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 REPLY BRIEF ON THE MERITS

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## INTRODUCTION

Charlene Roby, a person in a protected class (mental disability), was singled-out by her supervisor and subjected to a year-long harassment campaign to make her feel like a worthless, humiliated, pariah. It worked, achieving what the Court of Appeal found was McKesson's goal: to "rid itself" of Roby (an exceptional 25-year employee) in order to avoid accommodating her disability. It also destroyed Roby, reducing her to a suicidal, agoraphobic and penniless shell of her former self.

The legal question posed is whether this conduct constitutes harassment. If it doesn't, this State should hang its head in shame.

The other main issue raised is whether there is any justification for slashing a $15 million punitive damages award down to $2 million. Striving mightily to defend the appellate court's reduction, McKesson trumpets certain dicta taken from *State Farm Mutual Automobile Ins. Co. v. Campbell* ("*Campbell*") (2003) 538 U.S. 408.

That is a mistake. *Campbell*'s actual holding (that reprehensibility is the *most important* factor in evaluating the reasonableness of a punitive damages award) is fatal to McKesson's position.

McKesson knows this. Therefore, its 20,000-plus word brief *never mentions* four out of the five reprehensibility sub-factors which *Campbell*

declared were to guide any analysis. Each of those four sub-factors underscored that McKesson's reprehensibility was quite high.

Besides omitting 4/5 of the guiding legal standard, McKesson's defense likewise omits 4/5 of the damaging facts in the record. Rather than seriously addressing those facts which led the jury and trial judge to conclude that $15 million was the appropriate figure in light of the severe reprehensibility of McKesson's conduct, McKesson treats the verdict as if it had done nothing more than simply made an honest "mistake" in firing Roby.

Indeed, McKesson bewails that it is being condemned with "20/20 hindsight." This is ironic. One of the most damaging facts in the record is that McKesson's two purported "investigations" to discover whether Roby's firing was proper or improper were really cover-ups, designed to exonerate the termination decision while ignoring all the facts Roby kept trying to present. Had McKesson wanted to conduct an honest investigation, it would have easily ascertained the same facts which the jury/judge/and court of appeal all saw so clearly with their "20/20 hindsight." Had it done that, none of us would be here today.

Trying to justify where we are today, has been quite taxing on McKesson. Rarely has a successful respondent been forced to distance itself so much from the appellate decision it is seeking to defend. As we

detail below, in at least three or four major respects, McKesson has been forced to run from glaring errors in the appellate decision while simultaneously fabricating strained rationales for the result reached.

We conclude by noting an amazing statement in McKesson's brief. In insisting that it did nothing really wrong (much less highly reprehensible), McKesson proclaims that, although it is not challenging that there was sufficient evidence to support the basic liability finding against it, even that was a "close question." This invites the following question: If McKesson really did believe its liability was a "close question," would it have waived its right to attack the liability issue, knowing that almost $19 million (plus interest and attorneys fees) lay in the balance?

Of course not. But the fact that McKesson would pretend that its open-and-shut liability was really a "close question" forcefully underscores how desperate it is to recast its reprehensible conduct as merely a "mistake," and its liability-at-all as a "close question." It also underscores why more punitive damages, not less, are needed here for McKesson to get the message that punitive damages are intended to send.

## ARGUMENT

### I. NONE OF McKESSON'S ARGUMENTS CAN JUSTIFY THE COURT OF APPEAL'S ILLOGICAL DEPARTURE FROM THE TOTALITY-OF-CIRCUMSTANCES TEST AND ITS RESULTING DECISION TO SET ASIDE THE HARASSMENT JUDGMENT.

#### A. Overview

By sponsoring a warped interpretation of this Court's decision in *Reno v. Baird* (1998) 18 Cal.4th 640, McKesson convinced the appellate court to reverse the jury's harassment verdict. But McKesson recognizes that the very appellate opinion *it procured* is indefensible.

Tellingly, it now abandons the very argument it won with below. McKesson had convinced the Court of Appeal that conduct such as Schoener's *public* insults about Roby's disability and need for accommodations was allegedly "within the scope of Schoener's business and management duties." (Opinion26&28.)

But McKesson is now *forced to reverse* its claim that such verbal abuse is immune. "Nor do we advance any such theory. To the contrary, a supervisor may *not* manage subordinate employees through the use of verbal or physical abuse." (AB, 22) (McKesson's emphasis).

With its prior argument lying in tatters, McKesson fashions a new, custom-made rule of law. Now, so-called managerial conduct is only immunized so long as it is, in McKesson's newly-minted phrase, "*non-*

*abusive*" rather than "abusive" managerial conduct. (AB, 1-2 & 22 n.16) (McKesson's italics). The latter category consists of three, carefully limited, types of conduct which McKesson must concede courts have previously found constitute actionable harassment:

(1) physical abuse;

(2) verbal abuse (so long as "racial or gender-based epithets, gratuitous *ad hominem* name calling, [or] repeated name-calling or profanity" is used); and

(3) *quid pro quo* conduct. (AB, 22, n.16 & 29-30.)

Under McKesson's formula-du-jour, managerial conduct on this limited, three-prong list ("McKesson's Selective List") is actionable. But all other conduct by managerial employees—no matter how harassing—is immune.

Before we address the merits of McKesson's Selective List, we emphasize one point: the very fact that McKesson is compelled to draft a *new rule of law* underscores that the appellate court's decision cannot be affirmed under *existing* law.

On the merits, McKesson's argument cannot survive because it is inconsistent with this Court's long-recognized rule that harassment can only be evaluated under a *totality-of-the-circumstances* test. (*Miller v.*

*Department of Corrections* (2005) 36 Cal.4th 446, 462 ["all the circumstances."]; *see also* OB, 48-49.)

### B. *Reno* never held, nor should this Court hold, that acts *theoretically* within the scope of management duties are divorced from the totality-of-circumstances giving rise to a hostile environment claim.

#### 1. McKesson ignores *Reno*'s express limitation of its own holding.

Our Opening Brief ("OB") noted that *Reno* carefully limited itself to the issue of *individual* liability for discrimination and "express[ed] *no opinion* on the scope of *employer* liability under the FEHA for either discrimination or harassment." (*Reno*, 18 Cal.4th at 643-647, 658) (first italics added; *see* OB, 42-44.) Obviously, therefore, McKesson's insistence that *Reno* controls this case ignores *Reno*'s actual holding and the basic appellate principle that decisions are not authority for propositions not considered. (AB, 20-21.)

#### 2. The totality-of-circumstances necessarily includes the following *fact-intensive* question: Was the challenged conduct a *legitimate* exercise of managerial discretion or an abusive form of harassment?

McKesson's broad exclusion of managerial conduct cannot be the law. The totality-of-circumstances standard exists, in part, because

employers can fashion seemingly legitimate *theoretical explanations* for almost any type of conduct, including conduct which is clearly harassing and illegal. Therefore, the mere fact that the allegedly harassing conduct concerns what might arguably be termed a "managerial decision" does not create a "get-out-of-jail-free" card. (OB, 48-49.)

*Miller* provides the perfect illustration of why *context matters* and why mere labels (such as "managerial discretion") cannot be allowed to side-track the analysis. There is no debate that the very actions at issue in *Miller*—*e.g.*, deciding who should receive promotions—can be at the very heart of "managerial" prerogative. Nonetheless, this Court did not hesitate to find that because those promotion decisions were motivated by sexual favoritism (rather than the merits) the decisions could give rise to a hostile work environment claim. (*Miller*, 36 Cal.4th at 467-468.)

Recognizing the key difference between *true* managerial discretion versus abuse-of-managerial-discretion is inherent in our FEHA jurisprudence. For example, it is analogous to the typical "pretext" analysis frequently required in employment discrimination/wrongful termination cases. Juries are routinely asked to weigh the facts, separating *legitimate* employer decision-making from *illegitimate* decision-making. Whatever level of protection the former may receive, it is clear (under *Miller* and

numerous other cases) that the latter (*illegitimate* employer decision-making) is entitled to no protection at all.[1]

The decisive importance of *context* was recently illustrated in *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264. There, the focus on context led this Court to conclude that no actionable harassment had occurred. This Court repeatedly stressed that the nature of the workplace (the writing room of an adult audience comedy show) was a controlling factor in evaluating whether the conduct alleged could support a hostile environment claim. (*Id.* at 286-294.) In the abstract, the conduct was grossly offensive. But, rather than engage in a formulaic review of a checklist of recognized acts of harassment, the *Lyle* Court insisted that the "crude or inappropriate language" and "vulgar pictures" had to be judged

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[1] Given the record here, this Court has no need to address the precise parameters of *how much protection* should be given to *legitimate* decision-making. It is undisputed that Schoener's criticisms about Roby's performance and job (*e.g.*, "no brainer") were *not even believed* by Schoener. (OB 19.) *Miller* held that a *supervisor*'s "making unjustified criticisms of [plaintiff's] work" was one of the acts which supported the harassment claim. (*Miller*, 36 Cal. 4th at 455 & 466-468.)

Thus, the only legal question our case raises is whether conduct which the jury and trial judge, alike, concluded was *illegitimate* supervisorial conduct is somehow insulated from harassment liability because a theoretical connection to managerial decision-making can be spun.

by considering the context in which they arose (the totality-of-circumstances).

*Lyle* extensively cited *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, 81-82, where the United States Supreme Court similarly analyzed *the context* of the conduct, noting the stark difference between a football coach smacking the buttocks of a player versus smacking the buttocks of a secretary:

> The real social impact of workplace behavior depends on a constellation of surrounding circumstances, expectations, and relationships which are *not fully captured by a simple recitation of the words used or the physical acts performed.* (italics added.)

As noted, because of *Miller* (and other cases irreconcilable with the appellate court's treatment of "managerial discretion"), McKesson is forced to abandon its prior stance and construct a new justification for the appellate result below. Its solution to this dilemma is to piece together the most obvious recognized exceptions to any notion of managerial discretion to fashion McKesson's "List-of-Recognized Abusive Actions" ("McKesson's Selective List"). McKesson then treats its Selective List as exhaustive. The predicate for McKesson's proposed new rule is the implied assertion that there is a well-settled *itemization* of "abusive" conduct, that category is forever closed, and conduct which differs from that which a prior case has found to be actionable is forever immunized.

Of course, McKesson can cite no case which created—or recognized—its Selective List of harassment-worthy acts. This is not surprising. It would be unprecedented if, on a particular date, the progression of common law judicial development in harassment law was suddenly and permanently halted.

Moreover, McKesson's "abusive" versus "non-abusive" approach is directly contrary to *Oncale*'s and *Lyle*'s teaching. Contrary to *Oncale*, McKesson mechanistically attempts to capture "by a simple recitation of the words used or the physical acts performed" whether they are harassing and actionable. (*Oncale*, 523 U.S. at 81-82.) Nor did *Lyle* look to any set-in-stone "list" of acts previously-deemed actionable to determine whether a harassment claim was stated. Instead, *Lyle* focused on its particular factual context in applying case authority to reach its conclusion. (*Lyle*, 38 Cal.4th at 288.)

Because context is critical, McKesson's Selective List conflicts with the core roots of harassment jurisprudence. McKesson would replace the "totality-of-circumstances" test with McKesson's own, newly-minted Selective List test.

### 3. McKesson's purportedly exhaustive List eliminates or overlooks many recognized forms of harassment.

McKesson's entire argument depends on the following bit of alchemy. Whereas the FEHA forbids "harassment"—a very broad term—McKesson subtly switches that term with one it prefers, labeled "abusive" versus "non-abusive."

Under McKesson's definition, "abusive" conduct includes *only*: (1) physical or sexual touching; (2) verbal abuse, *i.e.*, racial or gender-based epithets, gratuitous *ad hominem* name calling, or repeated name calling or profanity; and (3) illegal supervisorial conduct, *i.e.*, sexual *quid pro quo* demands. (AB, 22 n.16.) But, this attempt to pigeon-hole and confine the scope of harassing conduct does not even comport with the dictionary definition of the term. (*See e.g.*, *Black's Law Dictionary* (7th Edition, 1999, p. 721) [defining harassment as "words, *conduct or action* (usually repeated or persistent) that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress in that person and serves no legitimate purpose"] (italics added).)

In addition, McKesson's Selective List does not even accurately capture the full breadth of the existing case law defining harassment.

Contrary to McKesson's suggestion, courts have *not* limited the evidence admissible to establish a hostile environment to only verbal or

physical abuse, or *quid pro quo* demands. Rather, courts have routinely recognized that a wide-range of conduct outside of McKesson's narrow list may support harassment claims, including conduct that could (theoretically) be linked to a supervisor's job duties. (*See e.g.*, *Birschtein v. New United Motor Manufacturing* (2001) 92 Cal.App.4th 994, 1001-1002 [disquieting staring]; *Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 348 [overtly hostile, non-sexual conduct, *e.g.*, *singling plaintiff out* for poor work assignments, *spreading false rumors* about plaintiff's abilities, making false complaints about her performance, etc.]; *Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30, 33 & 36-37 [insulting plaintiff for following orders; denying responsibility when plaintiff was criticized for following those orders; threatening employee's job; ordering plaintiff to remove files from another worker's desks, then berating her for getting caught; instructing plaintiff to hide documents, etc.].)

This Court's *Miller* decision provides another good example. Among other conduct which supported the harassment charge was the campaign of "ostracism" that Miller's supervisor waged against her. (*Miller*, 36 Cal.4th at 473.) This campaign *included* "loss of work responsibilities, *demeaning comments in the presence of other employees*, loss of entitlement to a pay enhancement and to disability accommodation," and other oppressive conduct. (*Id.* at 467-468) (italics added.)

The artificial narrowness of McKesson's Selective List is also underscored by the commentators. For example, a leading treatise notes that singling-out an employee for negative treatment is a commonly accepted type of harassment evidence. (*Chin, et al. Cal. Practice Guide: Employment Litigation* ("*Chin, et al.*") (Rutter Group 2007) ¶10:273, p. 10-53 ["...a *wide range of conduct* may give rise to liability for racial or national origin harassment"[2] including "*singling someone out* for poor treatment on the basis of race or ethnicity."] (italics added).)

The FEHC's definition of harassment expressly includes "visual forms of harassment." (2 Cal.Code Regs., §7287.6(b)(1)(C).) Schoener's public displays of disgust when Roby took her "daily" accommodation breaks fit within this broad category. (RT418&536.) But this too falls outside of McKesson's proposed verbal, physical or *quid pro quo* only definition.

In short, harassment under California law consists of *any* conduct that "shows itself in the form of intimidation and hostility for the purpose of interfering with an individual's work performance." (*Accardi*, 17 Cal.App.4th at 348.) Regardless of the type of conduct (verbal, physical,

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[2] The identical statutory provision that bars race or national origin harassment also bars disability-related, and all other forms of, harassment. (Government Code §12940(j)(1).)

etc.), "a workplace may give rise to liability when it 'is permeated with 'discriminatorily [disability-based] *intimidation, ridicule, and insult*,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" (*Lyle*, 38 Cal.4th at 279 (citation omitted and italics added.)

The reason McKesson's straight-jacket list of actionable harassing conduct finds no case law support should be obvious. Where a supervisor is determined to harass an employee, there are countless different ways that goal can be achieved. Sometimes harassment is explicit, such as physical groping or blatant racist comments. Other times, harassment manifests itself in a combination of derogatory comments ("very disgusting") and a pattern of hostility, exclusion and non-verbal abuse ("looks of disgust," ignoring, shunning, etc.). Harassment law requires flexibility in considering what does and does not constitute actionable harassment.

In *Cel-tech Communications, Inc. v. Los Angeles Cellular Telephone Company* (1999) 20 Cal.4th 163, 193, this Court observed that the ways in which fraud may be practiced "are as many and as various as the ingenuity of the dishonest schemer can invent." The same may be said of harassment. Necessarily, any attempt to create an exclusive list of harassment conduct is fore-doomed for the same reason that an approved "list of fraudulent acts" would be laughed at.

### 4. McKesson's argument would create an important gap in FEHA coverage leaving employees who are abused by supervisors (but who suffer no materially adverse employment action) without any FEHA remedy.

To justify immunizing most supervisor abuse from any claim of harassment, McKesson argues that the FEHA protects this conduct under a discrimination rubric. (AB, 19-20.) But this is not really the case. The Court of Appeal's treatment of *Reno*, if upheld, would create a hole in the FEHA's protection. Such an interpretation would permit a supervisor to abuse an employee through the use of management power *as long as* the abusive conduct did not rise to the level of creating an adverse employment action (a necessary element of any discrimination, but not harassment, claim).

Consider the following all-too-real hypothetical. Assume that an African-American employee, because of his race, is ignored on a daily basis by his supervisor, criticized publicly and falsely about his job performance, ignored at meetings, never given displays of recognition which his supervisor routinely gives to all other employees, and is ridiculed for observing Martin Luther King Day by taking off work, when other company employees worked that day. Assume the harassment meets the

severe or pervasive test, is clearly "because of" the employee's race, and wreaks emotional havoc on the employee's mental state.

If, despite the daily abusive treatment, the hypothetical African-American employee continued to receive raises and positive formal work evaluations, no adverse employment action could be shown. Thus, no discrimination claim could be stated. (*Malais v. Los Angeles City Fire Dept.* (2007) 150 Cal.App.4th 350, 358 [continued raises and promotions defeated adverse action claim].)

If the appellate court's decision were embraced, the abused employee would not be able to state a harassment claim either. In short, he would have no remedy under the FEHA despite having been subjected to the supervisor's message of "intimidation, ridicule, and insult." (*Lyle*, 38 Cal.4th at 279.)

In cases like this hypothetical, the FEHA's protection against harassment, not discrimination, provides the only legal deterrent against the conduct and the only remedy for the abused employee. Discrimination claims are meant to protect against discriminatory management decision-making that leads to adverse employment actions. Conversely, conduct like shunning, ostracism, displaying contempt (*e.g.*, "very disgusting," looks of

"public disgust," etc.) and other similar abuse (even when perpetrated by managers) is part of what only the harassment laws can protect against.

There is an independent reason to reject McKesson's argument. Our OB demonstrated that insulting, ostracizing and shunning an employee because of a disability (or the resulting accommodation needs) is forbidden under the Americans With Disabilities Act's ("ADA") protections against disability-based harassment. (OB, 52; *see also Chin, et al.*, ¶9:1058, p. 9-93-94; *Fox v. General Motors Corp.* (4th Cir. 2001) 247 F.3d 169, 178.)

McKesson does not dispute that the ADA prohibits this type of conduct as harassment (*not* discrimination). Nonetheless, McKesson asks this Court to construe the FEHA's disability-harassment protections as *less protective* than those under the ADA. (AB, 27 n.19.) But, this callous request turns California's disability-law protection on its head. Our Legislature made clear that "[a]lthough the federal act *provides a floor of protection*, this state's law has always, even prior to the passage of the federal act, afforded additional protections." (*Gov. Code* § 12926.1(e)) (italics added); *see also Chin, et al.*, ¶9:2096, p. 9-160.)

### 5. McKesson's crocodile tears concerning the danger of impeding the interactive process have nothing to do with this case.

McKesson voices a purported concern that supervisors, like Schoener, need leeway in disability harassment cases because of the legal obligation to engage in the interactive process. (AB, 34-35.) Given the facts of this case, the cynicism of this argument is overpowering. Any suggestion that Schoener's harassment was somehow a part of the interactive process is perverse. It is grossly offensive (and not a little ironic) to suggest that part of the "interactive process" required of management is to shoot a hostile look of "general disgust" at a subordinate employee struck with a severe panic attack as the employee takes a desperately-needed accommodation break to recuperate. (RT418;535-536.)

Besides the other absurdities in this claim, we note that Schoener adamantly (and falsely) denied at trial even knowing that Roby had a disability or needed any accommodations. (RT810-820;825-826;829;834;839;1269;1282;1291-1299.) Given her denial of the predicate knowledge, McKesson cannot seriously suggest her conduct was justified as a necessary part of an interactive process.

Nor do we need to fear whether—in some, theoretical, other case—the interactive process may be implicated. Where discussion of a

worker's disability occurs as part of a *good faith exploration* of possible accommodations, it is obvious that liability will not attach for such conversations. Conversely, if the conversations are really abusive and undertaken for improper motives, no protection should attach. Like so many other areas involving the employer's true motivation, this is a jury *fact question.*

### 6. McKesson's policy arguments fail.

McKesson offers a series of policy arguments trying to squeeze the appellate court's decision within *Reno*'s rationale. (AB, 30-32.) But McKesson ignores an overriding truth—*Reno*'s rationale was expressly predicated on the assumption that there was no need to impose *individual* liability for discrimination *precisely because* employers will still remain liable under the FEHA, and thus "will not condone discriminatory acts by their supervisory employees, because the employers must ultimately pay." (*Reno*, 18 Cal.4th at 661-662.) This is the polar opposite of the Court of Appeal's decision in our case, *i.e.*, that nobody, *neither* employer *nor* supervisor, is liable for the harassment.

McKesson also asserts that imposing harassment liability for conduct theoretically related to management duties would somehow "chill"

management decision-making by supervisors who fear liability. (AB, 30-32.) But the very authority on which *Reno* was based refutes this argument. *Janken v. GM Hughes Elecs.* (1996) 46 Cal.App.4th 55, 63, states that "conduct *presumably* engaged in for personal gratification, because of meanness or bigotry, or for other personal motives" is *not* "conduct of a type *necessary* for management of the employer's business or performance of the supervisory employee's job." (italics added.)

These *Janken*-recognized exceptions to legitimate supervisory actions are precisely what is at issue in our case, which involves conduct such as publicly insulting a subordinate (*e.g.*, "no-brainer"), etc. To paraphrase *Janken*: "No supervisory employee needs to" call a disability-related skin condition disgusting "to carry out legitimate objectives of personnel management." (*Id.* at 64; *see also Reno*, 18 Cal.4th at 657 ["Shouting out loud, however, as distinct from making personnel decisions, might be deemed actionable harassment."].) Likewise, shunning, ostracism or ridicule are not a necessary—or even legitimate—part of true management.

Finally, we note that McKesson's policy arguments ignore a central point our brief made: exempting supervisors who use the very tools of management to achieve harassment goals is fundamentally inconsistent with

the Legislature's decision to provide strict liability for supervisor harassment even when the harassment is "authorized ... by the employer." (*Compare* OB, 45-47 *with* AB, 27-28.) The Legislature obviously desired that, in affixing liability for harassment, supervisors be more accountable—not less so—than mere coworkers.[3]

### C. Even if this Court disagrees with our interpretation of *Reno*, the harassment verdict would still have to be reinstated given the jury's *factual* determination that Schoener's conduct was not managerially-necessary.

Our OB demonstrated that, even if this Court rejected our interpretation of *Reno*, the harassment verdict must still be reinstated. At McKesson's insistence, the jury was instructed with McKesson's proffered instruction tracking *Reno*.[4] McKesson thus sought the jury's determination

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[3] McKesson not only ignores that its proposed new rule would destroy the totality-of-circumstances test, it likewise ignores another key point: conduct by a supervisor, aided by the authority of supervisorial power, is more likely to interfere with a subordinate employee's work performance and, thus, more likely to constitute actionable harassment. (OB, 49; *Miller*, 36 Cal.4th at 462-463.) .

[4] It read: "Disability harassment consists of a type of *conduct not necessary* for performance of a supervisory job. Harassment is not conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job." (AA880-881) (italics added.)

Bizarrely, McKesson asserts that Roby has not challenged this

of this factual question: whether the harassing conduct was necessary for performance of a supervisory job versus gratuitous abuse engaged in for personal reasons. (AA880-881.)

After it submitted this question to the jury as a factual matter, McKesson discovered it did not like the jury's answer. So it reversed course and declared that this really was a "legal issue," not a factual one and the instruction which it had demanded should not have ever been given!

Such game-playing cannot save McKesson from the jury's repudiation of its "necessary for-management" defense.

### 1. Without even addressing the reason the appellate court rejected its assertion that a de novo standard applies, McKesson continues to distort the proper standard of review.

The appellate court properly concluded that the jury's harassment verdict is reviewed under the substantial evidence rule. (Opinion23.) The court rejected McKesson's claim of a de novo standard, specifically

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instruction. (AB, 21 n.15.) This misses the point. This appeal presents no claim of instructional error. The significance of this instruction is that, even if this Court concludes that *Reno* does extend to harassment (as well as discrimination), McKesson cannot justify overturning the harassment verdict because the jury was instructed that it could *not* base liability on any conduct that was "necessary for performance of a supervisory job." (AA880-881.)

distinguishing the cases McKesson relies on as "those in which the court was called upon to *interpret a statute*," while "[t]his case does not require us to interpret a statute. The question with which we are confronted is whether the evidence supports a *factual* finding by the jury that Schoener and McKesson were guilty of unlawful harassment...." (*Id.*) (italics in original.) This question is one of substantial evidence, not de novo review.[5] (*Id.*; *see also Hope v. California Youth Authority* (2005) 134 Cal.App.4th 577, 589.)

Nonetheless, McKesson continues to urge that a de novo standard applies. (AB, 42 n.26.) Incredibly, in doing so, it cites the same cases the appellate court distinguished without even mentioning what the appellate court had done or why it allegedly was wrong. McKesson has no legitimate answer.

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[5] Although the appellate court articulated the correct standard of review, it failed to apply it properly. As we demonstrated in our OB, and we reinforce above, there was more than substantial evidence supporting the jury's determination that, excluding any acts which truly were necessary to the performance of supervisory duties, there was ample evidence that Roby suffered actionable harassment.

### 2. Retreating from the appellate court's holding, McKesson now concedes that gratuitous supervisor abuse is not immunized even if it occurs in the course of management duties.

Unable to defend the scope of the appellate court's holding, McKesson now concedes *the key point* it disputed below: "gratuitously *abusive* conduct by a supervisor directed at a plaintiff within the course of discharging legitimate management responsibilities [] *is* actionable and *should* be considered in assessing a claim of harassment." (AB, 2 [italics in original]; *see also* AB, 24 ["...abusive behavior—even if it occurs in the course of performing management responsibilities—is not" protected.].)

This concession does far more than merely acknowledge that the appellate court's analysis cannot stand.[6] It is fatal to McKesson's attack on the harassment judgment because substantial evidence supports the jury's conclusion that, far from being necessary to legitimate management concerns, Schoener's treatment was gratuitous abuse.

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[6] It was the *theoretical* connection to management activity, not whether the conduct was abusive or not, which led the appellate court to insulate it under its McKesson-induced misreading of *Reno.* (Opinion28.)

### 3. McKesson continues to ignore that it forfeited any right to argue management-need when *Schoener denied* even engaging in the very conduct that McKesson now claims was managerial necessity.

McKesson ignores the *key point* our OB made on this issue. Schoener never articulated any alleged managerial need for her harassing conduct. Quite the opposite: she *denied* having engaged in it.

We devoted almost four pages of discussion to this very point. (OB, 54-57.) McKesson offers no response.

There is none. The *only* person who could articulate why Schoener alleged acted as she did was Schoener. But once she even denied performing the acts, she was obviously precluded from purporting to justify *why* she performed them. Neither McKesson nor Schoener offered any evidence or argument during trial of a "management need" for Schoener's behavior.

To illustrate the impropriety of McKesson's afterthought legal argument—and the re-writing of history that necessarily accompanies it—consider McKesson's claim that Schoener's *public* denigration of Roby (telling her that she needed to take more showers) was "taken pursuant to Schoener's management responsibilities." (AB, 11 & 33.) Incredible.

When asked at trial *by defense counsel*, Schoener flatly denied making these very comments or instructing Roby to move her fan. (RT1282;1291-1292.)

Not only did Schoener deny engaging in this conduct, she *affirmatively* testified that there would have been no need (management or otherwise) for her to have done so:

> Q. When Ms. Roby was under your supervision, did you have that problem, Ms. Roby's body odor?
> A. No. (RT816-817.)

During closing argument, defense counsel *never* argued any "management need" existed for the harassing conduct. Counsel's argument was limited to claiming (unsuccessfully) that Schoener had not engaged in the conduct which Roby (and the corroborating witnesses) described. (RT1742-1746;1756;1771.)

Finally, McKesson does not even try to respond to the critical policy argument we made. It makes no sense to allow supervisors to deny the harassing conduct at trial and then to toss them an after-the-fact appellate life preserver. Recognizing (indeed, creating) a "management justification" defense in these circumstances would provide a perverse incentive for managers to perjure themselves at trial.

### 4. Substantial evidence supports the jury's implied determination that Schoener's treatment of Roby was gratuitous harassment, not "necessary management."

McKesson defends as managerial-necessity Schoener's public insults telling Roby to shower and bathe more frequently. (AB, 33.) Besides Schoener's denial that this occurred, there is another reason McKesson cannot justify Schoener's actions based on managerial necessity.

Schoener herself affirmatively testified that Roby's body odor was *not* a problem during her supervision of Roby. (RT816-817.) Thus, McKesson's suggestion that Schoener was motivated to act because "other employees had complained about Roby's strong body odor" is an attempt to mislead this Court. (AB, 33 n.23.)

Similarly, McKesson cannot seriously defend Schoener's *public* denigrations of Roby's job or performance. (RT420-422;474-475;530;595-596;600-601.) McKesson's policy required correction in *private*. (RT472.)

Because the jury resolved this inherently *factual claim* against it, all of McKesson's briefing about the possible existence (and scope) of a management necessity defense is a red herring. Whether such doctrine does or does not exist (in a harassment context) cannot justify the Court of Appeal's decision based on the record in this case.

### D. McKesson cannot obscure the substantial evidence supporting the jury's (and the trial judge's) findings of severe *or* pervasive harassment "because of" disability.

#### 1. Substantial evidence supports the conclusion that Schoener harassed Roby "because of" her disability.

Once again, McKesson is forced to retreat from the appellate court's erroneous position. McKesson now concedes what always was the proper legal standard: "[O]nce a prohibited animus is established by *substantial evidence*, the trier of fact *may infer* that *other acts* of harassment—even those that on their face make no reference to the employer's disability—were motivated by that animus."[7] (AB, 40 [first italics in original]; *see also* OB, 61-63.) If only the Court of Appeal had properly applied this standard, it would have found that the jury's conclusion that Schoener's harassment was "because of" Roby's disability was supported by substantial evidence. The appellate court's own words prove this. (Opinion30 [acknowledging that "Schoener's occasional negative comments about Roby's sweating and body odor" could be viewed as "colored by discriminatory animus"].)

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[7] *See e.g.*, *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1163 ("This conduct, although not overtly sexual in nature, is colored by [defendant's] other clearly sexual conduct and, so colored, itself takes on an appearance of sexually offensive conduct.").

But the court mistakenly believed every piece of evidence had to contain evidence that it was motivated by illegal animus. (Opinion28-30; OB, 61-65.) Given McKesson's concession of the test that the Court of Appeal *should* have applied, the issue is simple: Does substantial evidence (whether direct or indirect) support the conclusion that Schoener bore at least some animus at Roby's disability?

Of course it does. Any one of the following pieces of evidence—even standing alone—would support a finding of animus. Collectively, they emphatically do so:

- Schoener's direct, derogatory slur targeting Roby's disability symptoms (head sweats and arm digging) as "very disgusting" and her insultingly telling Roby to take more baths when Schoener knew baths could not cure the odor caused by Roby's mediation. (RT527-528;533-534;595-596.)
- Schoener's visible and public displays of "general disgust" targeted at Roby's accommodation needs (rest breaks). (RT417-418&536.)
- Schoener's visible, vocal and public displays of annoyance at Roby's disability-related absences (something Schoener did with no other employee). (RT417-418;475;535-536.)

- Schoener's discrimination 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.[8] (Opinion34-36;RT502.)
- Schoener tricking Roby (*e.g.*, "new start"), effectuating the "deliberate plan to rid [McKesson] of the inconvenience of accommodating a mentally disabled employee." (Opinion34-36.)
- Schoener's refusal to accommodate Roby's disability by excusing her disability-related absences. (*See e.g., Kells v. Sinclair Buick-GMC Truck, Inc.* (8th Cir. 2000) 210 F.3d 827, 833-834 [supervisor's failure to accommodate disability permits an inference of animus].)
- Schoener's exclusion of Roby, and *only Roby*, from recognitions and acts of appreciation she consistently gave *every other employee*. (RT419-420;471-472;506;531;1271-1272.)

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[8] The "because of" requirement can be met by "direct comparative evidence about how the alleged harasser treated members" outside the protected class. (*Oncale*, 523 U.S. at 80-81.)

Faced with this mountain of evidence supporting the jury's finding of Schoener's disability-related animus, McKesson advances the following argument: "The interactions between Schoener and Plaintiff that *did* overtly relate to her disability were of the type that the disability laws contemplate and even require," which "cannot support an inference of disability-based animus." (AB, 39.) This is amazing. In McKesson's view, California's disability laws "require" supervisors to demean an employee's disability as "very disgusting," to intimidate and ridicule the employee for exercising her legal right to accommodations, and to publicly denigrate the employee about her disability-related body odor—all in the name of discharging its good faith obligation to engage in the interactive process.

McKesson's attempt to distinguish *Dee v. Vintage Petroleum* backfires. (AB, 37 n.24.) McKesson concedes *Dee* stands for the proposition that from a single derogatory "slur, a reasonable jury could infer that [the slur] was not an isolated event because there was other evidence of abusive conduct." (*Id.*) McKesson tries to avoid this holding by claiming that "there is simply no overt evidence of disability-based animus" in this case. (*Id.*) As detailed above, the record shows otherwise.

We acknowledge that there is no well-recognized and universal slur that exists to describe people to who have a severe panic disorder

(manifested by self-mutilation, arm digging and spontaneous and profuse head sweats). In insulting Roby's condition, therefore, Schoener was forced to improvise. But the somewhat unusual nature of the protected trait (panic disorder as compared, for example, to ethnicity) does *not* make Schoener's animus any less overt.

McKesson also falls far short in its attempt to reconcile the appellate court's decision in our case with *Lyle*. *Lyle* 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.) Our OB explained that the appellate court found substantial 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) (italics added; *see also* Opinion26;RT419-420;426-427;471-472;506;531;1271-1272.)

McKesson's response to *Lyle* proves our point: "The Court found that most of the conduct was not 'because of' sex because it was not

directed at the plaintiff or women in general, having been said around men and women indiscriminately." (AB, 36-37.) But our case is exactly the opposite: there is *no evidence* that Schoener treated others poorly or that she indiscriminately abused everyone around her. Instead, Schoener singled-out Roby for her campaign of ostracism.

McKesson's reliance on cases like *Roth v. Evangelical Health Sys. Corp.* (N.D. Ill. 1994) 1994 WL 388248 underscores its desperation. There, the court simply noted that "[t]o call [a visually-impaired employee] 'visually impaired' is not to hurl an epithet; by plaintiff's own admission, he is visually impaired or, indeed, his case would not now be before the court." (*Roth*, 1994 WL 388248, at *7.) We agree. We also submit that the *Roth* court would no doubt have reached quite a different conclusion had the employer called the employee "disgustingly blind."

### 2. Substantial evidence supports the jury's (and trial judge's) finding that the harassment was severe *or* pervasive.

McKesson did *not* argue below that the totality of harassing conduct (including those acts it claimed were *Reno*-protected) fell short of the severe *or* pervasive standard. Instead, McKesson's attack on the severe *or* pervasive requirement was limited to its claim that—after removing that

which it believed fell within necessary management action—what was left did not reach the necessary level. (Opening Brief in Court of Appeal, 40 ["The Actions of Schoener *Unrelated To The Performance* Of Her Supervisorial Duties Do Not Rise To The Level of Severe, Widespread Or Persistent Conduct...."] (italics added); *see also* Reply Brief in Court of Appeal, 27.)

The appellate court's conclusion that there was insufficient evidence of severe or pervasive harassment also necessarily depended on removing the bulk of the alleged harassing acts as "*Reno*-protected." The court first held that *Reno* "mandate[d] the conclusion that most of the alleged harassment here was conduct that fell within the scope of Schoener's business and management duties." (Opinion28.) After stripping away "most of the alleged harassment," the court reasoned that "[w]hen *Reno*-protected conduct is sifted out, what we have left ... is not sufficient to create liability for harassment based on a hostile work environment." (*Id.*)

Accordingly, our OB addressed the severe or pervasive issue with these points as undisputed. (OB, 57.) Given our showing that when the allegedly *Reno*-barred conduct is considered, there is no serious dispute that the severe or pervasive threshold is satisfied, McKesson, yet again, reverses its earlier position. It *now* claims that even if those acts McKesson alleges

are *Reno*-protected are included in the analysis, the totality of the evidence is still insufficient to support a finding of severe or pervasive harassment. (AB, 41-42.) Having elected not to argue this factual claim below, McKesson has waived it.

But even on the merits, this argument is easy to refute. First, our OB demonstrated that the harassing conduct—*even without including* the supposedly *Reno*-protected acts—was well beyond the severe *or* pervasive threshold. (OB, 58-61.) A fortiori, when the acts that the appellate court stripped away are also included, this conclusion increases exponentially. (OB, 15-24.)

Because of space constraints, we cannot re-detail each and every act of harassment that supports the verdict. Instead, we refer to our OB pages 15-24 and 58-61. Below we simply respond to the specific points McKesson makes in its answer brief.

In arguing the harassment here was not severe *or* pervasive, McKesson trivializes Schoener's abuse and distorts the evidentiary record. We offer a glaring example of McKesson's distortions.

- McKesson makes the ostrich-like claim that: "There is *no* evidence that Schoener ever engaged in verbal abuse such as epithets, name calling, repeated screaming or profanity."

(AB, 12.) Yet, only a few lines earlier, McKesson had conceded that Schoener called "Roby's arm digging and heavy sweating...'disgusting.'" (*Id.*; *see also* RT421-422;474-475;530.)

Addressing pervasiveness, McKesson quotes *Lyle*'s statement that absent "extreme" severity, "more than a few isolated incidents must have occurred." (*Lyle*, 38 Cal.4th at 284; AB, 43.) The harassing conduct must show "a concerted pattern of harassment of a repeated, routine, or a generalized nature." (*Id.* at 283; AB, 43.)

We agree. But the record here contains not only some conduct that *itself* is severe ("very disgusting"), it also contains evidence of the "concerted pattern of harassment" discussed in *Lyle*.

As fully detailed in our OB, some of Schoener's harassing behavior was *daily* (ignoring and shunning Roby's morning greetings or responding with a look of disgust [RT421;473;493;531-532]) and other harassing behavior was frequent, *e.g.*, displaying public expressions of disgust at Roby's daily accommodation breaks. (RT418&535-536; *see also* OB, 15-19.)

Both the severity and the pervasiveness of Schoener's harassment was confirmed by the appellate court and Roby's coworkers. The court of

appeal aptly noted, the harassment "aggravated [Roby's] symptoms and left her emotionally ravaged." (Opinion31.) The humiliating and demeaning impact was fully perceived by others. Three of Roby's coworkers (Chew, Schenken and Steckman), themselves having been "appalled," "concerned," and "embarrassed," all testified at trial confirming Schoener's abuse. (RT416-424;471-475;484;493;496;506-507;517.)

## II. McKESSON CONTINUES TO OVERLOOK THE SUBSTANTIAL EVIDENCE ANALYSIS OF THE CLAIMED DUPLICATIVE DAMAGES.

As with certain other portions of its brief, when it addresses the claimed duplicative damages McKesson is forced to flee from the faulty logic of the appellate court's Opinion. In seeking to defend the decision to strip away the $500,000 of non-economic damages on the termination claim (because it supposedly duplicated the $800,000 on the accommodation claim), McKesson *fully concedes* the key point we made in our OB in attacking that ruling. (AB, 48.)

To appreciate the significance of that concession, we must: (1) explain the key error in the appellate court's analysis; (2) then show how we exposed it; and, (3) then show how McKesson was forced to concede

our central point. Thereafter we can address McKesson's unsuccessful efforts to salvage the appellate court's erroneous ruling.

We begin by highlighting the key point *which controls* the allegedly "duplicate damages" issue. There was a logical basis for the jury to award *distinct* noneconomic damages for the emotional distress caused by McKesson's year-long failure to accommodate Roby's disability while Roby still worked at McKesson *versus* the different (temporally and otherwise) noneconomic damages Roby *later* suffered after she was illegally terminated.

The appellate court never understood this central point. Instead, it wrongly concluded that "all of Roby's damages—*economic as well as noneconomic*—were based on the violation of her primary right to continued employment despite her mental disability." (Opinion15 [italics in original].) In short, it erroneously concluded that the different sums the jury awarded for the failure to accommodate claim *must have* duplicated the sums it awarded for the termination claims and, thus, the latter needed to be stricken. It, therefore, felt that our case was controlled by *Finch v. Brenda Raceway Corp.* (1994) 22 Cal.App. 4th 547, 552-556 where the jury awarded duplicative damages under three distinct *legal* theories for the

*identical factual behavior* (making false representations to a prospective employee to convince him to move to a new location). (Opinion14.)

Our OB exposed that fallacy. Quoting the pertinent portion of this Court's dispositive decision, we stated:

> [T]he [appellate] 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 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. (OB, 65.)

Now McKesson is forced to concede we were correct. It admits that:

> She [Roby] contends that McKesson's failure to accommodate 'caused noneconomic harm separate from that caused by the later (temporally-distinct) termination' (OB 66) and that the wrongful termination caused 'separate harm' (OB 67). We do *not dispute either* proposition. (AB, 48) (italics added.)

In short, McKesson cannot justify the very essence of the appellate court's ruling.

Given McKesson's concession—and given that McKesson has never suggested that the jury was misinstructed on this issue—we have a simple case of applying substantial evidence principles to the jury's verdict.

(*Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1159.) Here, the appellate court noted that, after the jury showed initial confusion, the trial judge sent it back to deliberate after telling the jurors "to arrive at an independent damage figure for each wrong that was committed." (Opinion16.) The appellate court described the clarification the jury received as follows:

> On the other hand, with respect to noneconomic loss, the [trial judge] urged the jury independently to arrive at a figure for each theory of relief. The court suggested for example, that the amount Roby deserved to be compensated for mental suffering caused by the wrongful discharge *might be different* from that attributable to McKesson's failure to accommodate her disability. The important thing however was that they *independently* consider and *assign a value* for each line item of noneconomic loss appearing on the forms. (Opinion17) (italics added.)

The jury's verdict (affirmed by the trial judge who presided over the case and was in the best position to know) is *presumed correct* and the jury is presumed to have followed the court's instructions. The sole basis the appellate court invoked for overturning the verdict in this respect was its belief that there was no difference between the "primary rights," *i.e.*, the underlying factual predicate for the failure to accommodate theory and the wrongful discharge theories.

But, our OB demonstrated that there was, in fact, a difference. Much to its chagrin, McKesson is forced to concede that we are correct and that the rationale of the appellate court's ruling is indefensible.

McKesson now struggles to erect new rationales. It fails.

First, McKesson argues that the jury awarded the "same amount of *economic* damages ($1.311 million)" for each of the theories (wrongful termination and failure to accommodate). (AB, 49.) McKesson erroneously reasons that this necessarily proves the jury connected the failure to accommodate claim with the wrongful termination claim.

But there is a far simpler explanation. As the appellate court stated:

> The trial judge added that the *economic* damage figure on all the verdict forms should *always be the same.* '[A] wage loss is a wage loss. If there was a wrong done that led to a wage loss, then that's what it is.' The economic loss number on one form would therefore transfer over to all the others.' (Opinion17) (first italics in original, second added.)

Therefore, a reasonable construction of the jury's award of economic damages throughout the claims is that the jury simply believed that the one economic loss Roby suffered should always be the same and should be filled-in identically on each special verdict form.

Next, in a true stretch, McKesson seeks to justify the appellate court's striking of the damages by quoting a snippet from the opposition to

defendants' summary judgment, *i.e.*, the purely factual point that absences that were necessary to accommodate Roby's disability were later used—illegally—to terminate Roby's employment. (AB, 49 n.31.) This argument has two obvious errors.

- There is a world of difference between: (1) making the truthful *observation* that absences which should have been legally excused were instead illegally used as a pretext to support the subsequent termination; and (2) the entirely separate issue of whether Roby suffered different noneconomic damages while she was not being accommodated *versus later* when she was illegally terminated. Nothing in the summary judgment opposition purports to address those damages-related questions.

- The opposition brief was not read to the jury or used as evidence of anything. Obviously, it cannot shed any light on what the jury thought when it awarded, as noneconomic damages, $800,000 for failure to accommodate and $500,000 for wrongful termination.

McKesson's final rationale is nothing but an ipse dixit. It argues that besides the two legal theories "that dealt only with the termination itself" the jury had a "third legal theory—failure to accommodate" that *allegedly* "covered both pre-termination conduct and the termination itself." (AB, 50.)

No! That is the precise question which the trial judge resolved contrary to McKesson's contention and in favor of Roby's interpretation of the verdict. That is the precise question which the appellate court misconceived and answered incorrectly based on an analysis which even McKesson cannot support.

McKesson's ipse dixit cannot displace the jury's express verdict, as interpreted and affirmed by the one entity (the trial judge) that our system entrusts with just that task. Because the trial judge's interpretation is not illogical (as McKesson is forced to concede) and because McKesson is unable to point to any principled basis for overturning it, the appellate court erred in taking away $500,000 of the damages as inherently duplicative. This Court should reinstate the $500,000 damage award on the wrongful termination claim. (*Tavaglione*, 4 Cal.4th at 1159.)

## III. THE HIGH REPREHENSIBILITY OF McKESSON'S MISCONDUCT (AND OTHER FACTORS) FULLY SUPPORTS THE $15 MILLION PUNITIVE DAMAGES VERDICT.

### A. We cannot even begin to address McKesson's legal arguments without first correcting McKesson's gross distortions of the factual record.

Our OB demonstrated that while the determination of the constitutional boundary is subject to *de novo* review, the jury's implied "findings of historical fact" are given "the ordinary measure of appellate deference." (*Simon v. San Paolo U.S. Holding Co.* (2005) 35 Cal.4th 1159, 1172; *see also* OB, 69 n.19.) McKesson never addresses—or purports to rebut—this standard. That, however, did not prevent McKesson from acting as if no such standard existed.

Pretending this Court can re-weigh the facts and resolve all inferences in *its* favor, McKesson repeatedly contends that the conduct which the jury, trial judge, and appellate court all found to be reprehensible and appalling was really nothing more than a big misunderstanding. In McKesson's revisionist view, it is even a "close call" whether McKesson was liable for the underlying FEHA claims (much less for punitive damages) given that its only fault was its contemporaneous failure "to appreciate that the limited information it had received" indicated Roby was entitled to any legal protection. (AB, 56 n.37; *see also* AB, 13-16; 52-56;

62-63.) In short, this case allegedly involves nothing more than McKesson's carelessness, a simple mistake, or liability based on mere "constructive notice." (AB, 4 & 53-56.)

McKesson's "failure to connect the dots" defense is premised on the contention that the jury merely found it liable based on "constructive notice." (AB, 4 & 53.) But this contention disregards the jury's explicit findings, repeatedly-made, that "McKesson *knew*...Roby had a mental disability" and yet failed to accommodate it and discriminated against her because of it. (AA885-887;AA939;AA940-941;AA946.)

McKesson "accepts" and "does not challenge" these liability findings on appeal. (AB, 4 & 5.) Thus, in assessing its reprehensibility, McKesson must also "accept [these findings] as the factual basis for [the] constitutional analysis of the punitive damages award." (*Simon*, 35 Cal.4th at 1172.) The jury's express findings of *both* actual knowledge *and* intentional discrimination are irreconcilable with McKesson's current spin of its malicious conduct into simple mistake or "constructive notice."

Moreover, the appellate court expressly repudiated McKesson's "failure-to-appreciate" spin. It observed that "the jury could ... conclude McKesson's management was *fully aware* that Roby was emotionally fragile and vulnerable due to her psychological condition" and "saw Roby

as an *easy target*, who *could be forced out* of the company...." (Opinion35-36) (italics added.) In short, McKesson (and Schoener) engaged in "a *deliberate plan* to *rid itself* of the inconvenience of accommodating a mentally disabled employee." (Opinion36) (italics added.)

The appellate court's conclusion that McKesson acted pursuant to a "deliberate plan"—*not* a mere mistake—is amply supported. As detailed in our OB, this "deliberate plan" began when management ignored Roby's contemporaneous oral reports that her absences were disability-related. (OB, 12-14.) It continued when, during the initial suspension meeting, Roby reported to Grover and Rafter that Schoener had tricked her (*i.e.*, "clean slate") and that the attendance policy was being applied more harshly to her than others. In that same meeting, Roby requested that FMLA leave be afforded to her retroactively. Instead of granting Roby retroactive leave (as Rafter had previously done for Hardesty), Rafter and Grover put on deliberate blinders during their investigation. (OB, 25-32.) McKesson's "deliberate plan" was then doubly-ratified when Rafter and Chilton conducted the *second investigation*, the very purpose of which was (purportedly) to determine whether McKesson was punishing Roby for her disability-related absences. (OB, 32-36.) Further, the record shows that,

institutionally, McKesson implemented a series of illegal, artificial barriers to employees obtaining protected leave. (OB, 8-12.)

What is most striking about McKesson's campaign to "rid itself" of the "easy target" is that this was *not* a low-level termination carried out by a nearly rank-and-file supervisor.

Rather, Roby's termination required the participation, authorization and ratification of *multiple high-ranking* McKesson upper-managers. Not only did Schoener (who the appellate court found to be a managing agent) discriminate against and mercilessly harass Roby, but McKesson's entire management and human resource chain of command (*Rafter, Grover and Chilton*) all approved and/or ratified the termination (multiple times).

McKesson has the gall to complain that its conduct can be faulted only through "20-20 hindsight." (AB, 53.) This is ironic given that the purported purpose of McKesson's two investigations was to determine whether the termination was justified. Had it conducted either investigation with even a modicum of good faith—rather than as part of a cover-up—it, too, would have reached the same conclusions as the jury, the trial judge and the appellate court.

Moreover, if this Court reinstates the harassment verdict (as we believe it should), the degree of McKesson's reprehensibility obviously

increases. Just like the termination, McKesson's upper management fully authorized and ratified what Schoener began. Between December 1999 through April 2000, Roby repeatedly complained (orally and in writing) to Chilton, Grover, Rafter and Steele about Schoener's abuse. *None* of these upper managers or human resource personnel attempted to stop Schoener's abuse or disciplined Schoener at all.[9] (OB, 21-24; *College Hosp. v. Superior Court* (1994) 8 Cal.4th 704, 726-727 (ratification "commonly arises where the employer or its managing agent is charged with failing to intercede in a known pattern of workplace abuse, or failing to investigate or discipline the errant employee once such misconduct became known.")

But McKesson's distortion of the factual record surrounding its reprehensibility is hardly limited to the overarching claim that its malicious conduct was merely a "mistake." There are numerous other examples of McKesson urging interpretations of the record that contravene the jury's (express and implied) findings. As if it prevailed below, McKesson cites snippets of testimony that support its point while ignoring other evidence which contradicts it. It also spins disputed inferences in its favor. Some examples:

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[9] Twisting the record, McKesson dismisses Roby's complaints as raising merely work-related, personnel issues—not harassment accusations. (AB, 11-12 n.8.) Nonsense. (*See e.g.*, 594-597.)

- McKesson disputes that it "required employees to use 'secret magic words' in order to obtain FMLA leave."[10] (AB, 6.) But, contrary to McKesson's wishful thinking, Grover (the highest-ranking employee at Roby's facility) admitted that McKesson did require use of the "magic words":

  Q. Do you recall testifying that the employee had to use the magic words that they, specifically requested FMLA leave to get FMLA leave?

  A. Yes. . . . (RT788-789; *see also* RT1437-1438.)

- McKesson's attempt to justify Chilton's investigation (AB, 15-16) is riddled with factual distortions. For instance, McKesson's suggestion that Chilton asked Roby to get medical documentation to support FMLA coverage (AB, 16) is directly contradicted by Chilton's testimony: "Q. Did you

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[10] McKesson's need to deny this fact is obvious: this requirement of "secret magic words" is an unlawful policy, an artificial barrier to employees obtaining leave. (*See e.g.*, 29 C.F.R. §825.303(b); *see also* 2 Cal.Code Regs. §7297.4(a)(1).)

ask her to get any documentation from her doctor to support her request for FMLA coverage? A. No." (RT1240.) Likewise, McKesson claims that "Chilton did not testify that she 'assumed that Roby's panic disorder may have been the reason for at least some 'occasions.'" (AB, 16.) Wrong. Chilton testified: "I assumed that the panic disorder, if that's what the doctor had said in the documentation, may have been the reason for [the] day of absence...." (RT991-992.) Finally, McKesson tries to dispute our point that Chilton had "actual knowledge" that Rafter had only verified the reasons for two of Roby's numerous absences that were counted as "occasions." (*Compare* OB, 35-36 *with* AB, 15.) But this is precisely what Chilton admitted. (RT948-949 ["He told me about a couple of the reasons, but not every single one."]; *see also* 975-976.)

- In an unseemly effort to deflect its own blame for Roby's termination onto Roby herself, McKesson falsely claims that all Roby needed to do was to respond to McKesson's termination letter with medical documentation and she could

have saved her job. (AB, 16.) This after-the-fact assertion directly conflicts with what McKesson wrote to Roby in the termination letter it ultimately sent her. That letter confirmed McKesson's (illegal) policy that absences were treated as "occasions" unless "time off is *pre-planned* and *scheduled with management* along with other requirements of the FMLA Policy...." (AA1988) (italics added.) Given McKesson's illegal policy that only "pre-planned and scheduled" absences could be exempted from McKesson's attendance policy, nothing Roby could have done for her unforeseeable disability-related absences could have cured her violation of McKesson's attendance policy.

- McKesson takes Roby to task because she never "submitt[ed] a written objection to McKesson's actions as provided for on the Notice of Discipline form." (AB, 55-56.) McKesson ignores that Schoener expressly discouraged Roby from putting her complaints on the form, telling her: "it's really not going to do any good...." (RT583-585;591;666.)

- McKesson falsely suggests that Roby did not identify the nature of her medical condition in her discussions with management. (AB, 53-56.) This simply ignores Roby's testimony. (*See e.g.*, RT531-533;541-545;689-690.)

Indeed, we could pick apart almost every sentence in McKesson's narrative concerning the history of Roby's absences, and McKesson management's response thereto, and show how it has been distorted to support the alleged "mistake" theory that the jury rejected. (AB, 5-11; 13-16; 52-56.) Space limitations prohibit such an effort.

### B. McKesson's comparison to the monetary amounts in other judicial decisions (especially published ones) is a deliberately slanted maneuver.

McKesson's punitive damages analysis begins with a deft sleight-of-hand. Purporting to put the punitive damages issue into "perspective," McKesson invites this Court to compare the raw amount of the monetary award here to the amounts in other, *published* cases. (AB, 51-52) This is wrong on so many levels.

- It violates the fundamental mandate of *State Farm Mutual Automobile Ins. v. Campbell* ("*Campbell*") (2003) 538 U.S. 408, 425 which teaches that any punitive damages calculation "must be based" upon the "circumstances of the defendant's conduct" and plaintiff's harm. No amount of searching through other decisions will reveal how to quantify the full measure of McKesson's reprehensibility, much less the proper amount of punishment required to deter its repetition given the grievous physical, emotional and economic harm McKesson visited upon Roby.

- Any comparison to the "size" of other punitive damages verdicts is inherently unfair and slanted. The truly large potential verdicts have often been carefully removed from the pool of final judgments through the device of confidential settlements. Consider, for example, *Anderson, et al. v. General Motors Corp.* (2nd District Appellate Case No. B135147, where the jury awarded punitive damages of $4.8 billion, which the trial judge remitted to $1.09 billion, from which the defendant appealed. (*See* Roby's Request for Judicial Notice to Be Filed.) After full briefing, the appeal was abruptly dismissed. (*Id.*) Because cases like *Anderson* suddenly disappear off the radar screen because of confidential settlements and cannot later be referred to, McKesson's attempt to look at "other cases" is playing with a deck stacked artificially in favor of lower judgments.

- McKesson compounds its sleight-of-hand by artificially limiting the universe of cases included in its comparison to *published* cases only. However, until the publication rules were recently amended, the presumption was *against publishing* opinions unless they created a significant change in the law. Thus, numerous cases which affirmed punitive damages—even though correctly decided—were never published. McKesson never offers any principled reason to exclude such cases from its list of large verdicts.

Equally disingenuous is McKesson's statement that the pre-remittitur punitive damages here are fifteen times that permitted in *Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020. (AB, 52.) This statement ignores the fact that this Court expressly overruled the reasoning that produced the $1 million in punitive damages in *Diamond Woodworks*. (*Simon*, 35 Cal.4th at 1182-1183.)

### C. One cannot seriously apply *Campbell*'s reprehensibility standards when 4/5 of its enumerated reprehensibility factors are never mentioned and the overall discussion is filled with factual distortion.

#### 1. McKesson's stunning omission of *four* of *Campbell*'s *five* reprehensibility factors destroys its "low reprehensibility" argument.

Our OB discussed the five reprehensibility sub-factors that *Campbell* articulated. We demonstrated that *all five* are present here and that they cry out for punitive damages at the high end of the spectrum. (OB, 69-73.) Incredibly, McKesson's response *ignores four* of *Campbell*'s five sub-factors and discusses only one (trickery and deceit). (AB, 57-58.)

This produces the following absurd contradiction: To even begin to justify the Court of Appeal's massive reduction of the jury's punitive damages verdict McKesson *must rely* on *Campbell*. (AB, 58-60) Yet, any focus on *Campbell*'s actual analysis of the sub-factors defining reprehensibility is fatal to McKesson's "low reprehensibility" claim. Therefore, other than a brief discussion of the deceit/trickery sub-factor, McKesson's entire treatment of reprehensibility ignores the *Campbell* sub-factors and consists of the re-writing of facts to suggest its *intentional discrimination* was just a mistake. (AB, 52-58.)

Because McKesson relies upon only one little piece of *Campbell* to justify drastically cutting the jury's award, we must fill-in the balance of

*Campbell*'s reprehensibility analysis which McKesson studiously ignored. After noting that "[t]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct," *Campbell* explained, precisely, *how* courts must determine the degree of reprehensibility by focusing on *five* sub-factors:

> We have *instructed courts to determine the reprehensibility* of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. (*Campbell*, 538 U.S. at 419) (internal citations omitted).

### 2. In our case, *all five* reprehensibility sub-factors point in favor of high reprehensibility.

As discussed above, McKesson's answer brief *never attempts* to dispute our showing that four of the five reprehensibility sub-factors support a finding of high reprehensibility. (*Compare* OB, 69-73 *with* AB, 52-58.) The only sub-factor which McKesson attempts to challenge is the fifth, *i.e.*, McKesson asserts that "[t]here is no evidence that *McKesson* engaged in or authorized 'trickery and deceit.'" (AB, 57) (McKesson's italics.)

McKesson's use of italics is meant to distance itself from Schoener's conduct. Even McKesson does not dispute that Schoener engaged in deceitful conduct by tricking Roby into believing that she would have a "new start" (or a clean slate) under the attendance policy if she could make it to January 18, 2000 without any new "occasions." (Opinion35; *see also* RT507-507;551-552;599-600;605-606;1277-1278.)

Thus, the only dispute as to the trickery/deceit sub-factor is whether McKesson should be held liable for Schoener's conduct. The appellate court easily answered that question in the affirmative, finding substantial evidence that Schoener was McKesson's managing agent. (Opinion35 n.6.) McKesson never challenged that finding below or by Petition for Review.

But wholly apart from the appellate court's managing agent conclusion, there is an independent reason that McKesson is liable (in punitive damages terms) for Schoener's conduct. The record shows that McKesson's managing agents above Schoener repeatedly ratified Schoener's conduct.[11]

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[11] Grover, the Distribution Center (DC) Manager, was responsible for the overall operations of the DC, including managing its 170 employees and overseeing its entire operations. Grover's responsibility was broad and all-inclusive, ranging from inventory, facilities, warehouse, transportation and delivery, accounting, and computer departments. (RT728-730;735;746;797;1537-1540.) Chilton was the *Regional Director* of Human Resources for the Northwest and Southwest regions, covering multiple states and *over a thousand employees* in approximately15 separate

- First, on April 13, 2000, Roby protested to Grover and Rafter that Schoener had lied to her about having a "clean slate." (AA1974.) Grover and Rafter conducted a full investigation of Roby's concerns, confirmed that Schoener had told Roby about the clean slate, but nonetheless decided to uphold Schoener's decision. (OB, 27-32.)

- Next, in response to McKesson's April 17th termination letter, Roby pleaded to Chilton that, *inter alia*, Schoener promised her a "clean slate" if she "made it" (absence-free) to January. (RT1217-1219.)

- Again, on April 24, 2000, when Roby submitted to Chilton her written Request for Action, Roby wrote that Schoener had promised her a "clean slate" if she made it to January 2000, which Roby did. (AA1981-1982;RT610-612;945.) McKesson concedes that Chilton "conducted a complete investigation and prepared a written report in which she reviewed each of Plaintiff's complaints...." (AB, 15; *see also* OB, 32-37.) Thereafter, she nonetheless approved the decision to terminate Roby. (AA1984-1989.)

In short, despite Roby's multiple attempts to get McKesson (via Chilton, Grover and Rafter) to correct Schoener's act of deceit and trickery, McKesson did exactly the opposite. It *knowingly* ratified Schoener's

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locations. (RT765;865;932;999-1000.)

termination trap. In her final termination letter to Roby, Chilton accurately stated: "Your complaint included the following issues: 1. You were informed by Karen Schoener, your manager, after you received your final written warning, that if you could get to January without any other occasions, everything would be okay as far as your attendance." (AA1984.)

McKesson's course of malicious conduct left Roby "financially and emotionally devastated," and caused her to "deplete[] her savings, los[e] her medical insurance, [go] without treatment for months, bec[o]me suicidal and develop[] agoraphobia." (Opinion9.) Thus, the human toll was enormous, supporting a finding of high reprehensibility in this uniquely tragic employment discrimination case.

This conclusion is likewise dictated by consideration of *Campbell*'s five reprehensibility sub-factors. By its silence, McKesson concedes that four of them dictate a finding of high reprehensibility. The only factor McKesson even discusses is—upon analysis—just as radioactive to its cause as the four other factors it feared to mention.

### D. Given McKesson's reprehensibility and the need to adequately deter McKesson, the mid-single digit ratio here falls well within the permissible constitutional maximum.

#### 1. Rigid and mechanistic ratios cannot replace reprehensibility as the paramount consideration.

In *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1207, this Court held that "what ratio is reasonable necessarily depends on the reprehensibility of the conduct." (*Id.*) Likewise, the United States Supreme Court has firmly rejected attempts to impose bright-line ratios as the simplistic substitute for meaningful excessiveness review. (*See e.g.*, *Campbell*, 538 U.S. at 428 ["We decline again to impose a bright-line ratio...."].)

#### 2. McKesson has not proven that the compensatory damage award contains *any* punitive element.

Seeking to justify the appellate court's drastic reduction of the punitive damages, McKesson baldly asserts that the compensatory damage award contained a punitive element. (AB, 59-60.) No support for this claim is offered or even hinted at.

Moreover, the record precludes this supposition. The trial court *repeatedly instructed* the jury that, when awarding compensatory damages, it could not punish. Likewise, both sides' counsel emphasized the

distinction between compensation and punishment in the punitive damage phase closings. (RT1672-1673;1792-1793;1836;1844;AA891.)

Under California law, when juries are instructed not to punish at the compensatory damages phase and punitive damages are determined in a distinct, second phase with proper instructions, courts *cannot presume* that emotional distress awards contain *any* punitive element. Rather, the defendant must affirmatively show that there was such a component. (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 966:

> Unlike in [*Campbell*] the compensatory damages here do not include compensation for outrage and humiliation. While they include a substantial award for noneconomic damages for fear, anxiety, and emotional distress, in closing argument, [both] counsel ... warned the jury not to duplicate an amount awarded as compensatory damages. We *therefore reject* Century's *unsupported assertion* that the punitive damages award is duplicative of the compensatory damage award. (italics added.)

### 3. Whenever the defendant's conduct causes significant harm, *Campbell*'s dicta about "substantial" compensatory damages cannot create a judicial straight-jacket.

*Campbell* contains one sentence of dicta suggesting that "substantial" compensatory damages (whatever that vague term means) permit "a lesser ratio, perhaps only equal to compensatory damages...." (*Campbell*, 538 U.S. at 425.) Our OB explained *why* this Court should *not* follow that dicta. (OB, 74-77.) Where courts (including other state high

courts) have substantively analyzed this issue, they have *not* interpreted this single-sentence dicta as mandating a pre-determined 1:1 ratio (or even anything near it) whenever a compensatory damage award could be characterized as "substantial." (*See e.g.*, *Campbell v. State Farm Mutual Auto. Ins. Co. (Campbell II)* (Utah Sup.Ct. 2005) 98 P.3d 409, 418; *Hayes Sight & Sound, Inc. v. ONEOK, Inc.* (Kansas Sup.Ct. 2006) 136 P.3d 428, 448-449 [any decision which requires a 1:1 ratio "[b]ecause 'compensatory damages are substantial'" "distorts what the Supreme Court actually said in *Campbell*."].)

One obvious reason courts have refused to follow *Campbell*'s "substantial" damage dicta is because of the key importance of the deterrence function of punitive damages. It hardly makes sense to punish least those who cause the greatest harm.

Indeed, *Campbell*'s isolated sentence of dicta concerning "substantial" compensatory damages is *directly at odds* with the central theme of the balance of the *Campbell* opinion, *i.e.*, that there should be a proportional relationship between the harm caused (compensatory damages) and the punitive damages amount so that the greater the former, the greater the latter. *Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640 perfectly illustrates. There, the appellate court upheld a 9:1 ratio even though there was already a seemingly "substantial" compensatory damage

award ($5.5 million). The court pointed out that reducing the ratio because of larger compensatory damages:

> ...leads to the unsupportable proposition that those who commit the most devastating and reprehensible wrongs are given caps on their punitive damages exposure which those who commit lesser wrongs do not receive—a proposition standing the legitimate and necessary role of punitive damages *on its head.* (*Id.* at 1696-1697) (italics added.)

Courts have also recognized that requiring inflexible ratios just because the harm caused is significant would necessarily defy *Campbell*'s mandate that reprehensibility, not the ratio, is the "most important" factor in setting punitive damages awards. (*Campbell*, 538 U.S. at 419.)

McKesson offers no substantive response. It belittles the "two non-California authorities" we cited and counters with three intermediate California appellate court decisions. (AB, 59.)

But the cases McKesson cites did *not* apply a simple straight-jacket approach to the ratio analysis. Instead, the result in these cases was driven by a finding that the *reprehensibility was relatively low* or other similar factors. For example, in *Walker v. Farmers Ins. Exch.* (2007) 153 Cal.App.4th 965 the court upheld a low ratio because: (a) it found *low* reprehensibility; and (b) the trial court made explicit factual findings that the compensatory damage award already contained a punitive element.[12]

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[12] The opposite is true here. (AA1797-1798.)

(*Id.* at 973-974.) Still, *Walker expressly agreed* with the rationale of *Campbell II*, finding that the high reprehensibility in that case justified a "9:1 ratio" notwithstanding "substantial" compensatory damages. (*Walker*, 153 Cal.App.4th at 977.) Nor does *Jet Source Charter, Inc. v. Doherty* (2007) 148 Cal.App.4th 1 support McKesson's argument. There, too, the driving force of the decision was the low reprehensibility. (*Id.* at 11.)

McKesson also purports to find support for its argument in *Simon*. (AB, 58.) But as we showed—and McKesson ignores—*Simon* did *not* endorse any rigid, inflexible ratios. (OB, 74-75.) Instead, *Simon* expressly rejected the suggestion a 4:1 ratio was the constitutional outer-limit in the usual case. (*Simon*, 35 Cal.4th at 1182-1183.)

There is another critical reason why the size of the compensatory damage award cannot alone dictate the permissible amount of deterrence. *Campbell* reiterated that federalism demands that "each state may make its own reasoned judgment about *what conduct is permitted or proscribed within its borders*, and *each State alone can determine what measure of punishment*, if any, to impose on a defendant who acts within its jurisdiction." (*Campbell*, 538 U.S. at 422) (italics added).)

In rejecting *Campbell*'s single-sentence dicta, *Campbell II* emphasized this federalism principle:

> Just as behavior may be unlawful or tortious in one state and not in another, the *degree of blameworthiness* assigned to conduct *may also differ* among the states. [The Supreme Court should] ... be bound to *avoid creating* and imposing on the states *a nationwide code of personal and corporate behavior*. (*Campbell II*, 98 P.3d at 413) (italics added).

Our Legislature emphatically declared that freedom to work without discrimination is a fundamental right. (*Government Code* §12920.) To hold that a particular size of compensatory damage award automatically requires a particular cap on punitive damages would severely undermine the FEHA's purpose of "provid[ing] *effective remedies* that will both *prevent and deter* unlawful employment practices...." (*Government Code* §12920.5) (italics added).

McKesson suffers another problem—it ignores the context in which *Campbell* offered its dicta. There, the plaintiffs, who suffered no physical injuries and "only minor economic injuries," received "$1 million for a year and a half of emotional distress." (*Campbell*, 538 U.S. at 426.) This, the Court commented, was "substantial" compensation given the facts of the case, and it likely was "based on a component which was duplicated in the punitive award." (*Id.*)

Compare that to our case. Roby *did* suffer *physical* injuries (self-mutilation and increased panic attacks with increased symptoms). Moreover, she became agoraphobic and suicidal, and was reduced to a shell

of her former self. When McKesson illegally terminated her, Roby had a life expectancy of another 28 years, and she will suffer each day of each week of each month of each of those 28 years. (RT618&1134.) If this Court reinstates both the harassment damages and the wrongful termination damages, Roby's total emotional distress award will only be $1,900,000 for the destruction of her life. Even if the $1,000,000 award for a year and a half of worry in *Campbell* could arguably justify a lower ratio, the same cannot be said for a verdict that merely restores Roby's *actual economic loss* and allows her less than $2,000,000 for the life-long destruction she suffered.

### E. McKesson's massive net worth has to affect the ultimate result and support a higher-than-otherwise punitive amount.

McKesson vainly attempts to bury any consideration of its wealth as a factor in the calculation of punitive damages. But, ignoring wealth is directly contrary to *Simon*, where this Court held that "the defendant's financial condition is an essential factor in fixing an amount that is sufficient to serve" the goals of punishment and deterrence. (*Simon*, 35 Cal.4th at 1184-1185.) Indeed, *Simon* reaffirmed the central point that the very purpose of punitive damages will be defeated "if the wealth of the

defendant allows him to absorb the award with little or no discomfort." (*Id.* at 1185.)

That is our case! McKesson, ranked 16th on the Fortune 500, is the largest pharmaceutical distributor in North America. In 2004, it showed revenue of $69.5 billion and net worth of $5.165 billion. (AA2254; RT 1822-1823; 1826-1827.)

A punitive damage award of $15 million against McKesson represents a mere .3% of its net worth. If its reprehensibility were low, perhaps it could argue that its wealth cannot (constitutionally) justify a higher award. But where the most important factor (reprehensibility) is at the high end of the spectrum, McKesson's enormous wealth compels a sufficiently high sanction to adequately punish and deter. The $15 million awarded by the jury is well within the constitutionally-acceptable range.

### F. The FEHA's administrative jurisdictional limit is not a civil penalty within the meaning of the *Gore* guideposts.

McKesson misses the point of our discussion of the civil penalty guidepost. (*Compare* OB, 73-74 *with* AB, 61.) The FEHC is an administrative forum where an employee can *elect* to pursue a claim *instead* of litigating a court action. If the employee makes that election, there is a limit on the amount of compensation (whether for emotional distress, fines,

etc.) that the employee can receive in that administrative forum. This jurisdictional remedy limit does not purport to be a civil or statutory penalty. (*Government Code* §12970(a)(3).) Thus, because there is no comparable civil or statutory penalty for comparison purposes, this guidepost has limited use in the analysis here. (*Simon*, 35 Cal.4th at 1183-1184 [this "guidepost is less useful in a case like this one" that does not lend itself "to a comparison with statutory penalties."].)

### G. McKesson's claim that an appellate court must retain the jury's original ratio between compensatory and punitive damages has never been the law.

McKesson argues that because the verdict was reduced by 43% to eliminate alleged duplication, the punitive damages award must be reduced in the same proportion to preserve the jury's original ratio. (AB, 62.) McKesson cites two cases, neither one of which supports the assertion that courts are automatons which must maintain the jury's original ratio between compensatory and punitive damages. However, before showing how McKesson has grossly distorted those cases, it is important to show why the law could not be as McKesson claims it is.

California law is clear: "'The calculation of punitive damages involves a '*fluid process of adding or subtracting* depending on the nature of the acts and the effect on the parties and the worth of the defendants.'"

(*Croskey, et al. Cal Practice Guide: Insurance Litigation* (Rutter Group) ¶13:705) (italics original, citation omitted.)

This Court confirmed the fluidity of the process in *Adams v. Murakami* (1991) 54 Cal.3d 105, 110, stressing that the amount of punitive damages could only be judged for excessiveness if considered "*in light of* the relevant facts" because the nature of the inquiry is a "comparative one." (original italics.) All three factors (reprehensibility, proportionality and defendant's wealth) had to be measured against each other because, for example, failing to consider wealth would "be to eliminate a three-pronged analysis in favor of a two-pronged analysis." (*Id.* at 111.)

McKesson's position is even more extreme. It advocates a *single prong* approach [proportionality] as the *sole factor* to consider. Worse, it insists that no real analysis of proportionality be permitted but, rather, a fixed-ratio be rigidly imposed based solely on the jury's original ratio.

Nor do McKesson's two purported authorities (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1255 and *Diamond Woodworks*, 109 Cal.App. 4th at 1055-57) support its assertion that a *reduction* in compensatory damages compels a pro tanto reduction in punitive damages. *Diamond Woodworks* holds no such thing. It did *not* preserve the jury's original ratio, but instead remitted the punitive

damages based on since-disapproved reasoning that a 4:1 ratio is the constitutional limit "in the usual case." (*Id.* at 1055-1057.)

Likewise, *Las Palmas* does not—and could not—support McKesson's fixed-ratio reduction argument. There, the court's reduction of the punitive damages was largely dictated by an independent factor not operative here—the existing award was "grossly disproportionate" in light of the *relatively low* reprehensibility. (*Las Palmas*, 235 Cal.App.3d at 1255.)

In contrast to McKesson's inapposite cases, the decisions which have actually considered the issue have rejected the claim that the jury's original ratio need be maintained. (*See e.g.*, *McGee v. Tucoemas Federal Credit Union* (2007) 153 Cal.App.4th 1351, 1361 ["The reduction in compensatory damages did not require a corresponding reduction in punitive damages."].)

### H. Key conclusions regarding constitutional excessiveness.

A reviewing 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." (*Simon*, 35 Cal.4th at 1188.) Given its highly reprehensible conduct and enormous wealth, McKesson cannot seriously contend that the $15 million punitive damages award was

excessive. Indeed, McKesson's refusal to even admit that it acted improperly suggests the award is too low, not too high.

## IV. McKESSON'S ONLY DEFENSE TO THE PROCEDURAL PUNITIVE DAMAGE ISSUES IS TO DISTORT WHAT THE COURT OF APPEAL ACTUALLY DID.

If this Court reinstates the harassment verdict and fulfills its "constitutional mission ... to find a level higher than which an award *may not* go" (*Simon*, 35 Cal.4th at 1188), then the following discussion is moot. But, if this Court does not reinstate the harassment verdict, Roby is entitled to a conditional new trial if she declines to accept the remitted punitive damages amount. (*Id.*)

Nothing in McKesson's answer brief changes the fact that the appellate court drastically reduced the punitive damages verdict because it *assumed* the reversed harassment verdict tainted the jury's determination of the punitive damages amount. (Opinion39&42.) This key fact distinguishes our case from those cited in McKesson's brief where the appellate courts did, in fact, reduce the award to the *true* constitutional maximum and nothing in a re-trial could have changed the result. (AB, 65.)

## 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: May 29, 2008

Respectfully submitted,

Christopher H. Whelan, Inc.
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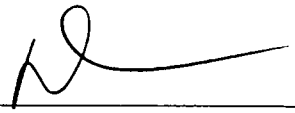
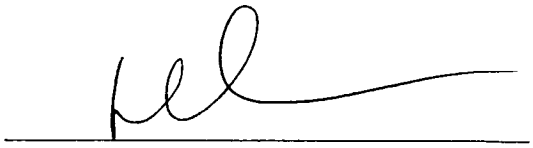
By 

David M. deRubertis, Esq.
*Attorneys for Petitioner and Respondent, Charlene Roby*

## 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 Reply Brief on the Merits contains 13,641 words, excluding those items identified in Rule 8.520(c)(3).

DATED: May 29, 2008



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 REPLY 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):

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

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

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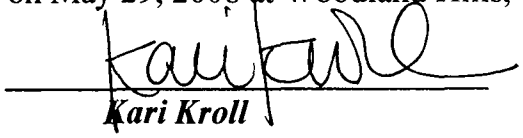
**SEE ATTACHED SERVICE LIST**

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 29, 2008 at Woodland Hills, California.



***Kari Kroll***

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