Employment Law

EXECUTIVE SUMMARY

Two cases pending before the California Supreme Court, *Roby v. McKesson HBOC* and *Jones v. Lodge at Torrey Pines Partnership*, highlight the recent shifts in employment law related to individual responsibility in harassment and retaliation allegations, and the court's adoption of the "totality-of-the-circumstances" standard in evaluating retaliation cases. In December 2007, our panel of experts discussed these issues, as well as major developments in disability law. They are Jahmal Davis and Dorothy Liu of Hanson Bridgett Marcus Vlahos & Rudy; JoAnna Brooks and C. Christine Maloney of Jackson Lewis; and Andrew Livingston of Orrick, Herrington & Sutcliffe. The roundtable was moderated by freelance writer Bernice Yeung and reported for Barkley Court Reporters by Krishanna DeRita.

MODERATOR: What are some potential implications resulting from *Roby v. McKesson HBOC?*

BROOKS: As background, the plaintiff in the case, Roby, was an exemplary, long-term employee who developed a panic disorder. A strained relationship developed between Roby and her supervisor, who appeared to treat Roby differently than her coworkers—for example, the supervisor would give out gifts, but not include Roby; she was ignored at staff meetings, things of this nature. A jury awarded Roby $22 million for discrimination, harassment, and failure to accommodate, and found the supervisor personally liable for harassment. The harassment portion of the verdict was reversed on appeal for a lack of evidence of severe and pervasive conduct by the supervisor. The California Supreme Court granted review of the case in April 2007.

From the employer's perspective, the appellate court decision is helpful in that it reiterates that the Fair Employment and Housing Act (FEHA) is not intended as a general civility code. The court said in *Roby* that the harassment had to be expressly based on and directed at the plaintiff because of her disability. From a plaintiffs bar standpoint, there's probably a feeling that this holds plaintiffs to a higher burden.

LIVINGSTON: The ruling in *Roby* will impact how defense lawyers approach litigation. If the ruling stands, it may make it easier for an employer to get summary judgment on harassment claims. In the case, the court drew a very fine line between supervisory-related conduct and conduct that was outside the scope of a supervisor's duties. Essentially, the Court of Appeal followed the Supreme Court's conclusion in *Reno v. Baird* that supervisors cannot be held personally liable for discrimination under FEHA. The court concluded that the same rationale meant that any conduct that was supervisory in nature isn't going to be used against an employer to substantiate a harassment claim. I agree that the logic of *Reno* applies here. However, I think it is possible that the Supreme Court could say it never meant to extend *Reno* in such a way that it would bar any liability being imposed on the *employer* for the harassing conduct of its supervisors.

LIU: I agree. The court reaffirmed that trivial acts—giving the cold shoulder or snubbing someone—shouldn't rise to the level of harassment. But there needs to be clarification because the court's decision suggests that although the acts don't constitute harassment, they might be sufficient to constitute discriminatory personnel actions. This would blur the line between personnel-related adverse employment decisions and acts of harassment. Under current standards, the types of acts complained of in *Roby*, such as general rude behavior, shouldn't rise to the level of an adverse action.

DAVIS: The ultimate conclusion in *Roby* is reassuring in that the trivialities in the workplace were not found to be actionable. But the court spent little time scrutinizing the facts under the "severe and pervasive" test. Although, had it done so, it is unlikely the result would have changed.

What will change however, is the burden on plaintiff and/or the defenses available to the employers. By relying on *Reno v. Baird*, the court seems to have added another prong to the framework for analysis. In addition to the requirements of showing unwelcome conduct sufficiently severe and pervasive, *Roby* arguably calls for a requisite showing that the harassing conduct was outside the scope of the supervisor's job duties. Such a requirement would obviously be hailed by employers and decried by plaintiffs.

BROOKS: The evidence appeared to fall short of establishing severe and pervasive harassment because this was merely a personality conflict between two employees. The plaintiff failed to show the connection between the supervisor's conduct and the plaintiff's disability. Again, this is a helpful case from the defense perspective

because we are often faced with defending the actions of a supervisor who may decide to socialize with certain members of their team to the exclusion of others without any evidence of discriminatory animus.

MALONEY: I still think there were a number of actions, as indicated in the factual record, that demonstrate clear animosity based on disability. I continue to be troubled by the fact that the appellate court is saying it's not harassment unless the conduct is expressly tinged with discriminatory animus. This seems contrary to established precedent that harassment may also take the form of hostile acts directed at a person because of a protected trait, even if not overtly discriminatory. The outcome may have been right, but I think that is because the supervisor's acts were not severe or pervasive, and not because there was no evidence linking the conduct to a protected trait.

LIVINGSTON: As a general comment, this case shows how angry a jury can get. The jury awarded $22 million in damages. It shows that unchecked conduct in the workplace can have grave consequences. When we do employee trainings, we talk about this case and let people know that not only the employer got hit with a damages verdict, but the manager got hit, as well, and that's a scary thing.

MODERATOR: What are the current repercussions of *Jones v. Lodge at Torrey Pines Partnership* for your clients and for your practice?

LIU: The *Jones* case is another cautionary example we use when conducting trainings. Jones complained of his supervisor's vulgar sexual remarks, which prompted a tirade from the supervisor. Jones later complained to the HR manager, who suggested that Jones quit. Thereafter, the plaintiff started receiving employee warnings and was excluded from meetings. He eventually quit and sued, alleging sexual orientation discrimination and retaliation. The jury awarded $1.4 million against the employer and $155,000 against the supervisor. The trial court overturned the verdicts based on insufficient evidence, but the appellate court disagreed, finding there was sufficient evidence of an adverse action.

On a practical level, this case serves to remind employers about the importance of taking discrimination and harassment complaints seriously, and about knowing what's happening at the front line supervisory level. As to the legal issue pending before the supreme court, the question is whether an individual supervisor can be liable for retaliation. The employer relied on *Reno v. Baird*'s interpretation of FEHA's discrimination provision, which applies only to "an employer," but the appellate court found the retaliation statute extends to individuals because it specifically refers to "any person."

LIVINGSTON: I think the rationale of *Reno* should also apply because the retaliation in *Jones* came in the form of disciplinary notices, discussions about terminating employment, leaves of absence—conduct related to the type of supervisory duties that did not support a harassment claim in *Reno*, and which also came up in *Roby*. So if the California Supreme Court wants to bolster the policies underlying the *Reno* opinion, it would have to overrule the Court of Appeal decision in this case and find a supervisor cannot be liable for retaliation. On the other hand, this will be difficult, because the legislature inserted the word "person" into the portion of the FEHA that prohibits retaliation, and the Supreme Court has repeatedly stated that we need to give full force to the clear language of a statute. So it will be interesting to see how the Supreme Court addresses this issue.

MALONEY: There's another element of the statutory language that I think the court has to consider, which is FEHA's definition of an employer and the applicability of its anti-discrimination and anti-retaliation provisions to employers of a certain size. The legislature has determined that small employers should not shoulder the burden of liability arising from alleged discrimination or retaliation. So, if it is contrary to public policy to burden a small employer with such a liability risk, it should also be deemed unfair to burden an individual decision-maker with the same risk. It makes sense for harassers to be individually liable for their conduct; it does not make sense for supervisors to be individually liable for making personnel decisions.

LIU: Also of concern is the court's application of *Yanowitz v. L'Oreal USA, Inc.*, in which the [state] supreme court held that the standard for an adverse action is whether the adverse treatment is reasonably likely to impair an employee's job performance or prospects for advancement. Here, it's unclear how the employee warnings or exclusion from meetings impaired plaintiff's performance or

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advancement. Based on these cases, employers need to continue to be mindful of the types of conduct that could be viewed as retaliatory.

MALONEY: *Jones* is also one of a handful of cases that has applied the totality-of-the-circumstances approach post-*Yanowitz*. This is a troubling standard for employers, though it can actually *help* employers demonstrate the absence of retaliation. For example, if an employee complains that he was denied a promotion due to retaliation, the employer might be able to show that during that same time frame the employee received a good job evaluation and was given training opportunities—all of which can negate any suggestion of retaliatory animus under a totality-of-the-circumstances approach.

DAVIS: What is of concern about this totality-of-the-circumstances test is that it can favor a quantitative, rather than qualitative, approach to analyzing retaliation claims. We have moved away from looking at conduct that patently affects the terms and conditions of employment, or causes substantial, tangible harm. Now, under this approach, the minor, trivial conduct that would not otherwise support a claim could, when coupled with other such conduct, be held to satisfy the *Yanowitz* test.

Some of the allegedly retaliatory acts in this case involved plaintiff's supervisor refusing to speak with him, using offensive language toward him, throwing a piece of paper at him and yelling at him. Standing alone, conduct such as this may not be sufficient to support plaintiff's claim of retaliation.

Continuing to analyze such conduct under a totality-of-the-circumstances test could prove troublesome. Ultimately, it is conceivable that there could be a degree of judicial disharmony on just how many of these otherwise trivial incidents will suffice to satisfy this test.

BROOKS: Based on this case and *Yanowitz*, employers need to place a greater emphasis on addressing retaliation in the workplace in general. We are seeing more retaliation cases go beyond summary judgment. Employers need to make sure that their frontline managers understand what could be considered retaliatory conduct. It is more than tangible job actions. Employers must monitor a broader range of conduct, such as performance documentation, low-level discipline or exclusion from meetings, which could be considered retaliatory.

"Employers need to place a greater emphasis on addressing retaliation in the workplace."

MALONEY: Yes, but it still must meet the "materiality" standard set forth in *Yanowitz*, which states that there must be a demonstrably material adverse effect on the employee's job performance or opportunities for career advancement. The Court of Appeal in this case, however, never made the connection to either the plaintiff's job performance or his opportunities for career advancement when it was examining the totality-of-the-circumstances, and as a result, to me, it's an incomplete analysis.

LIVINGSTON: I think that's right. There's probably enough for the court to hang its hat on in drawing that connection, but it is pretty thin. It doesn't really get to what we would expect a court would have to go through under the *Yanowitz* analysis. I think it's just another warning that the standard is quite low for showing adverse employment action under the retaliation theory and the employers have to be very, very careful.

MODERATOR: What are the significant developments in disability law given the outcomes in recent cases such as *Gambini v. Total Renal Care* and *Wysinger v. Auto Club of Southern California*?

MALONEY: *Gambini*, a Ninth Circuit case, involved a plaintiff who was diagnosed with bipolar disorder. She was terminated for misconduct that involved displays of anger and had violent overtones. She lost at trial, and appealed on the grounds that the jurors hadn't been instructed that "conduct resulting from a disability is part of the disability and not a separate basis for termination." The Ninth Circuit reversed and vacated the verdict, and remanded the case on the grounds that the jury had not been properly instructed.

Essentially, the court said that when it comes to conduct resulting from a disability, terminating an employee based on that conduct equates to

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termination based on the disability. This is problematic because it contradicts other precedent, as well as EEOC guidance on reasonable accommodation, which says that employers do not have to tolerate misconduct from a disabled worker when it does not tolerate that conduct from non-disabled employees, even if the employee's conduct was caused by the disability.

LIU: I agree that it's disturbing that there was no discussion by the court about whether reasonable accommodation means tolerating someone who displays behaviors that are unacceptable in the workplace, such as the plaintiff, who yelled obscenities and threw things in reaction to a performance plan. The piece that's missing in *Gambini* is analysis about whether normal civil workplace behavior is part of the essential functions of someone's job.

LIVINGSTON: I find the decision problematic because we've always trained employers that they don't need to tolerate misconduct in the workplace, no matter who engaged in it. But I do think the employer has a fall-back argument. It can argue that although it may now need to tolerate disability-related misconduct, these individuals are simply not qualified for the job. I suppose it goes to whether civility and respectful treatment of others in the workplace is considered an essential job function, and I certainly think it should be.

BROOKS: The case is essentially telling employers who have knowledge of unacceptable conduct that stem from an employee's alleged disability that the employer must give the employee a second chance and engage in the interactive process, no matter what. It is difficult for employers to apply this case to the day-to-day realities of the workplace, particularly where the very same employee might become violent when returned to work. It's a dangerous decision for employers.

DAVIS: What is noteworthy about this opinion is that it arose out of the Ninth Circuit's review of the discrimination laws of the State of Washington. As the facts played out in this case, the plaintiff was noted to have violent outbursts in the workplace, which several employees expressed concerns about. The court was clearly conscious of the significance of these violent outbursts as it made specific reference to the potential applicability of the ADA's "direct threat" doctrine. This doctrine provides a defense to employers to terminate an otherwise protected employee if they pose a threat to the health or safety of themselves or others. Notably, the court passed on analyzing such a defense under these facts in part because Washington law does not have a counterpart to the ADA's direct threat doctrine. This may be a significant issue in analyzing disability-related conduct that disturbs the workplace as California law does have such a counterpart to the "direct threat" doctrine. And the application of the doctrine under California law may have resulted in a different outcome to the *Gambini* case.

LIU: There cannot be a bright line rule in the way *Gambini* seems to suggest. For day-to-day business realities, it's not workable to have a rule that says if the employee gets a doctor's note stating that otherwise unacceptable behavior is a byproduct of the disability, then the employer cannot hold the employee to regular work standards. Employers must be able to manage these situations and evaluate whether accommodation for that behavior is possible or reasonable.

LIVINGSTON: What about *Wysinger*? That case presents interesting issues related to claims for failure to engage in the interactive process and claims for failure to reasonably accommodate.

BROOKS: The court ultimately held that the duty to engage in the interactive process stands on its own and exists even if there is no reasonable accommodation available. On the retaliation claim, the court also applied the totality-of-the-circumstances approach, and I think it's a cautionary tale about ensuring that employers monitor management after a complaint has been made, and make sure managers understand what could be considered retaliatory conduct.

MALONEY: On the retaliation claim, there was a three-year lapse between the protected activity and the denied transfer or promotion. Although this time lapse would usually suggest no causal connection between the two, the court applied the totality-of-the-circumstances test and included in its analysis minor slights that occurred between the original complaint of discrimination and the later, substantive adverse employment action. Here again, the totality-of-the-circumstances standard is having the effect of broadening liability and the number of retaliation cases that we will see. ■