

S 149752

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

Charlene J. Roby,

Plaintiff and Respondent,

v.

McKesson HBOC et al.,

Defendants and Appellants.

Court of Appeal, Third Appellate District, Nos. C047617, C048799

**Application of Disability Rights and
Women's Rights Advocacy Groups
for Leave to File *Amici Curiae* Brief
in Support of Respondent Charlene J. Roby
and *Amicus Curiae* Brief**

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Amici Curiae in Support of Charlene J. Roby

APPLICATION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The undersigned legal advocacy organizations – the Legal Aid Society – Employment Law Center (LAS-ELC), Disability Rights Education and Defense Fund (DREDF), the Impact Fund, the Disability Rights Legal Center (DRLC), Equal Rights Advocates (ERA), California Women’s Law Center (CWLC), Protection and Advocacy, Inc. (PAI), and Disability Rights Advocates (DRA) – are dedicated to advancing and protecting the civil rights of working people, including persons with disabilities and women. Amici have extensive policy and litigation experience with employment law and disability law, and are recognized for their expertise in the interpretation of both federal and California employment and disability rights statutes.

The amici respectfully move this Court for leave to file the brief submitted herewith, as amici curiae in support of the plaintiff-respondent Charlene J. Roby. It is the position of the amici that the Court should reject the rule proposed by the panel below, and by Appellants, exempting “management actions,” and that this Court should reaffirm the “totality of the circumstances” standard, which examines the context and content of supervisory conduct rather than relying upon the label of “managerial” or “non-managerial.”

Statements of Interest

Amicus the Legal Aid Society – Employment Law Center (“LAS-ELC”) is a public interest legal organization that advocates to improve the working lives of disadvantaged people. Since 1970, the LAS-ELC has represented clients in cases covering a broad range of employment-related issues including discrimination on the basis of race, gender, age, disability, pregnancy, and national origin. The LAS-ELC has represented, and continues to represent, clients challenging unlawful workplace harassment and discrimination, including persons with disabilities and women. The LAS-ELC has filed amicus briefs in cases of importance to persons with disabilities and women, and in cases addressing the standards applicable to claims of unlawful harassment under the Fair Employment and Housing Act.

Amicus Disability Rights Education and Defense Fund, Inc. (“DREDF”), based in Berkeley, California, is a national law and policy center dedicated to securing equal citizenship for Americans with disabilities. DREDF is funded in part by the California State Bar Legal Services Trust Fund Program as a legal services Support Center. DREDF pursues its mission through education, advocacy and law reform efforts, fighting to ensure that people with disabilities have the legal protections necessary to vindicate their right to be free from discrimination. DREDF is

nationally recognized for its expertise in the interpretation of disability civil rights laws.

The Impact Fund is a nonprofit foundation that provides funding, training, and co-counsel to public interest litigators across the country. It is also a California State Bar Legal Services Trust Fund Support Center, providing services to legal services projects across the state. In its funding role, The Impact Fund reviews requests for grants to cover expenses of complex litigation and is frequently called upon to assist firms in finding financing, co-counsel, or other resources necessary to bring significant litigation. It has funded numerous disability cases in the fields of access, housing, and employment. It offers training programs, advice and counseling, and amicus representation to nonprofit organizations regarding class actions and related issues. It litigates class cases, including disability discrimination cases. The Impact Fund is currently co-counsel in *Moeller et al. v. Taco Bell Corp.* (N.D. Cal. filed June 4, 2003) No. 3:02-cv-5849, a certified disability access class action against Taco Bell, challenging accessibility barriers at California Taco Bell restaurants, and *Glover v. Potter*, EEOC Case No. 320-A2-8011X, a disability discrimination employment class action against the United States Postal Service in which a \$61 million global settlement agreement has been reached. It was also co-counsel in *Arnold v. United Artists Theater Circuit* (N.D. Cal. 1994) 158 F.R.D. 439, then the largest ADA access settlement in the country.

Amicus Disability Rights Legal Center (formerly Western Law Center for Disability Rights) (“DRLC”) is a non-profit organization that promotes the rights of people with disabilities and the public interest and awareness of those rights by providing legal and related services. DRLC accomplishes this mission through several programs, including the Cancer Legal Resource Center (a joint program with Loyola Law School), Disability Mediation Center, Education Advocacy Project, Options Counseling, Lawyer Referral Service, and Civil Rights Litigation Project. Since 1975, DRLC has handled disability rights cases, including numerous employment, housing, and access cases, under California and federal civil rights laws.

Amicus Equal Rights Advocates (“ERA”) is a San Francisco based women’s rights organization whose mission is to protect and secure equal rights and economic opportunities for women and girls through litigation and advocacy. ERA litigates high-impact cases on issues of gender discrimination in employment and education. ERA also provides legal advice and counseling to hundreds of individuals each year through a telephone hotline. The organization has also participated as amicus curiae in scores of cases involving interpretation of anti-discrimination laws in the United States and California Supreme Courts.

Amicus California Women’s Law Center (“CWLC”) is a private, nonprofit public interest law center specializing in the civil rights of women

and girls. The California Women's Law Center, established in 1989, works in the following priority areas: Sex Discrimination, Women's Health, Race and Gender, Women's Economic Security, Exploitation of Women and Violence Against Women. Since its inception, CWLC has sought to eradicate unlawful harassment in employment.

Amicus Protection and Advocacy, Inc. ("PAI") is a private non-profit agency established under federal law to advance the legal rights of Californians with disabilities.¹ PAI works with and for individuals with all types of disabilities and has considerable knowledge and experience dealing with the legal employment-related issues facing these individuals. PAI legal staff provide referral and advice, as well as representation in individual and class actions in state and federal court. PAI therefore has an interest in ensuring that Californians with disabilities are afforded broad legal protections against disability discrimination in employment.

Amicus Disability Rights Advocates ("DRA") is a non-profit public interest law firm that specializes in class action civil rights litigation on behalf of persons with disabilities throughout the United States. Based in

¹ PAI is designated pursuant to the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6001 et seq.; the Protection and Advocacy for Individuals with Mental Illness Act of 1986, 42 U.S.C. § 10801 et seq.; the Protection and Advocacy of Individual Rights Program of the Rehabilitation Act of 1973, 29 U.S.C. § 794e; the Assistive Technology Act of 1998, 29 U.S.C. §§ 3011, 3012; the Ticket to Work and Work Incentives Improvement Act, 42 U.S.C. § 1320b-20; the Children's Health Act of 2000, 42 U.S.C. § 300d-53; and the Help America Vote Act of 2002, 42 U.S.C. §§ 15461-62.

Oakland, California, DRA strives to protect the civil and human rights of people with disabilities throughout the United States and worldwide. DRA works to end discrimination in areas such as access to public accommodations, employment, transportation, education, and housing.

Respectfully submitted,

Claudia Center
THE LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER

By: /s/Claudia Center
Claudia Center

COUNSEL FOR *AMICI*

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Amicus Curiae Brief in Support of Respondent

INTRODUCTION

Appellants acknowledge, as they must, Charlene Roby's evidence of harassment by her supervisor, Appellant Karen Schoener, on the basis of disability, including:

- publicly insulting and displaying disgust toward Ms. Roby on the basis of her disability and need for accommodations such as breaks;
- telling Ms. Roby that the symptoms of her panic disorder were "disgusting";
- telling Ms. Roby to bathe and shower more frequently (even after Ms. Roby informed her supervisor that her body odor was related to her medication);
- providing periodic gifts to all subordinates except Ms. Roby;
- requiring Ms. Roby to cover the phones during the office Christmas party and other office gatherings;
- refusing to respond to Ms. Roby's "good morning";
- snubbing Ms. Roby at staff meetings, while praising other workers for their contributions; and
- loudly reprimanding Ms. Roby in front of co-workers.

(RT 414-15, 417-22, 424, 426-28, 455, 470-75, 483-84, 493, 506-07, 517, 527-28, 530-36, 576-77, 595-96, 600-03, 1015, 1272, 1274-75); see also

Respondent's Opening Brief on the Merits at pp. 15-19; *Roby v. McKesson HBOC* (2006) 53 Cal.Rptr.3d 558, 562, 566 (*Roby*.) These facts and the resulting jury verdict speak for themselves. After a 14-day trial, the jury found that the evidence met the standards for unlawful harassment under the Fair Employment and Housing Act (FEHA), and awarded compensatory and punitive damages. (See Respondent's Opening Brief on the Merits at p. 41 [describing jury's award].)

Their protestations notwithstanding, Appellants had ample opportunity to demonstrate some sort of business necessity for any of the supervisory actions alleged, such that they should not be considered as evidence of hostile work environment. The jury was instructed, properly, that "[d]isability harassment consists of a type of conduct not necessary for performance of a supervisory job." (See Respondent's Reply Brief at p. 22 fn. 4 [quoting jury instruction at 3-AA-880] [emphasis added].) Given the course of conduct admitted to here, and the evidence of its devastating impact, it is unsurprising that the jury rejected Appellants' suggestion that Schoener's cruel treatment of Ms. Roby was somehow "necessary" to her role as a supervisor.

Nevertheless, and extrapolating from this Court's ruling in *Reno v. Baird* (1998) 18 Cal.4th 640 (*Reno*), the appellate panel vacated the jury's verdict on harassment, concluding that much of the conduct demonstrated by supervisor Schoener "fell within the scope of [the supervisor's] business

and management duties,” *Roby, supra*, 53 Cal.Rptr.3d at p. 566, and could not be considered as evidence in support of an unlawful hostile work environment.

Appellants reiterate and refashion the appellate panel’s holdings here, urging this Court to affirm the vacating of the jury’s harassment verdict. Like the panel below, Appellants argue that a portion of the evidence presented by Respondent Roby should be disregarded as “managerial conduct,” which is described by Appellants as “related to” or “within” Schoener’s supervisory responsibilities. Appellants further attempt to distinguish between “abusive and gratuitous” managerial conduct, and “non-abusive and non-gratuitous” managerial conduct, asserting that much of the conduct presented to the jury falls in the latter category.

On its face, the Appellants’ position, and the appellate court’s ruling below, must be rejected – surely that the supervisor here repeatedly and publicly denigrated Ms. Roby’s status as a person with a disability while exercising her supervisory authority provides a more – and not a less – persuasive basis for liability! The Appellants’ further proposal to categorize admittedly hostile conduct, see *Roby, supra*, 53 Cal.Rptr.3d at p. 562 (“Schoener made no effort to conceal her dislike of Roby”), as meeting or not meeting the “non-abusive and non-gratuitous” standard is hardly a serious approach to reviewing harassment liability under the FEHA.

Unsurprisingly, the Appellants' analysis cannot be reconciled with governing Supreme Court case law.

Upon the commonsense application of California's harassment jurisprudence, which gives due consideration to the context of supervisory conduct, and the perspective of the victim, the verdict below must be reinstated. And, happily, these fundamental principles already respond to the Appellants' stated fears by ensuring that liability is not founded upon employment actions that are found to be "necessary" to running a business, engaging in the interactive process, or taking other steps required by the FEHA.

I. APPELLANTS' PROPOSAL FOR SORTING A PLAINTIFF'S EVIDENCE OF HARASSMENT INTO PERMISSIBLE AND IMPERMISSIBLE CATEGORIES CONFLICTS WITH THE "TOTALITY OF THE CIRCUMSTANCES" STANDARD.

Seeking to reconcile the appellate court's opinion with this Court's past case law, the Appellants propose a sorting scheme in which a harassment plaintiff's evidence is divided into various categories. First, Appellants propose, a supervisor's conduct should be separated into "managerial conduct" and "non-managerial conduct." (The proposed division, see Appellants' Answer Brief at pp. 11-12, is incoherent – here, all of the conduct, including Schoener's on-the-job rudeness, was done in her capacity as a supervisor.) Second, managerial conduct should be divided into two further categories, "gratuitous and abusive managerial

conduct” and “non-gratuitous and non-abusive managerial conduct.”

(Again, this further division is perplexing at best – the conduct alleged is nearly entirely facially hostile, and the jury found it to constitute unlawful disability-based harassment in violation of the FEHA.)¹

Under the Appellant’s scheme, only two of the three categories of conduct evidence may be considered by the jury – the “non-managerial conduct” category and the “gratuitous and abusive managerial conduct” category. Conduct labeled “non-gratuitous and non-abusive managerial conduct” must be excluded. That, as here, the supervisor’s managerial actions are infused with animus on the basis of a protected classification, are part and parcel of a severe and pervasive course of action, is of no consequence to Appellants’ process. Upon such labeling and “sifting,” cf. *Roby, supra*, 53 Cal.Rptr.3d at pp. 566-67, the jury’s verdict is extinguished.

Putting aside for a moment the considerable definitional and boundary problems with the proposed categories, the entire enterprise is contrary to decades of California and federal harassment case law. Under these authorities, whether unlawful harassment has occurred depends upon

¹ Appellants proffer a finite list of managerial conduct they deem to meet this standard: physical or sexual touchings; racial or gender-based slurs; name-calling; profanity; and quid pro quo conduct. (Appellants’ Answer Brief at p. 2, 22, fn. 16.)

the totality of the circumstances, which includes the context and content of the conduct, and the perspective of the victim.

In *Miller*, this Court again emphasized the need for a comprehensive review of all facts and circumstances:

Past California decisions have established that the prohibition against sexual harassment includes protection from a broad range of conduct ... In one case, for example, a cause of action based upon a hostile environment was stated when the plaintiff alleged she had been subjected to long-standing ridicule, insult, threats, and especially exacting work requirements by male coworkers who evidently resented a female employee's entry into a position in law enforcement. ...

We have agreed with the United States Supreme Court that ... [t]he working environment must be evaluated in light of the totality of the circumstances: “[W]hether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.”

(*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 461-62 [citing *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 607-608; *Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1414-1415; *Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 347-348; *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 23; *Oncala v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, 81-82; and *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 517-518] (*Miller*).)²

² Appellants assert that federal case law has “limited value” due to the differences between the FEHA’s separate subsection barring harassment

Central to the inquiry, the *Miller* Court reiterated, is an assessment of the evidence in its context and from the perspective of the victim:

The United States Supreme Court has warned that the evidence in a hostile environment sexual harassment case should not be viewed too narrowly: “[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances.’ ... [T]hat inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target....”

(*Miller, supra*, 36 Cal.4th at p. 462; accord *Lyle v. Warner Bros. Television Productions* (2006) 38 Cal.4th 264, 283 (“[The] inquiry requires careful

and Title VII’s general nondiscrimination provision. (Appellants’ Answer Brief at p. 19, fn. 13.) In fact, California’s prohibition against harassment is founded on both the general prohibition of subsection (a) and the specific proscriptions of subsection (j). (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 73, fn. 4 [276 Cal.Rptr. 130] (“Although the FEHA cites harassment as an unlawful employment practice separate from discrimination (§ 12940, subd. (h)), the regulations and Commission decisions recognize that sexual harassment is a form of sex discrimination in employment.”); *DFEH v. Ambylou Enterprises, Inc.* (1982) No. 82-06, FEHC Precedential Decs. 1982-1982, CEB 3, p. 4 [1982 WL 36751] (“The Act provides in pertinent part that it is unlawful to discriminate against a person in the terms, conditions or privileges of employment because of her sex. Subjecting an employee to harassment on a basis enumerated in the Act constitutes such unlawful discrimination.”); *DFEH v. Madera County* (1990) No. 90-03, FEHC Precedential Decs. 1990-1991, CEB 1, p. 19 [1990 WL 312871] (“In its original prohibition of sex discrimination (Gov.Code, § 12940, subs. (a)-(d)) and in its subsequent specific enactments against harassment (Gov.Code, § 12940, subs. (h) and (i)), the Legislature made clear its purpose to outlaw all forms of sexual harassment and to eliminate them from the workplace in California.”).) And, of course, this Court frequently relies upon federal precedents in its opinions construing harassment claims brought under the FEHA. See, e.g., *Miller*, 36 Cal.4th at p. 463 (“Our courts frequently turn to federal authorities interpreting Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) (Title VII) for assistance in interpreting the FEHA and its prohibition against sexual harassment.”); *Lyle v. Warner Bros. Television Productions* (2006) 38 Cal.4th 264.

consideration of the social context in which particular behavior occurs and is experienced by its target.”) [quoting *Oncale v. Sundowner Offshore Services, Inc.*, *supra*, 523 U.S. at pp. 81-82] (*Lyle*); *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 878 [“in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim”].)

This Court expressly disavowed the use of labels to determine whether unlawful harassment has occurred:

The real social impact of workplace behavior often 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. Common sense, and an appropriate sensibility to social context, will enable courts and juries to distinguish between simple teasing or roughhousing ... and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.

(*Miller, supra*, 36 Cal.4th at p. 462.)

Applying these standards eight years after its decision in *Reno*, the Court in *Miller* found that a course of conduct resulting from a warden's consensual sexual involvement with several subordinates – including such “managerial conduct” as giving out promotions and favorable employment benefits to the paramours, while denying on-the-job training opportunities, advancement, and reasonable accommodations to other women – created a triable issue of unlawful harassment. (*Miller, supra*, 36 Cal.4th 446.)³

³ In an effort to reconcile *Miller* with this proceeding, Appellants assert that it was the sexist message sent by the pro-paramour, anti-other-females management actions, and not the management actions themselves, that

Consistently, in *Lyle*, this Court found no triable claim of harassment, despite extensive sexist and vulgar language, where the workplace was a writers' room of an adult comedy show, and the conduct was not "directed at" the plaintiff. *Lyle, supra*, 38 Cal.4th at pp. 286-94. In *Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30, 36-37, the appellate panel concluded that a broad range of conduct stated a claim for race harassment (including conduct that Appellants here would deem "non-

created the hostile work environment in *Miller*. (Appellant's Answer Brief at p. 29.) No reasonable review of *Miller* would find support for considering or excluding harassment evidence based upon some purported distinction between conduct and the message of the conduct. While this Court emphasized the harmful message sent by widespread sexual favoritism, it reviewed with equal consideration the more tangible injuries imposed by such conduct upon plaintiffs Miller and Mackey. (See, e.g., *Miller, supra*, 36 Cal.4th at pp. 466-68 ["There was evidence Kuykendall promised and granted unwarranted and unfair employment benefits to the three women. ... [O]n two occasions Kuykendall promoted Brown to facility captain positions in preference to Miller, although Miller was more qualified. ... There also was evidence that Kuykendall promoted Bibb from clerical to correctional staff duties despite her lack of qualifications, and at the same time refused to permit Mackey to secure the on-the-job training that would have enabled her to make a similar advance. ... There was evidence Kuykendall's sexual favoritism not only blocked the way to merit-based advancement for plaintiffs, but also caused them to be subjected to harassment at the hands of Brown, whose behavior Kuykendall refused or failed to control even after it escalated to physical assault. This harassment, apparently retaliatory, 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 physical assault and false imprisonment."].) Appellants' similar effort to distinguish this Court's quid pro quo harassment cases – asserting that it is the proffered exchange, and not the "managerial conduct" which denies or grants an employment benefit, that is offensive (see Appellants' Answer Brief at p. 30) – is likewise unworkable.

abusive managerial conduct”), given the testimony of a single racial slur. (Accord *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1163.)

The inclusive and nuanced analysis described by this Court in *Miller* is totally contrary to the rule articulated in *Roby*, and reformulated by the Appellants in their briefing. Consistent with this Court’s opinions, it is the content and context of supervisory conduct, viewed from the perspective of the victim, which determine whether a hostile work environment has been shown. Here, Respondent Roby presented an extensive pattern of hostile conduct, including evidence of Appellant Schoener’s disability-based animus, and testimony detailing the devastating impact of the abusive behavior upon Roby. It is plain that Schoener’s conduct – all of it – was relevant to Roby’s claim.

This Court’s Opinion in *Reno v. Baird* Does Not Require or Recommend Exempting “Managerial Conduct.”

This Court’s decision in *Reno v. Baird* does not hold otherwise. In *Reno*, the Court held that supervisors cannot be held individually liable for claims of non-harassment discrimination. (*Reno, supra*, 18 Cal.4th at pp. 645-47.) In reaching its decision, the Court reviewed the statutory differences between section 12940, subdivision (a) of the FEHA, prohibiting discrimination by “an employer,” and section 12940, subdivision (h)(1) [now 12940(j)(1)], prohibiting harassment by “an employer ... or any other person.” (*Id.* at pp. 645, 663.) The Court also

reprinted portions of the decision in *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, a Second District case that previously found no individual liability for discrimination. The Court thus described harassment as conduct “outside the scope of necessary job performance,” and “avoidable and unnecessary to job performance,” as contrasted with certain “commonly necessary management actions.” (*Reno, supra*, 18 Cal.4th at pp. 645-67 [quoting *Janken, supra*, 46 Cal.App.4th 55].)

The *Reno* Court grappled with claims arising out of the termination of an employee: the plaintiff was not claiming unlawful harassment, and the Court explicitly withheld judgment on the question of individual liability for harassment. (*Reno, supra*, 18 Cal.4th at p. 645, fn. 2.) The passages describing harassment claims are dicta;⁴ more importantly, they are descriptive and general – they nowhere suggest the rigid system Appellants propose here.

Accordingly, to the extent that several federal district courts in California have relied upon *Reno*, *Janken*, and *Roby* to exclude evidence from the harassment analysis based solely upon its label as managerial or

⁴ Accord *Lyle, supra*, 38 Cal.4th at p. 292, fn. 14 (reversing Court of Appeal decision) (“In support of this reasoning, the Court of Appeal relied on decisions that, in the specific context of determining who may be held liable for discrimination under the FEHA, described harassment as consisting ‘of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives’”).

personnel conduct,⁵ the reasoning of these cases must be rejected.⁶ This is not to say that the plaintiffs in these myriad cases each created a triable issue of fact as to his or her claim of hostile work environment. But whether a plaintiff has made such a showing should turn not on labels, but on whether the evidence shows conduct that is sufficiently severe or

⁵ See *Jacques v. Allstate Ins. Co.* (E.D. Cal. Feb. 12, 2007) No. 2:05-cv-1994-MCE-DAD [2007 WL 527989 at p. 8] (excluding certain allegations as “protected activity” under *Roby, supra*, 53 Cal.Rptr.3d 558, and finding that “was remains” was not sufficiently pervasive to state claim); *Velente-Hook v. Eastern Plumas Health Care* (E.D. Cal. 2005) 368 F.Supp.2d 1084, 1102-03 (citing *Reno, supra*, 18 Cal.4th 640, to exclude evidence of series of interactions with supervisor deemed to be “within the scope of job duties of a type necessary to business and personnel management” and/or occurring while the supervisor “acted in the supervisory capacity” as opposed to “outside the scope of work duties”); *Lancaster v. County of Yolo* (E.D. Cal. June 29, 2007) No. CIV. S-03-2342 FCD DAD [2007 WL 1888773 at p. 8 fn. 14] (citing *Velente-Hook, supra*, 368 F.Supp.2d 1084, and *Reno, supra*, 18 Cal.4th 640, to find that plaintiff’s harassment claim fails to the extent that it is based upon evaluations of work performance, comments in performance evaluations, and “any other personnel management activity”); *Roger-Vasselin v. Marriott Int’l, Inc.* (N.D. Cal. July 19, 2006) No. C04-4027 TEH [2006 WL 2038291 at p. 10] (citing *Reno* to dismiss harassment claims “to the extent that such claims are based on denials of promotion”); *Heath v. AT&T Corp.* (N.D. Cal. Sept. 12, 2005) No. C-05-0719 VRW [2005 WL 2206498] (citing *Janke, supra*, 46 Cal.App.4th 55, and dismissing harassment claim based upon denial of promotions and bonuses, and termination, as “[s]uch actions are within the realm of properly delegated management authority”); *Jacobson v. Schwarzenegger* (C.D. Cal. 2006) 357 F.Supp.2d 1198, 1220 (citing *Reno, supra*, 18 Cal.4th, to dismiss harassment claim based upon requirement to write explanatory letter, threat to remove plaintiff from appointment list, and removal from list).

⁶ Without guidance from this Court, federal courts are required to consider intermediate state appellate court decisions in applying the FEHA. (*Walker v. City of Lakewood* (9th Cir. 2001) 272 F.3d 1114, 1125.) The federal courts were thus obliged to recognize the panel’s reasoning in *Roby*, a circumstance not applicable here.

pervasive to alter the conditions of employment, thereby creating a work environment that is hostile.

II. “MANAGERIAL CONDUCT” IS PARTICULARLY RELEVANT EVIDENCE OF HARASSMENT – IT CANNOT BE EXCLUDED FROM THE ANALYSIS.

The Appellants’ proposal to exempt “managerial conduct” from the harassment analysis is contrary to longstanding case law highlighting the critical importance of such evidence. This Court has highlighted the central role of tangible job detriment – the sorts of job changes implemented by supervisors through managerial conduct – to claims of hostile work environment. (*Lyle, supra*, 38 Cal.4th at p. 285 [where comments did not target plaintiff, and plaintiff did not experience tangible job detriment, she would have to show that comments permeated her direct work environment or were destructive of that environment, citing *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 610-611]; see also *Fisher*, 214 Cal.App.3d at p. 610 [“[W]hile an employee need not prove tangible job detriment to establish a sexual harassment claim, the absence of such detriment requires a commensurately higher showing that the sexually harassing conduct was pervasive and destructive of the working environment”].)⁷ Here, Ms. Roby was entitled to present to the jury such

⁷ Accord *Silk v. City of Chicago* (7th Cir. 1999) 194 F.3d 788, 804-05 (noting in disability harassment case that “[t]o establish an alteration in the terms or conditions of his employment or ‘an adverse employment action,’ [the disability harassment plaintiff] must demonstrate either a tangible

tangible job detriments as being assigned to cover the phones during office parties, being ignored during staff meetings, and receiving harsh, public critiques of her work performance.

Similarly, this Court has recognized that an important factor in establishing hostile work environment harassment is “whether [the conduct] unreasonably interferes with an employee’s work performance.” (*Miller*, 36 Cal.4th at p. 462 [citing *Harris v. Forklift Systems, Inc.*, *supra*, 510 U.S. at p. 23]; accord *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 130-31 (plur. opn.) [harassment is actionable if “the defendant’s conduct would have interfered with a reasonable employee’s work performance and would have seriously affected the psychological well-being of a reasonable employee and [the plaintiff] was actually offended”].) Managerial conduct is instrumental to an employee’s work performance, and a hostile supervisor can interfere to great effect. The evidence showed such interference here.

Further, in *McGinnis*, this Court concluded that an employer is strictly liable under the FEHA for “all acts of harassment by a supervisor.” (*State Dept. of Health Services v. Superior Court (McGinnis)* (2003) 31 Cal.4th 1026, 1041 [emphasis in original].) The *McGinnis* Court explicitly

employment action (such as discharge, demotion or undesirable reassignment) or a non-tangible action such as discriminatory conduct which is so severe or pervasive that it creates an abusive working environment”).

presumed that a supervisor engaged in harassment is “acting in the capacity of supervisor when the harassment occurs.” (*McGinnis*, 31 Cal.4th at p. 1041, fn. 3 [“Of course, this analysis assumes the supervisor is acting in the capacity of supervisor when the harassment occurs. The employer is not strictly liable for a supervisor’s acts of harassment resulting from a completely private relationship unconnected with the employment and not occurring at the workplace or during normal working hours. But instances of such harassment must be rare.”].) Here, it is undisputed that the conduct labeled by the Appellants as “managerial conduct” (see Appellants’ Answer Brief at p. 11) was done by Appellant Schoener in her capacity as supervisor, and therefore triggers strict employer liability. It cannot be disregarded.

The same is true for the conduct labeled by the Appellants (see Appellants’ Answer Brief at p. 12) as “non-managerial conduct.” All of Appellant Shoener’s conduct was done as a supervisor – the purported distinction collapses upon examination. (See *Meritor Sav. Bank, FSB v. Vinson* (1986) 477 U.S. 57, 76-77 (conc. opn. of Marshall, J.) [“A supervisor’s responsibilities do not begin and end with the power to hire, fire, and discipline employees, or with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace. ... [I]t is the authority vested in the supervisor by the employer that enables

him to commit the wrong.”].) As the jury found that supervisor Schoener’s conduct constituted severe or pervasive harassment, Appellant McKesson is strictly liable.

In *McGinnis*, this Court focused its attention upon the role of the harasser – was the person engaging in the harassment the victim’s supervisor or a nonsupervisory coemployee? (*McGinnis, supra*, 31 Cal.4th at pp. 1040-41.) In cases where the harasser was a supervisor, the Court adopted strict liability (with an “avoidable consequences” doctrine as to the scope of damages), rejecting the federal law defenses to liability based upon the employer’s remedial actions. (*McGinnis, supra*, 31 Cal.4th at p. 1042.) Nowhere in its unanimous opinion did the Court suggest the existence of additional defenses for circumstances in which a supervisor is engaged in particular tasks.

**III. MANAGERIAL CONDUCT MAY BE NECESSARY, AND
THUS LAWFUL; THIS TRUISM DOES NOT RENDER ALL
MANAGERIAL CONDUCT NECESSARY AND LAWFUL.**

It is unremarkable to note that some supervisory conduct may be necessary to running a business,⁸ engaging in the interactive process, providing reasonable accommodation, investigating a charge of sexual

⁸ See, e.g., Appellant’s Answer Brief at pp. 2, 20, 21 (referencing “necessary personnel actions” and “necessary job performance”); p. 3 (“making decisions necessary to running a business”); p. 22 (expressing fear that supervisors will be “liable for actions essential to running a business”); pp. 25, 26 (referencing “job duties of a type necessary to business and personnel management”).

harassment, or taking any other affirmative step required by the FEHA or other employment laws. (See Gov't Code §§ 12940(k), (l), (m), (n), 12950, 12950.1; Labor Code §§ 207, 215.) The established standards for harassment under the FEHA do not impose liability based upon a supervisor's conduct that is truly necessary or essential to running a business. And, here, Appellants had the opportunity to demonstrate that Schoener's "managerial" conduct was necessary. Indeed, the jury was explicitly instructed to disregard any conduct it found to be necessary. (See Appellants' Answer Brief at p. 21, fn. 15 [reviewing jury instruction at 3-AA-880]; cf. Appellants' Answer Brief at p. 34 ["Judges and juries are perfectly capable of applying that standard"].) The argument – that Appellants' hostile treatment of Respondent Roby was "necessary" – failed to persuade.

On appeal, Appellants seek to broaden the concept of "necessary" supervisory conduct to include, well, virtually anything a supervisor might say or do. Appellants seek to exclude: "non-abusive actions by a supervisor in the discharge of her managerial duties," Appellants' Answer Brief at p. 2; conduct "related to performing [the supervisor's] job duties," *id.* at p. 3; interactions "in discharge of the supervisor's managerial obligations," *id.* at p. 4; actions "taken pursuant to Schoener's management responsibilities," *id.* at p. 11; "actions within the scope of Schoener's managerial duties," *id.* at p. 19; "conduct that fell within the scope of

Schoener's business and management duties," *id.* at p. 21; "ordinary supervisory interactions with employees," *id.* at p. 24; "non-abusive conduct within the scope of managerial duties," *id.* at p. 24; "conduct ... within the sphere of business and management duties," *id.* at p. 25; actions "within the realm of properly delegated personnel management authority," *id.* at p. 27, fn. 19; "conduct within the scope of managerial duties" which disturbs the work environment, *id.* at p. 31, fn. 21; "actions ... within the scope of Schoener's personnel managerial duties," *id.* at p. 33; and "managerial activities" that "were appropriately within Schoener's supervisory responsibilities," *id.* at p. 35.

In short, Appellants seek to define ALL "non-abusive" managerial conduct⁹ as "essential to the running of a business." (See Appellants' Answer Brief at p. 31.) Of course, some is; some isn't.¹⁰ As a matter of

⁹ The various labels proffered by the Appellants – "gratuitous," "non-gratuitous," "abusive," and "non-abusive" – do not function to distinguish necessary managerial conduct from unnecessary managerial conduct. The facts of this case – somehow protected by Appellants' labels – are compelling argument against their adoption. Under the "totality of the circumstances" standard, which considers the context and meaning of the supervisory conduct challenged, the trial court and the jury are in the best position to assess whether the conduct was necessary or supports the plaintiff's claim for unlawful harassment.

¹⁰ For example, in the context of an employee with a disability who needs accommodation, there may be additional types of management conduct that are necessary. This does not mean that all management conduct toward a person with a disability who needs accommodation is necessary (and thus irrelevant to any claim of harassment).

common sense, and under this Court's harassment jurisprudence,

Appellants' simplistic equation must be rejected.

IV. ENFORCING THE PROHIBITION AGAINST HOSTILE WORK ENVIRONMENT HARASSMENT ENHANCES THE AFFIRMATIVE OBLIGATIONS THE FEHA REQUIRES OF EMPLOYERS.

The proscriptions of the FEHA exist side-by-side with its affirmative obligations. Thus, an employer must not discriminate or harass based upon a protected status, and must not retaliate against those who have engaged in certain protected activities. At the same time, an employer must:

- provide reasonable accommodations to employees with disabilities who need them, see Gov't Code § 12940(m);
- take all steps necessary to prevent harassment and discrimination, see Gov't Code § 19240(j)(1), (k);
- promptly investigate and remedy allegations of harassment, see *Bradley v. California Dept. of Corrections and Rehabilitation* (2008) 158 Cal.App.4th 1612, 1630;
- reasonably accommodate an employee's religious beliefs, see Gov't Code § 12940(l);
- engage in a timely, good faith interactive process with employees who request or need accommodation, see Gov't Code § 12940(n); *Prilliman v. United Airlines, Inc.* (1997) 53 Cal.App.4th 935, 950-51; *Barnett v. U.S. Air, Inc.* (9th Cir. 2000) 228 F.3d 1105, 1112-14, rev'd on other grounds, *U.S. Airways v. Barnett* (2002) 535 U.S. 391; *Norris v. Allied-Sysco Food Services, Inc.* (N.D. Cal. 1996) 948 F.Supp. 1418, 1436-37;
- post certain information about sexual harassment, see Gov't Code § 12950;

- (if having 50 or more employees) provide sexual harassment training to all supervisory employees, see Gov't Code § 12950.1;
- maintain certain employment records, see Cal. Admin. Code tit. 2, § 7287.0 (a) to (c); and
- post certain information which the Department of Fair Employment and Housing deems necessary to explain the FEHA, see Cal. Admin. Code tit. 2, § 7287.0(d).

These obligations, both “negative” and “positive,” can and must be met simultaneously.

The Legislature intended these protections to be complementary. Implementing disability accommodations requires an employee to feel safe enough to make a request for assistance regarding a problem that may be intimate and difficult to discuss. The process for identifying and implementing accommodations includes prompt, “good faith,” interactive communications between the employer and employee. Accommodating religious beliefs demands an analogous exploration. Similarly, investigating an allegation of unlawful harassment requires that management employees sit down with their workers and discuss experiences that may be embarrassing or traumatic. To undertake effectively any of these communications, an employer, and its supervisors, must proceed in an environment free from the chilling effects of severe or pervasive harassment.

Appellants complain, repeatedly, that in undertaking its affirmative obligations under the FEHA, an employer risks harassment liability.

(Appellants' Answer Brief at pp. 3, 34-35.) Certainly, where an employer undertakes its affirmative obligations with care and in good faith, it is well situated under the "totality of the circumstances" standard to explain that its actions were required by the FEHA, and should not be considered as evidence supporting a finding of unlawful harassment. Given the record here, Appellants are not in this position. The suggestion that Schoener's conduct was somehow required by the FEHA to advance the interactive process or the accommodation mandate, and should thereby be exempted from consideration as harassment evidence, is repellant and deserves this Court's most forceful correction.

V. THAT SOME SUPERVISORY ACTS MAY ALSO CREATE LIABILITY UNDER A DISCRIMINATION THEORY DOES NOT RENDER SUCH EVIDENCE IRRELEVANT TO A CLAIM OF HARASSMENT.

It is common for evidence relevant to one claim or theory of liability to be evidence relevant to another claim. (See, e.g. *Balboa Ins. Co. v. Trans Global Equities* (1990) 218 Cal.App.3d 1327, 1342 ["In a proper case, the same conduct may support relief under multiple theories"].) That some managerial conduct may create liability as an "adverse action" under Government Code section 12940, subdivision (a) does not render it somehow irrelevant as evidence to support unlawful harassment under sections (a) and (j). A "disparate treatment" claim brought under subsection (a) is distinct from a "hostile work environment" claim brought

under subsections (a) and (j). The two claims have different elements and standards,¹¹ and exist to respond to different types of workplace wrongs.

Specifically, hostile work environment harassment exists to respond to a pattern of conduct that in context, over time, and cumulatively, constitutes severe or pervasive, and thus unlawful, harassment. As the U.S. Supreme Court stated in *National Railroad Passenger Corp. v. Morgan* (2002) 536 U.S. 101, 115, “Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. ... Such claims are based on the cumulative effect of individual acts.” It is rare that the first act of harassment reaches the “severe or pervasive” standard.

Typically, it is only over time that the “severe or pervasive” standard is reached – certainly this was true here. (See *Morgan, supra*, 536 U.S. at 115 [“[I]n direct contrast to discrete acts, a single act of harassment may not be actionable on its own”].) Similarly, it is rare that a single act of harassment by itself materially affects the terms and conditions of employment so as to constitute an “adverse action” as defined by the Court in *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1051 (*Yanowitz*).

¹¹ Compare Judicial Council Of California Civil Jury Instructions, No. 2500 (Disparate Treatment—Essential Factual Elements) with Nos. 2521A (Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant) and 2522A (Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant).

Consistently, harassment claims, unlike the typical disparate treatment claim, are reviewed using a continuing violation analysis. (*McGinnis, supra*, 31 Cal.4th at p. 1044 [“Deciding when a harassed employee has first suffered compensable harm and when a reasonable employee would have reported the harassment will in many and perhaps most instances present disputed factual issues to be resolved by application of practical knowledge and experience”]; *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 821 [applying continuing violation doctrine to a plaintiff’s disability accommodation and disability harassment claims]; see also *Yanowitz, supra*, 36 Cal.4th at pp. 1056-59 [applying continuing violation doctrine where plaintiff has shown a continuing course of retaliatory conduct]; *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1114, fn. 6 [explaining that evidence of harassment is admissible for liability purposes where it is “sufficiently related” to the timely harassment allegations in the case].)

Further, key to harassment is the perspective of the victim. This viewpoint is not a central feature of traditional disparate treatment claims. Additional important distinctions exist. There are defenses to disparate treatment claims that are not applicable to harassment claims. The type of showing required for intent is different – a disparate treatment plaintiff must show that the protected status was a “motivating factor” of the adverse action, while a harassment plaintiff must more generally demonstrate that

the pattern of conduct was “because of” the protected status. Harassment claims are available against all employers, while non-harassment disparate treatment claims are only available against employers with five or more employees.

The FEHA’s prohibitions against discrimination and harassment found at subdivisions (a) and (j) “represent a fundamental public policy decision regarding the need to protect and safeguard the right and opportunity of all persons to seek and hold employment free from discrimination.” (*Lyle, supra*, 38 Cal.4th at p. 277.) It is the purpose of the Act “to provide effective remedies which will eliminate these discriminatory practices.” (Gov’t Code § 12920.) “In order to eliminate discrimination, it is necessary to provide effective remedies that will both prevent and deter unlawful employment practices and redress the adverse effects of those practices on aggrieved persons.” (Gov’t Code § 12920.5; see also Gov’t Code § 12993, subd. (a) (“The provisions of this part shall be construed liberally for the accomplishment of the purposes of this part.”).) Limiting a harassment plaintiff to the use of disparate treatment theory for conduct labeled “managerial” is contrary to this fundamental policy, and would hinder the Act’s enforcement.

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VI. EXEMPTING “MANAGERIAL CONDUCT” IS CONTRARY TO THE LEGISLATURE’S DIRECTIVE THAT STATE LAW MEET OR EXCEED THE STANDARDS OF THE AMERICANS WITH DISABILITIES ACT.

The Legislature has repeatedly directed that the FEHA’s disability nondiscrimination standards may not be construed to be less protective than the federal law standards. In 1992, the California Legislature enacted comprehensive amendments of the State’s disability nondiscrimination laws in order to retain California law where it was stronger, and to incorporate the ADA’s standards where they were stronger.¹² The Legislature enacted its next comprehensive set of disability amendments in 2000, and again reiterated its intent to look to the ADA’s standards as a floor, while providing additional protections. (Cal. Gov’t Code § 12926.1 [“Although the federal act provides a floor of protection, this state’s law has always ... afforded additional protections”].)

Here, Appellants’ proposed rule would render the FEHA’s prohibition against disability-based harassment weaker than the federal law, contrary to repeated legislative directives. (See, e.g., *Fox v. General Motors* (4th Cir. 2001) 247 F.3d 169, 179 [reviewing work assignments as

¹² See, e.g., Assembly Judiciary Committee, AB 1077 (Jan. 22, 1992), at pp. 2, 4 (“[I]n enacting this bill, the Legislature intends to strengthen California law where it is weaker than the ADA and to retain California law when it provides more protection to individuals with disabilities than the ADA. ... [The sponsor argues that] “conformity [with the ADA] will benefit employers and businesses because they will have one set of standards with which they must comply”); Senate Judiciary Committee, AB 1077 (June 9, 1992), at pp. 4, 10 (same).

component of disability-based harassment]; *Flowers v. Southern Regional Physician Services Inc.* (5th Cir. 2001) 247 F.3d 229, 237 [reviewing write-up, 90-day probation, and discharge as evidence of disability-based harassment]; accord U.S. Equal Employment Opportunity Commission, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999) [reviewing importance of tangible employment actions to finding of supervisory harassment].) Such a result is yet one more basis for rejecting Appellants' positions.

CONCLUSION

It is difficult to imagine or construct a more poorly considered framework for harassment liability than that proposed by Appellants here. Contrary to the Appellants' stated worldview, harassment liability depends not upon conduct labels, but upon the totality of the circumstances, which includes context and the perspective of the victim. Given the entire body of harassment jurisprudence applicable here, developed over many years by this Court and by the federal courts, the Appellants' briefing can only be explained by their disappointment with the jury's verdict. Amici, legal advocacy groups committed to disability rights and women's rights, urge the Court to reaffirm the longstanding principles which govern the fundamental rights at issue here.

Respectfully submitted,

Claudia Center
THE LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER

Dated: June 30, 2008

By: /s/Claudia Center
Claudia Center

COUNSEL FOR *AMICI*

CERTIFICATE OF COMPLIANCE UNDER CRC 14(C)(1)

I certify that pursuant to CRC 14(c)(1), this brief has a typeface of
13 points or more and contains 6,387 words.

Dated: June 30, 2008

By: /s/Claudia Center
Claudia Center

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PROOF OF SERVICE

I, Djuna Gray, declare:

I am a citizen of the United States, over 18 years of age, employed in the County of San Francisco, and not a party to or interested in the within entitled action. I am an employee of THE LEGAL AID SOCIETY - EMPLOYMENT LAW CENTER, and my business address is 600 Harrison St., Suite 120, San Francisco, California 94107.

I am familiar with this company's practices for mail, whereby the mail, after being placed in a designated area, is given the appropriate postage and labeling and is deposited in a U.S. mailbox in the City of San Francisco, California, and, during the normal course of business on the same day is placed in its designated area for delivery.

On June 30, 2008, I served the within:

**APPLICATION OF DISABILITY AND WOMEN'S RIGHTS
ADVOCACY GROUPS FOR LEAVE TO FILE AMICI CURIAE
BRIEF IN SUPPORT OF RESPONDENT CHARLENE J. ROBY
AND AMICUS CURIAE BRIEF**

on parties in said action, by causing to be delivered one true and correct copy thereof to the person(s) and at the addresses set forth below by U.S. Mail:

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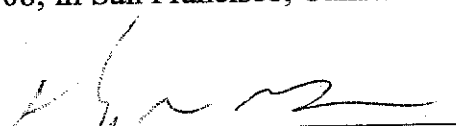
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I declare under penalty of perjury under the laws of the State of California and of the United States of America that the foregoing is true and correct. Executed on June 30, 2008, in San Francisco, California.



Djuna Gray