "terrible sores" and body odor were manifestations of Roby's panic disorder and resulting medication, Schoener nonetheless "told Roby her arm digging and heavy sweating was 'disgusting'," made other "negative comments about Roby's body odor," and humiliatingly told Roby to take more baths and showers. (RT414-415;417-418;420-422;424;426;470-472;474;527-528;530-536;576-577;595-596;600-601;1015;Opinion7;26&30.) When Roby told her that the body odor was a medication side-effect, beyond Roby's control, Schoener's response was to repeat the insulting non-sequitor: "You need to take more showers." (RT533-534.)

Berating Roby because of her medication-caused body odor was pouring salt into an open wound.[4] Roby was already understandably ashamed and humiliated about this condition. She was so self-conscious about it that she often asked her coworkers if they could smell her to see if she needed more perfume. (RT470-471;526-527.)

Schoener also displayed visible disgust at Roby's need for accommodation breaks when Roby suffered panic attacks. This helped complete a vicious cycle. As Schoener's harassment intensified, Roby needed breaks (due to panic attacks) "*at least* once a day." (RT576-577.) But to take breaks, Roby had to "walk past [Schoener's] desk" and when she did so, Schoener *publicly* showed that she was "upset with the breaks" and displayed "general disgust." She treated Roby as if she was malingering, ignoring the fact that Roby's hair was drenched with sweat. (RT418;536.)

Similarly, when Roby called in absences, Schoener publicly announced to other employees with a derisive tone: "Charlene's absent again." (RT417-418.) Schoener treated no other absent employees this way. (RT475.)

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[4] One day, soaps, deodorant and shampoos were left (anonymously) on Roby's desk. Roby was "completely crushed." (RT428-429.)

Schoener's harassment also included humiliating forms of public ostracism. *Every* morning Schoener either publicly ignored Roby's smile and "hellos" or (worse) responded with 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 a worthless outcast. (RT421;473;493;531-532.)

Schoener 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 workplace recognition. (RT506.) Likewise, *whenever* there were office parties, "it was *always* Charlene" who was ordered to cover the phones and excluded from participation. (RT506.)

Schoener confirmed Roby's "outcast" message in another way. *Every* week (approximately 52 times), Schoener placed pastries on the desks of all her subordinates—except Roby. (RT419-420;455;471-472.) Likewise, upon return from her many trips, Schoener publicly distributed gifts "to all her coworkers" but "always" skipped Roby. (RT419-420;471-472.) Additionally, Schoener gave all her subordinates—except Roby—Christmas gifts. (RT420).

Often, the ostracism message came in a way that also directly undermined Roby's ability to do her job. Schoener frequently publicly turned her back on Roby when Roby tried to ask her questions. (RT473;483-484;530-531.) As one co-worker observed, Schoener's response to questions from Roby was abrupt and rude, forcefully communicating that Schoener just wanted Roby "to go away." (RT483-484.) This public shunning was a "constant thing." (RT419-420;455;471-472.)

At monthly staff meetings, Schoener praised *every single employee* for what they did that month—*except Roby*. (RT420;531;1272.) What made this all the more remarkable was that Roby was an "excellent" employee according to Schoener's boss (Grover). Even Schoener, herself, had to admit during trial that Roby was a desirable employee. (RT723;817-818;1272.) Nonetheless, during these meetings, Schoener often passed over Roby, not allowing her to speak. On those few occasions when Schoener did let Roby speak, Schoener made it "quite apparent [to others in the room] that what [Roby] was saying really doesn't matter." (RT517;506-507.)

Schoener chastised and berated Roby for allegedly mis-handling business matters even when others observed how well Roby had handled

the situation in question. In short, she leveled *false* criticism of Roby's performance. (RT420-421;602-603.)

McKesson's policy required *private* correction of subordinates' conduct. (RT472-473.) Yet, Schoener was "loud and boisterous" in publicly reprimanding Roby in front of her coworkers. (RT420-421;600-601;Opinion7&26.)

Schoener's constant efforts to undermine Roby were so extreme that she even falsely demeaned Roby's job positions at McKesson. Schoener publicly called Roby's job a "no-brainer," though she was later forced to admit that Roby's job actually took "years to know what she's doing." (RT421-422;474-475;493;530;1274-1275.)

Roby pleaded with upper management to get Schoener to stop the abuse or "at least take [her] behind closed doors" to at least eliminate the public embarrassment. But nothing stopped Schoener's harassment. (RT595-596.)

Schoener found other ways to single-out, burden and/or demean Roby. (*See e.g.*, RT426-428.)

2. Roby's co-workers are appalled by Schoener's harassment of Roby.

Three of Roby's coworkers (Chew, Schenken and Steckman) testified that they, too, observed and were offended by Schoener's miserable treatment of Roby. These coworkers testified that they themselves were "appalled," "concerned," and "embarrassed" by Schoener's harassment of Roby. (RT416-424;471-475;484;493;496;506-507;517.)

These coworkers also confirmed the toll that they observed Schoener's abuse take on Roby. As Chew described it, Schoener's treatment left Roby "feeling like the dirt beneath somebody's shoes, humiliated, let down, disappointed." (RT423-424.) Steckman explained that after Roby had to interact with Schoener, Roby would suffer "severe head sweats and the tremors" and need a break to "compose herself." (RT484.) Schenken recounted how Schoener left Roby in tears. (RT496.) Steckman observed that with time Roby's arms became "a real bad scabby mess" as she self-mutilated. (RT470;484.)

3. Schoener's attacks aggravate Roby's panic disorder creating a terribly vicious cycle.

Schoener despised Roby because of her panic disorder and the symptoms it caused. Ironically, however, that very dislike intensified the disorder and its symptoms. During Schoener's supervision, the frequency (and intensity) of Roby's panic attacks increased as did the frequency of the breaks Roby needed due to these attacks. (RT496-497;529.) Roby's visible symptoms (shaking, head sweats, etc.) became *almost daily occurrences* at the workplace, getting progressively worse until Roby's termination in April 2000. (RT473-474.) Roby's self-mutilation got worse and worse. Not only did she dig at her arms, she began to dig at her own face and head. (RT536-537.)

As the Court of Appeal aptly observed, "Schoener's behavior aggravated [Roby's] symptoms and left her emotionally ravaged." (Opinion31).

4. Roby's repeated complaints to upper management fall on deaf ears. McKesson refuses to protect Roby.

One day in mid-December 1999, Schoener subjected Roby to "a day of complete and total harassment, ridicule, derogatory remarks." Roby began to panic, shake uncontrollably and feared she might die. (RT594-

595.) That day's harassment included Schoener's attacks on Roby for her sweating and arm digging, including Schoener calling it "disgusting." (RT596.) Roby met with Grover and Chilton (McKesson's HR Director) and reported that Schoener again was publicly harassing her. Roby highlighted that the public-nature of the harassment made it especially intolerable. (RT595-596;932.) Even before this, Roby had told Chilton that she could not deal both with her panic attacks *and* Schoener's "constant harassment; that [she] needed her help to get something done...." Chilton's response was simply to deny that Schoener would do such things. (RT597.) (Chilton could have easily confirmed Roby's version by asking the coworkers, but chose, instead, to remain willfully ignorant.)

Steele, another HR employee, also received complaints from Roby that Schoener treated her unfairly. Steele reported these complaints to HR manager Rafter, but heard nothing further about it from upper management. (RT865;1327;1334;1352.)

Subsequently, Roby emailed Steele about another instance of Schoener publicly reprimanding Roby in a "loud and boisterous" manner. Roby's email (titled "DESPERATION") explained that "desperate is how I feel" because of Schoener's abuse. Despite Roby's frantic pleas, Steele never replied. (AA1966;RT600-601.)

Two weeks later, Roby sent Grover an email titled "UNFAIR TREATMENT," complaining about false criticisms Schoener leveled against her. (AA1968;RT602-603.) Later that same day, Roby sent Grover an "urgent" email, stating: "I am very sorry to let you know that I am going to have to seek other employment due to the fact that I am being treated like a 2nd class citizen and cannot go any further." (AA1970;RT534-535.) Roby asked Grover for help because she felt "like [she] was a rug somebody was going to walk on...." (RT604) Grover neither responded to this urgent email nor even spoke with Roby about it. He was, admittedly, "not at all concerned that Ms. Roby felt like she was being treated like a second-class citizen" and he "did not care enough" to find out why she felt that way. (RT603-604;792-794.)

In April 2000, Roby brought these emails to Rafter and pleaded for his help. (RT923-924.) On April 4, 2000, Rafter, Grover and Roby met to discuss Roby's concerns. Rafter's notes reflect that Roby reported that Schoener made outbursts at Roby and picked on her. Grover confirmed that during this meeting, Roby complained about Schoener's treatment of her. (AA2357;RT928-929;1405;1568-1569.)

Nothing in the record suggests that anyone disciplined Schoener or told her to change any of these behaviors. Despite Roby's many pleas for

help to Grover and *all three HR employees*, Schoener's harassment continued unabated.

F. Schoener fraudulently tricks Roby, setting up an illegal termination trap.

Schoener plainly resented Roby as a "disgusting" inconvenience she wanted to be rid of. Schoener directly told Grover that Roby's absences were making things more difficult for Schoener. (RT416;418;531;773;813-815;1591;1593.) Moreover, Schoener called Roby's symptoms "disgusting" and resented even minor accommodations (occasional breaks) for Roby. (RT418;536.)

In October 1999, Schoener told Roby that Roby may be on her way out because of the attendance issues. Roby was devastated. (RT551.) But Schoener reassured Roby that *if she could make it* to January 18, 2000 without any new "occasions," she would have a "new start" or a clean slate under the policy. (RT551-552;599-600.)

When she did reach the "clean slate" date, Roby was "thrilled to death." (RT551-552.) Wrongly assuming that Schoener shared her joy at this accomplishment, Roby expressed her relief to Schoener that she "made it" and would not be fired. Schoener looked back at Roby, but said nothing. (RT 507-508; 551-552; 599-600.) Little did Roby suspect why.

Believing that she had a "clean slate" as of January 18, 2000, Roby missed February 25 (because of laryngitis) and April 11, 2000 (because of her panic disorder). (RT605-606.) On April 11th, Roby called Schoener and reported that she was sick. Carrying-out her plan to effectuate Roby's illegal termination, Schoener did *not* inform Roby that if she was absent that day, she would be terminated. (RT1277-1278.)

Instead, Schoener told Grover that Roby had reached the termination stage under the attendance policy. (RT1574.) As the Court of Appeal concluded: "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." (Opinion35.)

On April 13, 2000—just two weeks after Roby met face-to-face with Grover and Rafter and detailed her complaints about Schoener's unfair abuse and threatening of her—Roby was summoned to a very different meeting with Grover and Rafter. She had gone from accuser to the accused and was told she was being terminated because she "abused" the attendance program! Roby, understandably "startled," protested that:

- She had been given false information by Schoener (*i.e.*, "clean slate");

• The attendance policy was being applied more harshly to her than others; and,

• She had not suffered an "occasion" in the most recent rolling 90 day period and, thus, should no longer be on the last disciplinary step. (AA1974;2362;RT605-608;777-778;869;1574-1575.)

Roby was asked why she had not taken FMLA to cover these absences and she explained that she did not know what FMLA was, but she then asked to take it (retroactively). (RT613.) Roby was suspended pending a promised investigation into her complaints. (RT607-608.)

G. Rafter jovially brags and celebrates about terminating Roby.

After meeting with Grover and Rafter, Roby tried to retrieve her medical certifications from her desk drawer. But Rafter refused, physically pushing Roby out of the way, slamming her desk drawer shut (almost pinning Roby's leg inside) and instructing her that she could not remove anything from her desk. In fact, Roby was never allowed to retrieve either her doctors' notes or her personal items. Rafter promised to send them to her. Instead, however, they were thrown away—presumably by Schoener, who cleaned-out Roby's desk. (RT538-539;609;837-838.)

Roby was devastated. Her panic consumed her. She took Paxil to calm herself enough to safely drive home. Meanwhile, she sat in her car in McKesson's parking lot for what seemed like forever. Rafter approached her. (RT609-610.) After he observed Roby sitting lifelessly in her car, Rafter told Roby's co-worker (Schenken) he "had to" call the police on Roby because she looked so upset as she sat in her car. (RT509-510.) However, Schenken pointedly added "but yet he looked *very jovial* when he was telling this; *very pleased* that they had gotten rid of her. And he didn't look remorseful at all." Schenken added: "I'm looking in his face. You look *awfully happy* for somebody that was concerned." In fact, Rafter appeared to be "bragging" about it. (RT509-510.)

H. Chilton formally instructs Rafter and Grover to fully review the basis for Roby's contemplated termination. They purportedly do so.

The next day, Chilton instructed Rafter and Grover to "review all of the records very carefully" to make a final decision. (RT1210-1213.) Grover and Rafter then conducted a pre-termination investigation, the purported purpose of which was to ensure that the math on the number of "occasions" was correct and *also to confirm that none of the "occasions"*

was protected by the disability or leave laws.[5] (RT752-754;763-764;768-769;848.)

But there was substantial (indeed overwhelming) evidence that this initial investigation was a sham designed solely to justify the known-to-be illegal termination. Rafter, a law school graduate and licensed private investigator with extensive experience conducting disability discrimination investigations for the EEOC, was fully qualified to conduct a *thorough and complete* investigation if he so chose. (RT855;865;1430.) But he chose otherwise.

In performing their "investigation," Rafter and Grover purported to review Roby's personnel file in search of anything (such as a doctor's note) suggesting Roby was not at work because of a disability or FMLA issue. (AA2367;RT1418-1420;1578-1579;1589.) The file contained precisely what they were purportedly looking for. Yet, they ignored this exculpatory evidence, including that: (1) Roby was treated by Dr. Schnitzler for panic disorder since April 1999; (2) Dr. Schnitzler had written medical notes excusing Roby's May 28, 1999 and July 27-28, 1999 absences (AA1939;1947); (3) these latter absences were counted as "occasions"; (4)

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[5] Both Rafter and Grover knew that punishing Roby for an absence caused by a disability or protected by FMLA/CFRA would break the law. (RT752;848-849.)

Dr. Schnitzler continued treating Roby for panic disorder through at least December 1999; and (5) Roby's panic disorder was an ongoing or chronic condition. (AA2367;RT855-856;1440-1443;1445.)

Together, Grover and Rafter put on blinders to whitewash Roby's termination in the face of the very medical information they were allegedly "searching" for. Although purportedly searching to "find the reasons for Ms. Roby's absences," neither Rafter nor Grover even bothered to discuss the particular absence dates with her to ascertain why she had missed those days. Rafter (the experienced investigator) never asked Roby for her medical records to substantiate the reasons for her absences—even though he was not sure if the file he reviewed was complete and contained all of Roby's medical information. (RT872-880;888-889;895-897;910.)

The results would have been comical if the consequences were not so serious. For example, rather than *asking Roby* if her panic disorder was the cause of her absences, Rafter asked Schoener or Grover instead! In response, Schoener and Grover lied, claiming Roby's absences were related

to something other than her panic disorder.[6] (RT849-851;853-854.) Given this pretext to affirm the termination, Rafter looked no further.

But it gets far worse. Rafter did see in Roby's file Dr. Schnitzler's note excusing the July 27/28 absences. (AA1947;2367.) Rafter also saw in the file that Dr. Schnitzler had been Roby's psychiatrist who treated her "panic disorder" (a "chronic condition") for over a year. (RT855-856;1440-1446.) He thus realized that, at a minimum, this absence "may have been" related to her panic disorder. (RT883;891-892.) If so, he knew it should not (and legally could not) have been counted against her as an "occasion."[7] (RT848-849;883.)

Likewise, Grover admits that, during the investigation, he too saw Dr. Schnitzler's July 27th medical certification, which was an "indication" that "Ms. Roby had an absence due to this condition of panic disorder." (RT790;801-802;804.) In fact, to Grover's knowledge, the *only* condition Dr. Schnitzler treated Roby for was her panic disorder. (RT783-785.) Still,

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[6] Tellingly, Rafter knew that Roby had recently formally complained in writing that Schoener was treating her like a "second-class citizen." (RT900.) He also knew that Roby alleged Schoener tricked Roby into thinking she had a "new start." (AA2362.) Yet he still chose to ask Schoener, not Roby, about the reasons for *Roby's* absences. (RT849-851;853-854.)

[7] This reasoning applied equally to the May 27th absence, which was also excused by a medical note from Dr. Schnitzler that Rafter found in Roby's file. (AA1939;2367.)

neither Grover (nor anyone to his knowledge) checked with Roby or Dr. Schnitzler to obtain any information about this medically-excused absence. (RT790-791;801-803.)

Nor did Grover suggest to Roby that she supply additional medical information or try to determine if her condition qualified for FMLA coverage. (RT781-782.) This was especially significant because, during the April 13th meeting with Grover and Rafter, Roby had asked that she be allowed to "take" FMLA coverage. (RT613.) They fully understood that Roby was requesting *retroactive* FMLA coverage for her disability-related absences and that she claimed that all of the "occasions" related to her single condition. (RT1439-1440;1589.)

McKesson could have easily reclassified Roby's absences as FMLA-protected if there was evidence supporting that reclassification—especially in light of the fact that Rafter *personally reclassified* some of Hardesty's "occasions" as FMLA-protected when Hardesty was on final written warning and needed additional medical time-off. (RT962;1011-1012;1023-1026.) McKesson's policies *required* management to provide an employee who sought FMLA coverage with McKesson's required FMLA paperwork within two days of the request. (RT1449;1507.) But neither Rafter nor Grover provided Roby the McKesson-required FMLA paperwork when she

requested that she be allowed to "take" (retroactive) FMLA leave. (RT780-782;1440.)

By the end of this half-day investigation, neither Rafter nor Grover had ruled-out that some of Roby's "occasions" were related to her disability or FMLA/CFRA-protected absences. (RT768-769;854.) In other words, they had not fulfilled the *basic* charge they understood they needed to perform as the condition precedent to affirming the termination—ruling-out valid (or protected) reasons for Roby's "occasions." (RT848.) And yet they still refused to interview Roby (or her doctor) or to look any further. (RT849-851;976-980.) Nonetheless, Grover, Rafter and Chilton jointly agreed to terminate Roby. (RT1579-1580.)

Later that day, Rafter and Grover called Roby and informed her that they were affirming the termination decision. Roby again protested that her absences were caused by her "panic disorder." (AA2367.)

I. Roby formally grieves the illegal termination. But McKesson ratifies it after a purported "second investigation," no better than the first.

After receiving McKesson's April 17th termination letter (AA1978-1979), Roby repeatedly tried to get McKesson to correct her illegal termination. Roby pleaded to Chilton that it was unfair, explaining that she

had never had an attendance problem until recently when she experienced severe acute, stress-related panic attacks. (RT946-947.) She also told Chilton that the attendance policy was applied differently to her than to others (*e.g.*, Schenken's multiple absences were treated as only a single occasion due to a gall bladder problem and another employee named "Dawn" was allowed to come and go as pleased) and that Schoener applied the policy differently to other employees. (RT1214-1215; 1217-1219.) Moreover, Roby specifically mentioned that Schoener promised her a "clean slate" if she "made it" (absence-free) to January. (RT1217-1218.) Wholly apart from the mandates of discrimination law, these allegations of differential treatment should have cried-out for a thorough investigation. After all, according to Chilton, the new attendance policy had been implemented precisely because of concern over *differential application* of attendance standards. (RT1195-1198;1207-1208.)

On April 24, 2000, Roby submitted to Chilton a written Request for Action form (AA1981-1982;RT610-612;945), detailing that:

- Schoener had promised a "clean slate" if Roby made it to January 2000, which she accomplished.

- After missing February 25th, Roby was never informed that she received an "occasion" or was approaching her termination mark under the policy.
- She suffered from panic disorder over the last year, but kept management abreast of her condition.
- "During this 12 months, every absence was related to [her] illness on file[8], yet each absence counted against [her] independently as an 'occasion.'"
- Even though not requested to do so, Roby had provided a doctor's note excusing some of her absences. (AA1982.)

In the face of all this, Chilton fully understood someone needed "to go through each and every absence to determine its validity." (RT972.) She assigned Rafter to verify Roby's "occasions," including whether *any* of them qualified for protection under appropriate laws. (RT867;948-949;989.) Chilton instructed Rafter to do whatever was necessary to determine if McKesson had the proper documentation or, if not, whether it needed any additional information. (RT970-971.)

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[8] The "illness on file" was Roby's panic disorder. (RT705-707.) We note in passing that Roby mistakenly stated "every absence," when she should have, more accurately, stated "virtually every absence."

Rafter read Roby's request for action and then purported to conduct another investigation, this time under Chilton's supervision and oversight and keeping her informed of his progress. (AA1982;RT886-887;945-951;967-970;984-985.)

Yet Rafter's second "investigation" left open the identical gaping questions as his first. Although Rafter had been charged to investigate every one of the subject "occasions" to see if they should have been protected, he only ascertained and reported *actual reasons* for the last two absences. (RT948-949.) Coincidentally (or not!), these two were not related (or related only indirectly) to Roby's panic disorder. Yet, the entire focus of Roby's "Request for Action" was that McKesson had ignored her panic disorder and the multiple absences it had caused. (AA1981-1982.) Moreover, in his second investigation, Rafter continued to totally ignore Dr. Schnitzler's notes excusing her May 27th and July 27/28th absences on medical grounds even though he knew the *only* condition Dr. Schnitzler was treating Roby for was her panic disorder. (RT1441.)

Chilton then knowingly approved the termination despite the fact that: (1) Roby reported to Chilton that many of her "occasions" related to her panic disorder and (2) Chilton had *actual knowledge* that Rafter's investigation clearly did *not* prove that the termination was proper given

that Rafter only determined the actual reasons for two of the many disputed "occasions." (RT948-949;975-976.)

Even worse, Chilton admittedly assumed that Roby's panic disorder may have been the reason for at least some "occasion(s)." (RT991-992.) And, if even *one* "occasion" was removed from Roby's history of "occasions," then termination could not have been justified under McKesson's policy. (RT832-833;984.) Yet, despite all of this, Chilton still stubbornly upheld the termination without even eliminating her suspicion that Roby's panic disorder caused at least some of her "occasions." (RT997.)

Chilton also knew that, after-the-fact, she could reclassify "occasions" as FMLA-protected provided that the facts supported doing so. (RT962;965-967;977;1011-1012.) Chilton testified that if an employee told her that earlier absences resulted from a medical condition for which the employee was treated over the course of a year, this was "sufficient to characterize or recharacterize...an absence" as FMLA-, CFRA- or disability-protected. (RT977.) Yet, Roby not only did tell Chilton that her

absences were related to her panic disorder, Roby's formal Request for Action reiterated this very point.[9] (RT973;AA1982.)

Despite *all* the foregoing, Chilton played out the sham investigation she had ordered. On May 10, 2000, Chilton sent Roby a letter affirming Roby's termination, refusing to reclassify any of Roby's "occasions," and ending her 25-year stellar career.[10] (AA1984-1989.)

J. Others without mental disabilities were treated more favorably under McKesson's attendance policy.

The evidence demonstrated that McKesson applied the attendance policy far more harshly against Roby than against employees who did not have mental disabilities. (RT431;436-437;501-502;548-549;666-667;1017-1020.) Chew testified that when she had an intermittent series of absences related to a single condition, she was assigned only one "occasion" for these

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[9] If Chilton wanted more than Roby's word, Chilton knew the law requires the employer to notify employees of leave rights and otherwise help them obtain these laws' protections. (RT1010-1011;1239.) Not only did McKesson never do this for Roby *before* her termination, but Chilton never told Roby—in their discussions or the letter upholding Roby's termination—that all Roby needed to do to save her career was provide documentation or a doctor's certification confirming that at least one of her absences was FMLA- or disability-related. (RT976-977;1239-1243.)

[10] McKesson fully ratified Roby's termination. Grover was never criticized or disciplined in any way for his role in the termination. (RT787-788.) Nor was Rafter; instead, he was *de facto* promoted. (RT865-866.)

multiple absences. (RT436.) Steckman, who had asthma, missed many days of work without twenty-four hours notice, yet received *no occasions*. (RT480-482.) Likewise, Schenken missed significant amounts of time over the course of a year for a gall bladder condition. Nonetheless, she received *only one* "occasion" for all of these absences, even though many involved less than twenty four hours notice. (RT498-499;1219.)

In utter contrast, each of Roby's absences or tardies relating to her condition was treated as a separate "occasion." (RT548-549.) Roby, herself, identified five other employees (beyond Chew and Steckman) who were treated more favorably than she was. (RT666-667.) This was not merely Roby's perception. Schenken specifically told Grover that "[i]t shouldn't be okay for me, and not okay for Charlene." (RT501-502.)

Roby brought this discriminatory application of the policy to Schoener's attention. Schoener's response was that Roby could write a protest on the disciplinary form, "but it won't make any difference." (RT549-550.) How right she was. Roby brought the discriminatory application of the policy to Grover's attention—even illustrating it by contrasting the more favorable application Schenken received for her gall bladder. (RT550-551.) As Schoener predicted, it did no good.

The appellate court accurately summed up that in contrast to its treatment of Roby, McKesson "showed great leniency to other employees by counting their multiple absences due to medical reasons as a single 'occasion.'" (Opinion6;8&34.)

K. Roby is financially and emotionally devastated.

Roby's termination devastated her emotionally and financially. It "took [her] life away" because she "was stripped of everything...[she] had worked for." "[T]here went my life, and they didn't seem to care." (RT608.)

Roby's job had been "the stabilizing force in her life." She had lived a tough life even since childhood. As Dr. Schnitzler explained, Roby's job at McKesson was "the glue that kept this woman's life together, because everything else in her life was fairly disruptive." Losing her job was "the final straw," which "collapsed her world." (RT1066;1080-1081.) Coworkers confirmed that Roby was "severely distraught," "absolutely devastated" and that "her condition had really deteriorated." (RT485;507.)

After her termination, Roby developed agoraphobia. This is so severe that she does not leave the house unless she must. (RT618-619.)

Roby's present condition of panic disorder combined with agoraphobia is much more debilitating and disabling than was the panic disorder she had experienced while at McKesson. The panic disorder leads to panic attacks when Roby gets too anxious. The agoraphobia leads to anxiousness when outside or around crowds. Thus, the synergistic combination is toxic—leading to self-isolation. (RT1065.) It is safer to simply stay home and live within one's house than the leave and trigger panic attacks. (RT1065.)

Roby was 54 years-old when terminated. She loved her work and the sense of pride and accomplishment it brought her. Wanting to remain active and busy so that her disability did not control her, she planned to work until age 72. (RT618.) But, instead, she has not been able to work a day since her termination and, in July 2001, was declared *totally disabled* by Social Security Disability. She now lives off of this meager government benefit. (RT617;680-681.)

Roby earned approximately $43,000 annually before her termination. (RT1127.) The present value of her total economic loss is approximately $605,000. (RT1149.) Roby had to deplete her retirement savings to get by. (RT617-618.) The financial decimation compounded the emotional devastation. By June 2000, Roby had so depleted her savings that she could

no longer afford health insurance coverage. Yet, she desperately needed that coverage to keep her disabling condition under control. Instead, she was forced to go without treatment, or medication, for approximately nine months. Spiraling ever downwards, she became suicidal and was afraid to speak to anyone. Literally, her world became the four walls of her bedroom. (RT441;626-627;1080.)

PROCEDURAL HISTORY

A jury found that McKesson wrongfully terminated, failed to accommodate, discriminated against and harassed Roby in violation of the FEHA. (AA937-947.) It awarded compensatory damages totaling $4,011,000. (*Id.*) Finding malice, fraud and oppression, it imposed punitive damages totaling $15,000,000 against McKesson and $3,000 against Schoener. (AA949-950.) The trial court denied defendants' extensive post-trial motions (AA958-1796), except reducing economic damages by a stipulated $706,000. (AA1797-1798.) The court awarded Roby statutory attorney's fees (not challenged on appeal). (AA1914-1919.)

On McKesson's appeal, the Third District reversed the harassment verdict, reduced compensatory damages to $1,405,000, upheld the award of

punitive damages, but slashed the amount imposed against McKesson from $15,000,000 to $2,000,000. Roby sought re-hearing; McKesson did not.

ARGUMENT

I. THE HARASSMENT VERDICT MUST BE REINSTATED.

A. *Reno* did *not* create an immunity from harassment liability.

Reno v. Baird (1998) 18 Cal.4th 640 addressed "whether persons claiming *discrimination* may sue their supervisors *individually.*" (*Id.* at 643-647) (italics added.) *Reno* relied on descriptive language within *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, where 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." (*Janken*, 46 Cal.App.4th at 63.)

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." (*Id.* at 658) (italics in original and added.)

Despite *Reno*'s careful limitation, the appellate court here expressly relied on *Reno* to define the scope of *employer* liability for *harassment*. It reasoned 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." (Opinion28.) But *Reno* does *not* support this holding.

First, *Reno* expressly stated that it did not mandate any conclusion regarding "the scope of employer liability under the FEHA for ... harassment." (*Reno*, 18 Cal.4th at 658.)

Second, this misuse of *Reno* actually *inverts* its rationale. One fact *Reno* relied on to hold there was no need to impose *individual* liability for discrimination was that employers who remain liable "will not condone discriminatory acts by their supervisory employees, because the employers must ultimately pay." (*Id.* at 661-662.) The result here—that *neither* employer *nor* supervisor is liable for harassment—eliminates a safeguard *Reno* assumed would remain. This perverts, not follows, *Reno*'s rationale.

Third, the use of *Reno* to immunize the employer (and supervisor) from liability for Schoener's public verbal harassment directly conflicts with language found within *Reno* and *Janken*. For example, the Opinion immunized 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." (Opinion26&28.) But *Reno* states 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; *see also Janken*, 46 Cal.App.4th at 64 ["No supervisory employee needs to use slurs...to carry out the legitimate objective of personnel management."].) Thus, both *Janken* and *Reno* contradict the holding that McKesson is insulated from harassment liability for Schoener's derogatory slurs and insults about Roby's disability and resulting accommodation needs.

B. Neither legislative intent, existing authority nor sound policy supports this new immunity.

1. The Legislature's provision of vigorous protection against supervisor harassment—including when "authorized" by the employer—is inconsistent with this novel immunity.

A judicially-created immunity that permits courts to "sift-out" alleged supervisory actions, excluding them from the totality of evidence supporting a harassment claim, conflicts with the legislative decision to provide strict employer liability when an employer authorizes supervisor harassment.

The FEHA's harassment provisions were modeled after then-existing federal regulations, which "imposed liability on employers for all acts of sexual harassment by a supervisory employee 'regardless of whether the specific acts complained of were *authorized* or even forbidden by the employer'...." (*State Department of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1042) (italics added.) The FEHA's legislative history demonstrates "that an employer is strictly liable for *all* acts of ... harassment by a supervisor." (*Id.* at 1041) (italics added.) Strict liability applies whenever one is "acting in the capacity of supervisor when the harassment occurs." (*Id.* at 1041 fn. 3 and 1042.)

That the Legislature imposed strict liability for supervisor harassment that the employer "authorizes" undercuts the claim that acts "within the scope of...business and management duties" or bearing a "reasonable relationship" to management cannot support harassment liability. (Opinion28&30.) It is a rare employer indeed that would authorize sexually-deviant assaults of employees or blatant use of derogatory epithets by management. Far more common would be employer authorization of the use of supervisor power as a tool to effectuate harassment, *e.g.*, "to rid [the employer] of the inconvenience of accommodating a mentally disabled employee." (Opinion36.) Protecting victims from the former—but not the more common latter—both makes no sense and conflicts with the Legislature's decision to hold the employer strictly liable for supervisor harassment the employer authorized.

In contrast to strict liability for supervisor harassment, an employer is liable for coworker harassment only if the employer itself was negligent. (*Government Code* §12940(j)(1).) This legislative decision to provide greater protection against supervisor harassment than against coworker harassment also undercuts any suggestion that the Legislature intended to immunize acts of harassment that purportedly constitute "management duties."

Harassment committed by a supervisor (carrying the full authority of the employer) is more egregious, not less so, than similar coworker harassment. Supervisors, not coworkers, have the power to change the terms, conditions and privileges of employment. That power inherently increases the ability to threaten, intimidate and disturb the work environment, particularly because it directly threatens one's job security. Immunizing this category of harassment defies the Legislature's decision to provide more vigorous protection against supervisor than coworker harassment.

2. A rule immunizing harassment disguised under "management need" contradicts multiple established tenets of harassment law.

A "management duties" immunity would fundamentally alter existing harassment jurisprudence.

First, a "management duties" immunity would eliminate *quid pro quo* harassment claims, *i.e.*, those resulting in tangible employment action. The essence of a *quid pro quo* harassment claim is a supervisor's exploitation of the power inherent in a supervisory position by "conditioning employment benefits on submission to or tolerance of unwelcome sexual advances...." (*Miller v. Department of Corrections*

(2005) 36 Cal.4th 446, 461.) Only a supervisor exercising supervisory authority that falls within the realm of "management duties" can provide or deny "employment benefits." (*Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 762.) Immunizing the use of supervisory power to commit harassment would eliminate *quid pro quo* claims entirely.

Second, the "totality of the circumstances" test is a hallmark of hostile environment jurisprudence. (*Miller*, 36 Cal.4th at 462.) It is imperative that courts (and juries) view the complete record of harassment in context because "[a] work environment is shaped by the accumulation of abusive conduct, and the resulting harm cannot be measured by carving it 'into a series of discrete incidents.'" (*Eich v. Board of Regents, etc.* (8th Cir. 2003) 350 F.3d 752, 758; *accord Richards v. CH2M Hill* (2001) 26 Cal.4th 798, 822.)

Permitting courts to "sift-out" those acts arguably within the rubric of "management duties" would undermine the essence of the "totality of the circumstances" test: a context-based evaluation of *all* harassing conduct to determine its aggregate effect on the plaintiff's work environment.

Consider the "divide and conquer" exercise that the appellate court undertook here. First, it isolated or "sifted out" certain acts as purportedly "*Reno*-protected." (Opinion28.) Next, it deemed what was left (*e.g.*,

"evidence that Schoener treated Roby with general scorn and contempt and failed to show any sympathy for her disability") insufficient to create hostile work environment liability. (*Id.*) The "totality of the circumstances" test was replaced by a "divide and conquer" exercise.

Third, another critical principle underlying hostile environment analysis is that harassing conduct is considered *more severe* if it "unreasonably interferes with an employee's work performance." (*Miller*, 36 Cal.4th at 462-463; *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 [lower severity or pervasiveness required if harassing conduct causes tangible job detriment or loss of job benefits].)

This novel immunity turns this principle upside down. It is harassment by a supervisor (including threatening to take personnel action) that is most likely to interfere with an employee's work performance or cause tangible job detriment. That a supervisor abuses management power to interfere with the work environment supports, not undermines, imposing liability.

3. The appellate court's "management duties" immunity conflicts with *Miller*.

A rule immunizing supervisor harassment that bears a connection to "managerial duties" is irreconcilable with this Court's recent (and post-

Reno) *Miller* decision. (*Miller*, 36 Cal.4th 446.) There, this Court allowed harassment claims based on many acts that the appellate court here would have deemed non-actionable "personnel action." These acts included: a supervisor's discriminatory promotions and assignments; "imposing additional onerous duties on" the plaintiff; "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.)

In stark contrast, the court here held nearly identical acts (*e.g.*, "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") non-actionable as "*Reno*-protected." (Opinion28.)

4. The novel immunity is arbitrary and unworkable in practice.

Another reason to reject this "managerial duties" immunity is that it is simply unworkable in practice. How does a court draw that line between supervisor abuse of power versus legitimate managerial action? A bigoted (yet creatively intelligent) supervisor can easily manufacture a

management-need justification for what is in actuality deliberate harassment. And, according to the appellate court here, even if the manager fails to articulate any such need (*as did Schoener!*), as long as a reviewing court can imagine a need, the employer is insulated from harassment liability; the jury's verdict is thrown out. Worse, there is nothing the employee can do to rebut the appellate court's after-the-fact creation of management-need.

The absurdity of this rule (and inability to produce a principled application of it) is seen in the holding that Schoener's derogatory comments about Roby's body odor and "admonitions to Roby to take more showers or bathe more frequently had a reasonable relationship to her management duties and cannot be classified as harassment." (Opinion30-31.) Derogatory slurs of this nature are a classic form of "verbal harassment." (2 Cal.Code of Regs.§7287.6(b)(1).)

Likewise, when Schoener shot Roby looks of disgust at Roby's daily accommodation breaks, was she acting as a manager or a bigot ("disgusted" at Roby's disability)? Faced with liability for this harassing behavior, a supervisor can easily manufacture a managerial purpose, *e.g.*, the insulting look was really because the supervisor disagreed with *when* the employee

took the accommodation break. This rule thus not only defies principled application, it perversely encourages creative justification for bigotry.

The allegations from *Department of Health Services*, 31 Cal.4th 1026 forcefully illustrate this point. There, the plaintiff alleged her supervisor offered to excuse her attendance problems if he could touch her vagina. (*Id.* at 1035.) According to the appellate court here, 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." (Opinion28&30.) Can the same be said of the supervisor's offer to excuse the employee's attendance problems in *Department of Health Services*? Of course not. But that is precisely the result that this "managerial duties" immunity could produce.

5. This novel immunity would wreak particular havoc on employees with disabilities.

Both the Legislature and this Court have vigorously protected the rights of California's disabled workers. (*Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1030; *Government Code* §12926.1.(a).) The "managerial duties" immunity would undermine these broad protections.

Disability harassment often manifests itself in supervisory 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 and encouraged ostracism of disabled employees]; *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...."].)

Consider Schoener's conduct when Roby took breaks to control her panic attacks—breaks Schoener never *explicitly* denied. Where, like here, the employer *reluctantly grants* the accommodation but the supervisor berates the employee for needing it, this misuse of *Reno* deprives the employee of a remedy for supervisory verbal or visual abuse directed at the accommodation.

Because this immunity rule would eliminate an entire sphere of recognized disability harassment claims (those based on a supervisor berating or badgering an employee about an accommodation need), it is incompatible with California's emphatically-strong pledge to protect the rights of workers with disabilities.

B. Even if the appellate court properly interpreted *Reno*, there is no basis for overturning the jury's *factual determination* that Schoener's harassment was not necessary management action.

Even if this Court fully disagrees with our discussion of *Reno*, there is still no basis to vacate the harassment verdict. 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.) The jury is presumed to have followed this instruction. (*People v. Duncan* (1960) 53 Cal.2d 803, 818.) And, substantial evidence supports its *factual determination* that Schoener's conduct was not "necessary management action" but instead gratuitous harassment "engaged in for personal gratification, because of meanness or bigotry, or for other personal motives." (*Reno*, 18 Cal.4th at 657.)

The *only* person who could provide direct evidence of Schoener's state of mind behind her words and actions was Schoener herself. But Schoener's testimony disproves any claimed management need for this abusive conduct.

The appellate court swept Schoener's derogatory "comments about Roby's sweating and body odor" and telling Roby she needed "to take more

showers or bathe more frequently" under the *Reno* immunity because Roby's coworkers had *once* complained about her body odor. Thus, it said, Schoener's conduct bore "a reasonable relationship to management duties..." (Opinion30.)

But substantial evidence supports the opposite conclusion. Schoener herself denied making these statements. (RT1282;1291-1292.) Thus, the person who should have articulated the need for them (if it existed) never did. Worse, instead of offering a justification, Schoener actually admitted that Roby's body odor *never* posed a problem during her supervision of Roby.[11] (RT816-817.)

The claimed "management need" is further destroyed by the fact that Schoener made these comments *publicly* (humiliating Roby in front of others) when McKesson's policy (and *Reno*'s language) required that she do so privately. (RT414-415;470-473;527-528;530.) And, finally, there was no "management need" to tell Roby to bathe more frequently *after* Roby told Schoener that "she had no control over" the odor. (RT533.) What good would another shower do if nothing could control the odor?

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[11] The only complaints occurred when Saamer supervised Roby. Saamer, *not Schoener*, addressed them. (RT839-841;1484-1485.)

The conclusion that "portraying Roby's job responsibilities in a negative light," *e.g.*, calling Roby's job a "no-brainer," was necessary management action (Opinion28) also ignores the substantial evidence to the contrary. Schoener herself did *not* ever believe Roby's job was a "no-brainer." Schoener testified that it "takes a lot of experience and a lot of knowledge" and "years to know what she's doing."[12] (RT1275.) A jury could reasonably infer Schoener *falsely* denigrated Roby's job as a "no-brainer" "for personal gratification, because of meanness or bigotry, or for other personal motives." (*Reno*, 18 Cal.4th at 657.)

The appellate court also found that "management need" justified Schoener's "ignoring [Roby] at staff meetings." (Opinion28.) Again, Schoener *never* articulated that need. Instead, she denied having done so. (RT1272-1273.) With these denials, Schoener necessarily (and willingly) disclaimed having engaged in this conduct for legitimate (versus improper) purposes.

Consider the perverse incentive that an immunity rule, which disregards the jury's factual determinations, would create. It would encourage supervisors to perjure themselves by falsely denying harassing conduct, knowing that they can take comfort in the fact that (should the jury

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[12] Others agreed. (RT421-422;474-475.)

reject their false denials) the appellate court will somehow rescue them by ascribing legitimate purposes to the very acts they denied doing. When Schoener denied under oath these statements or actions, she willingly surrendered the opportunity to offer any alleged legitimate justification for them. Nothing in law or public policy can justify a reviewing court rescuing her from that election.

C. Substantial evidence supports that Schoener's harassment was "severe *or* pervasive" and "because of" Roby's disability.

1. Schoener's harassment of Roby was severe or pervasive.

McKesson has never contended that the *totality* of Schoener's abusive conduct (*including* the allegedly "*Reno*-protected" acts) fell short of the severe *or* pervasive threshold. McKesson *only* claimed that "the actions of Schoener *unrelated to the performance of her supervisorial duties* do not" reach this level. (McKesson's Opening Brief, p. 40) (italics added.) Likewise, the harassment reversal expressly relied on the exclusion of "most of the alleged harassment" as "*Reno*-protected." (Opinion28.) If this Court rejects the "divide and conquer" misuse of *Reno*, there is no meaningful debate that Schoener's harassment of Roby meets the severe or pervasive threshold.

But, even if this Court affirms this novel use of *Reno*, the remaining acts (including those the jury could reasonably infer were not legitimate management action) more than satisfy the severe *or* pervasive standard. Far from merely "occasional, isolated, sporadic, or trivial," Schoener's abuse of Roby was a "concerted pattern of harassment of a repeated, routine or generalized nature." (*Fisher v. San Pedro Peninsula Hosp.* (1989) 214 Cal.App.3d 590, 610.)

Every single morning (approximately 220 times in a year), Schoener publicly shunned Roby, either by ignoring Roby's greetings—or worse—responding with a look of disgust. (RT421;473;493;531-532.) Schoener repeatedly and publicly ostracized Roby in front of her coworkers, sending a clear and demeaning message that management viewed Roby as an "outcast." (RT473;483-484;530-531.) Schoener reinforced this demeaning message "at least once a week" (*approximately 52 times*) by public demonstrations of excluding Roby, which took many forms and was "a constant thing."[13] (RT419-420;455;471-472;1256-1257;1259-1260;1270.)

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[13] Ostracism can create a disability-based hostile environment. (*Chin, et al. Cal. Practice Guide: Employment Litigation* (Rutter Group 2006) ¶9:1058, p. 9-88.)

Schoener's derogatory comments and visual expressions about Roby's condition (and the accommodations it necessitated) were themselves very frequent and often heard by Roby's coworkers. In addition to being pervasive, certain of these comments (calling Roby's arm digging and sweating "disgusting" and humiliatingly telling her to take more showers) were themselves *severe.*[14] (RT414-415;417-418;420-422;424;426;470-472;474;526-528;530-536;576-577;595-596;600-601). *Reno* declares such publicly derogatory slurs are *not* legitimate personnel action. (*Reno*, 18 Cal.4th at 657.)

Schoener also harassed Roby with visual (and public) displays of disgust when Roby took her "daily" accommodation breaks. (RT418;536.) This *daily* visual harassment itself was pervasive enough to alter Roby's work environment. (*Birschtein v. New United Motor Manufacturing* (2001) 92 Cal.App.4th 994, 1001-1002.)

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[14] (*See e.g. Rodgers v. Western Southern Life Ins.* (7th Cir. 1993) 12 F.3d 668, 675 ("Perhaps no single act can more quickly 'alter the conditions of employment and create an abusive work environment' ... than the use of an [unambiguous] racial epithet by a supervisor in the presence of his subordinates."].) To someone with Charlene Roby's disability—a disability that caused her skin to become a bloody mass of scabs (RT414;470)—what is the difference in the bigotry behind an attack on one's skin color and the bigotry behind an attack on one's disability-related skin condition?

These acts alone—not even considering the *many* other acts detailed in our factual summary—show a "concerted pattern of harassment of a repeated, routine or generalized nature." (*Fisher*, 214 Cal.App.3d at 610.) This pattern of hostility is more severe *or* pervasive than that found sufficient in many published decisions. For example, in *Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30, the appellate court found triable issues on severe or pervasive harassment based on the single overt racial slur combined with a six month pattern of generalized poor treatment that was far less pervasive than Schoener's harassment of Roby.[15] (*Id.* at 36-37.)

As the appellate court observed, "Schoener's behavior aggravated [Roby's] symptoms and left her emotionally ravaged." (Opinion31.) Schoener made Roby feel like "a second-class citizen," to the point that Roby almost felt compelled to abandon her nearly 25-year career. (RT534-535;604;AA1920.) Schoener made Roby feel "like the dirt beneath

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[15] *Accord Sheffield v. Los Angeles Co. Dept. of Social Services* (2003) 109 Cal.App.4th 153, 163-164 [seven days of *co-worker* harassment consisting of less than ten acts]; *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1143-1144 [harassment lasted *only sixteen days* and consisted of reaching towards plaintiff's breast to grab candy from her shirt pocket, dropping candy in the same pocket, asking her which breast was bigger and about a sexual experience, and lunging towards her *once* with cupped hands]; *Birschtein*, 92 Cal.App.4th at 1001-1002 [daily "staring"].

somebody's shoes, humiliated, let down, disappointed." (RT423-424.) Schenken was "embarrassed" by Schoener's abuse of Roby. (RT493.)

Schoener's conduct (even stripped of so-called "*Reno*-protected" acts) is easily described as "show[ing] itself in the form of intimidation and hostility for the purpose of interfering with an individual's work performance," a purpose Schoener effectively achieved. (*Lyle*, 38 Cal.4th at 1001.)

2. Substantial evidence supports the jury's factual determination that Schoener's harassment was "because of" Roby's disability.

The appellate court correctly noted that Schoener made "negative comments about Roby's sweating and body odor" and stated that "Roby's sweating and arm digging were 'disgusting'." (Opinion28&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' directed at the disability." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 54 fn. 14.)

The appellate court frankly acknowledged this. (Opinion30 ["Schoener's occasional negative comments about Roby's sweating and

body odor" could be viewed as "colored by discriminatory animus"].) But it then dismissed this evidence as merely "episodic" and not occurring "in concert or with a regularity that can reasonably be termed pervasive." (Opinion30&34.)

By requiring proof that each instance of harassment be independently directed at Roby "because of" her disability, the court conflated these two distinct elements. When evidence shows that *some* of the harassing conduct was directed at the plaintiff's protected trait, the jury may reasonably infer that the other (seemingly ambiguous) treatment was likewise caused by similar animus. (*See e.g. Dee,* 106 Cal.App.4th at 36-37; *Birschtein*, 92 Cal.App.4th at 1001-1002.)

Dee forcefully illustrates this principle. 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.) "A reasonable trier of fact could infer that the racial slur was not an isolated event because it explained [the harasser's] motivation for creating an abusive working environment for Dee." (*Id.* at 36-37; *accord Birschtein*, 92 Cal.App.4th at 1001-1002 [prior campaign of overtly sexual conduct allowed inference that later ambiguous staring was "because of" gender].)

By contrast, the court here held 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, and her public expressions of "disgust" at Roby's need for breaks, were still insufficient to establish that Schoener's acknowledged pattern of "general scorn and contempt" (*e.g.*, ignoring, shunning, excluding, etc.) was "because of" Roby's disability.

But it gets worse. The appellate court's treatment of the "because of" element *also* conflicts with *Lyle*. There, 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! The appellate court found substantial ("clear and convincing") evidence that Schoener discriminated against Roby "because of" her disability, showing others "great leniency...by counting their multiple absences due to medical reasons as a single 'occasion,'" while treating Roby "far more harshly" under the same policy. (Opinion34-36;RT502.) Additionally, Schoener "tricked" Roby (*e.g.*, "new start"), effectuating the "deliberate plan to rid [McKesson] of the inconvenience of accommodating a mentally disabled employee." (Opinion34-36.)

The appellate court's own words show that its harassment analysis is illogical. The court's punitive damage findings establish that Schoener "exposed [Roby] to disadvantageous terms or conditions of employment to which [those not belonging to the protected class were] not exposed."[16] (*Lyle*, 38 Cal.4th 279-280.)

A causal link between Roby's disability and Schoener's mistreatment can also be inferred from Schoener's false exculpatory denial of *any animus* towards Roby. Schoener testified she "[g]ot along fine" with Roby. (RT810.) But, as the appellate court confirmed, Schoener lied: "[T]he evidence showed that Schoener obviously disliked Roby, shunned her, and showed no compassion for her condition...." (Opinion31.) A reasonable jury could infer that Schoener's false claim that she and Roby "[g]ot along fine" was really a cover-up for the incriminating truth: Schoener did not like Roby *because of her disability.* After all, while it is not a violation of the law to mistreat someone, it is a violation of the law to mistreat someone because of their protected status. Schoener had no reason to deny her dislike for or mistreatment of Roby *unless* it was due to Roby's disability. (*Donchin v. Guerrero* (1995) 34 Cal.App.4th 1832, 1839.)

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[16] The record contains additional evidence of Schoener's differential treatment of Roby compared to others. (*See e.g.*Opinion26;RT426-427.)

The jury's findings of severe or pervasive harassment "because of" Roby's disability were amply supported. The harassment verdict must be reinstated.[17]

II. THERE IS NO DUPLICATION OF DAMAGES ON THE PRE-TERMINATION FAILURE TO ACCOMMODATE AND THE TEMPORALLY-DISTINCT TERMINATION CLAIMS.

The jury awarded $800,000 on the accommodation claim and an additional $500,000 on the termination claim. (AA937-947.) The appellate court struck the termination damages as duplicative of the accommodation verdict, reasoning that Roby's reasonable accommodation, disparate treatment and wrongful termination claims were "three termination-related torts" all "based upon a single legal wrong."[18] (Opinion11-13&15.)

In so doing, the court ignored 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

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[17] Upon reinstating the harassment verdict, Roby should receive at least the *greater* of the jury's two awards, *i.e.*, the $600,000 against McKesson.

[18] The jury also awarded Roby $300,000 on her disparate treatment claim, which the appellate court struck. Roby does not challenge this elimination.

referring to different claims or legal theories." (*Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1159.) Had the court followed *Tavaglione*, it would have found substantial evidence independently supporting *both* the $800,000 accommodation verdict *and* the $500,000 termination verdict.

A pre-termination failure to accommodate is itself an unlawful employment practice, which supports damages independent of (and even without) a later termination. *Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344 illustrates this principle. There, the court held that the plaintiff had stated an accommodation claim based on *injuries occurring as a result of the failure to accommodate*, even without alleging adverse action (such as termination). (*Id.* at 360-361; *see also Smith v. International Brotherhood of Electrical Workers* (2003) 109 Cal.App.4th 1637, 1656-1657 [pre-termination failure to accommodate actionable separate from the termination claim].)

Substantial evidence supports that McKesson's pre-termination failure to accommodate Roby, spanning from April 1999 until Roby's April 2000 termination (AA1927&1978), caused non-economic harm separate from that caused by the later (temporally-distinct) termination. Testimony from Roby, her coworkers and Dr. Schnitzler demonstrated that Roby suffered emotional distress and physical harm from the ongoing failure to

accommodate her disability. This harm, which occurred *before* her termination, was independent of the harm caused by the eventual termination. It included increased panic attacks, uncontrollable spontaneous crying, progressively worse arm digging, other increased symptoms and anxiety about the possible loss of her career. (RT472;529-530;533;536-537;549-551;572-573;583;591;632;1014-1015;1050-1054;1057;1066-1068;1110-1112; AA1927;1929;1943;1951.)

In contrast to the harm Roby suffered during the year of McKesson's failure to accommodate her, the record also supports that Roby suffered separate harm from the termination itself. (*See e.g.*, RT616-620;626-627;680-682;1065-1066;1080-1081;Opinion9.)

Thus, this Court should reinstate the wrongful termination non-economic damage of $500,000 in addition to the existing failure to accommodate non-economic damage of $800,000.

III. THE PUNITIVE DAMAGES VERDICT IS WITHIN CONSTITUTIONAL LIMITS.

An appellate court's "constitutional mission is only to find a level higher than which an award *may not* go; it is not to find the 'right' level in the court's own view." (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1188.) The court "does not sit as a replacement for the

jury but only as a check on arbitrary awards" and, thus, the "determination of a maximum award should allow some leeway for the possibility of reasonable differences in the weighing of culpability." (*Id.*; *see also Phillip Morris USA v. Williams* (2007) 127 S.Ct. 1057, 1062 [constitution prohibits "amounts forbidden as 'grossly excessive.'"].)

State Farm Mutual Automobile Ins. Co. v. Campbell (2003) 538 U.S. 408 reaffirmed that "each State alone can determine what measure of punishment...to impose on a defendant who acts within its jurisdiction." (*Id.* at 422.) In determining the necessary "measure of punishment," California courts cannot ignore the Legislative mandates that freedom from discrimination is a *fundamental public policy* and *civil right* and, thus, the FEHA's remedial powers are broadly construed "to provide effective remedies that will both prevent and deter unlawful employment practices...." (*Gov. Code* §§12920; 12920.5.)

The appellate court here ignored *Simon*'s mandate and the fundamental public policies that McKesson's malicious conduct violated.

A. The appellate court misapplied the *Gore* Guideposts.

1. McKesson's conduct was highly reprehensible.

Campbell reiterated that the degree of reprehensibility remains "[t]he most important indicium of the reasonableness of a punitive damages award." (*Campbell*, 538 U.S. at 419-420.) The record supports *all* five reprehensibility subfactors. McKesson's conduct was *highly reprehensible.*

a. The harm to Roby was physical.

The first subfactor is whether the harm caused was "physical as opposed to economic." (*Campbell*, 538 U.S. at 419.) Without analysis, the court concluded "McKesson did not cause physical harm." (Opinion38.) This *both* misconstrues this subfactor (ignoring that serious emotional harm is closer to physical harm than economic) *and* overlooks that McKesson *did* cause physical harm.[19]

McKesson's malicious conduct *aggravated* Roby's existing panic disorder condition, causing *further disfigurement, scarring, self-mutilation* and other physical harm, *e.g.*, migraine pain, itching, upset stomach, etc. (*See e.g.*, RT414;470;491;495;526;529-530;536-538;679-680;1014-1015.)

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[19] The jury's implied "findings of historical fact" receive "the ordinary measure of appellate deference." (*Simon*, 35 Cal.4th at 1172.)

The malicious conduct increased the frequency and severity of Roby's panic attacks, which caused her to "experience physical symptoms such as difficulty breathing, uncontrollable shaking, and scratching or picking at her arms until they bled." (Opinion4.) After her termination, Roby became agoraphobic and suicidal. (RT414;618-619;626-627;1065-1066.)

To suggest that Roby's harm was "mere economic" is to trivialize the irreversible, life-destructive physical and emotional damage that McKesson inflicted.

b. McKesson evinced indifference to and reckless disregard of health and safety.

McKesson's "tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others." (*Campbell*, 538 U.S. at 419.) This is seen *both* in Schoener's preying on Roby *and* in McKesson's systematic disregard for the medical leave and accommodation laws—laws designed to *protect employees with health concerns*.

Even though "no-fault" attendance policies are known to violate medical leave and disability rights if not carefully applied (*see Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, 1122), McKesson implemented such a policy without training managers like Schoener about these laws. (RT825-826.) Even at trial, Schoener still had

no plan to learn about them and felt fully justified in imposing "occasions" against employees who needed time off *because of a disability*. (RT834-836.)

McKesson's handbook did *not* explain FMLA rights (Opinion6), nor mention CFRA or FEHA disability rights. (AA2269;RT599;758; 806.) At trial, Grover remained unaware of whether the handbook had any such information and was woefully ignorant about CFRA and disability accommodation rights. (RT755-757;759;767-768;771.)

McKesson's policy imposed illegal barriers to employees obtaining FMLA/CFRA protection, including the requirement of using "magic words" in a specific request. (RT771-772;788-789;1356-1357;1437-1439; *see* 2 Cal.Code Regs. §7297.4(a)(1).) Worse, these "magic words" were kept secret from the employees who could not receive FMLA/CFRA protection without using them! (RT754;788-789.)

McKesson's management admittedly had no "concern" for the impact of these illegal policies on Roby's career, health, future or life. (RT787;829-830.) Management admittedly had "no concern" for Roby's physical or mental health as they observed her condition deteriorate. (RT818-819;825-826.) McKesson never trained Schoener that her

employees' health or welfare was her problem and, thus, to Schoener it was not. (RT826.)

Schoener knew about Roby's panic disorder, but did everything in her power to exacerbate it—harassing her because of her disability, applying the attendance policy in violation of her statutory leave and accommodation rights, tricking Roby by the "new start" termination trap, etc. This misconduct exploited the very disability (panic disorder) that the law says McKesson was required to accommodate—not aggravate.

c. Roby was financially vulnerable.

The appellate court correctly concluded that Roby "was financially vulnerable." (Opinion38.)

d. McKesson's wrongful acts were "a series of repeated actions."

A "series of repeated actions" is more reprehensible than an "isolated incident." (*Campbell*, 538 U.S. at 419.)

For over a year, McKesson committed a series of discrete (and separately actionable) malicious acts. This cannot be dismissed as an "isolated incident." It began with illegally characterizing a *series* of protected absences as "occasions," and evolved into imposing a progressive

and incremental *series* of disciplinary illegal notices. It included Schoener (with Grover's knowledge) misrepresenting the "new start" to Roby, laying in wait for the termination trap to spring upon Roby. It included Schoener's harassment of Roby and upper-management's refusal to stop it—notwithstanding Roby's repeated complaints to upper management. It culminated in the admittedly illegal termination, which was covered-up by the *two separate* sham investigations!

Far from an "isolated incident," this "series of repeated actions" consisted of multiple, independent unlawful employment practices, *e.g.*, harassment, failure to accommodate, denial of leave, etc.

e. McKesson engaged in intentional deceit and trickery.

The appellate court properly found the last sub-factor, *i.e.*, that McKesson's "conduct contained elements of trickery and deceit" and not mere accident. (Opinion39.)

2. No comparable civil penalties exist.

The second *Gore* guidepost—comparable civil penalties—is inapplicable. Reliance on the FEHC's jurisdictional limitation on *combined* compensatory damages and fines *it may award* is misplaced. (Opinion40-

41.) This combined jurisdictional limitation is not a civil penalty; it merely represents the *administrative body's* jurisdictional remedial limit. (*Government Code* §12970(a)(3).) No limit applies when FEHA claims are pursued in court. (*Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 221.)

3. A mid-range single-digit ratio is not "grossly excessive."

Campbell declined "to impose a bright-line ratio which a punitive damages award cannot exceed." (*Campbell*, 538 U.S. at 425.) It added that while "few awards exceeding a single-digit ratio" will pass due process, "there are no rigid benchmarks that a punitive damages award may not surpass." (*Id.*) *Simon* interpreted this "to establish a type of presumption: ratios ... significantly greater than 9 or 10 to 1 are suspect and, absent special circumstances ... cannot survive...." (*Simon*, 35 Cal.4th at 1182.)

The ratio between $15,000,000 in punitive damages and $2,505,000 in compensatory damages[20] is shy of 6:1, and *well below* the presumption of unconstitutionality. Nonetheless, despite *high reprehensibility*, the appellate court seemed to presume this mid-range single-digit ratio was

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[20] This consists of $605,000 in economic damage and $1,900,000 in non-economic damage, *i.e.,* $800,000 failure to accommodate, $600,000 harassment and $500,000 wrongful termination.

unconstitutional. But unless something *compels* a finding of unconstitutionality, no presumption arises with a mid-range single-digit ratio. (*Simon*, 35 Cal.4th at 1182-1183.)

To justify its 87% reduction from $15,000,000 to $2,000,000, the court seized *Campbell*'s dicta that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit....." (*Campbell*, 538 U.S. at 425.) Other courts have properly rejected this single sentence dicta. (*See e.g., Hayes Sight & Sound, Inc. v. ONEOK, Inc.* (Kan. 2006) 136 P.3d 428, 448-449 [requiring 1:1 ratio "[b]ecause 'compensatory damages are substantial'" "distorts what the Supreme Court actually said in *Campbell*."]; *Campbell v. State Farm Mutual Auto. Ins. Co.* (Ut. 2005) 98 P.3d 409, 418 [permitting 9:1 ratio because "[t]he 1-to-1 ratio between compensatory and punitive damages is most applicable where a sizeable compensatory damages award for economic injury is coupled with conduct of unremarkable reprehensibility."].)[21]

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[21] While five justices did not reach the issue, that four justices recently voted to affirm a 97:1 ratio with $821,000 in compensatory damages undercuts the suggestion that the Court adheres to strict, diminutive ratios. (*Williams*, 127 S.Ct. 1057.)

These decisions make sense. Larger awards often result from *more reprehensible* conduct, as where intentional misconduct causes severe physical or mental harm. Such cases demand more punishment than, by comparison, commercial or business tort cases where high ratios are nonetheless frequently approved. (*See e.g. Simon*, 35 Cal.4th at 1189 (10:1-plus ratio; fraud); *Bardis v. Oates* (3rd Dist. 2004) 119 Cal.App.4th 1, 26-27 [9:1-plus ratio; fraud against sophisticated investors]; *Johnson v. Ford Motor Co.* (5th Dist. 2005) 135 Cal.App.4th 137, 150 [near 10:1 ratio; lemon law violations].) That McKesson caused Roby *actual harm* valued in the millions does justify letting McKesson escape without meaningful punishment. (*Campbell*, 98 P.3d at 418 [that defendant caused "1 million of emotional distress warrants condemnation in the upper single-digit ratio range rather than the 1-to-1 ratio urged by State Farm"].)

But even if this Court interprets *Campbell* to require a lower ratio when compensatory damages are "substantial," the original punitive damage amount is still permissible. "Substantial" does not merely mean large; it should mean disproportionate to the harm caused—something McKesson has not shown (not even raising a "passion or prejudice" challenge) and courts cannot presume. (*Century Surety Co. v. Polisso*

(2005) 139 Cal.App.4th 922, 966.)[22] The $2,505,000 in compensatory damages (reduced from the jury's original $4,011,000) is not "substantial" in the sense of justifying a rigid ratio given McKesson's destruction of Roby's life and trampling of her civil rights.

The mid-range single-digit ratio, well below the double-digit presumption of unconstitutionality, is not "grossly excessive."

B. The punitive damage amount is .3% of McKesson's net worth.

Net worth "remains a legitimate consideration in setting punitive damages" because the guideposts "were not intended 'to prevent juries from levying awards that serve important state interests and provide meaningful deterrence against corporate misconduct.'" (*Simon*, 35 Cal.4th at 1185-1186.)

Here, the $15,000,000 punitive damages award represents a mere .3% of McKesson's $5.165 billion net worth. This, too, fully supports a mid-range single-digit ratio.

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[22] Here, the trial court repeatedly instructed the jury not to punish in the compensatory phase, a point counsel reiterated. (RT1672-1673;1792-1793;1836;1844AA891.)

IV. IF THE REVERSAL OF THE HARASSMENT VERDICT IS AFFIRMED, THE PUNITIVE DAMAGES REDUCTION IS STILL FLAWED.

Assuming, *arguendo*, that this Court does not reinstate the harassment verdict, it should still correct the punitive damages reduction.

First, because this reduction was premised on speculation that the jury imposed punishment for the reversed harassment claim, it violated the prohibition against second-guessing the "mental processes by which [the verdict] was obtained." (*Evidence Code* §1150(a).) Punitive damage review cannot start with the speculative assumption that a reduction is required because of a reversed claim—especially given the fact that the jury's punitive damages verdict was decided by general verdict. (AA949-950; *Tavaglione*, 4 Cal.4th at 1157 ["general verdict will be sustained if any one count is supported by substantial evidence...despite possible insufficiency of evidence as to the remaining count"].)

Second, even if this Court agrees that the harassment reversal requires punitive damage reduction, Roby must receive a conditional remittitur. *Simon* only supports denying a conditional new trial right when punitive damages are reduced to the constitutional maximum and a new trial cannot produce a higher result. (*Simon*, 5 Cal.4th at 1188.)

But our situation is strikingly different. Because the excessiveness review began with the premise that a "sharp reduction" was required because of the reversal of the harassment claim (Opinion39&42), here, a re-trial *can produce* a higher, yet constitutionally-sound, result.

CONCLUSION

Roby respectfully requests that this Court reinstate: (1) the harassment verdict; (2) the wrongful termination damages; and (3) the jury's original punitive damages verdict.

DATED: October 2, 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 Respondent's Opening Brief on the Merits contains 13,997 words, excluding those items identified in Rule 8.520(c)(3).

DATED: October 2, 2007

David M. deRubertis, Esq.

PROOF OF SERVICE

Case Name: Roby v. McKesson HBOC, et al.
Supreme Court Case No: S149752
Court of Appeal Case Number: C047617 (Consol.: C048799)

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

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): **RESPONDENT'S OPENING BRIEF ON THE MERITS**

/___/ 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):

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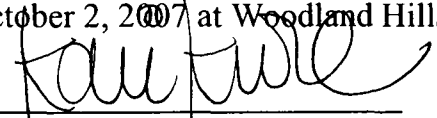
I declare under penalty of perjury that the foregoing is true and correct. Executed on October 2, 2007 at Woodland Hills, California.



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