Sending Mixed Messages on Harassment Law

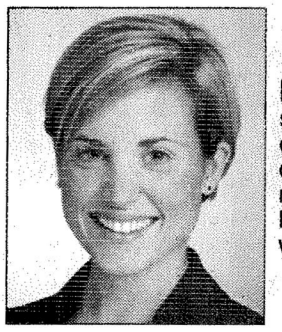
The California Supreme Court's recent decisions of *Hughes v. Pair*, 46 Cal. 4th 1035 (2009) and *Roby v. McKesson Corp.*, 47 Cal. 4th 686 (2009) send employers mixed messages on the current state of California harassment law, and emphasize that now, more than ever, employers must take all appropriate steps to prevent and address harassment in the workplace.

On one hand, *Hughes v. Pair* clarifies that the "severe or pervasive" standard required to prove unlawful harassment under California's Fair Employment and Housing Act (FEHA) is a high standard to meet. Although *Hughes* is not an employment case, it adopted the standard for sexual harassment under the FEHA and held that even when the defendant called the plaintiff "sweetie" and "honey" and told her he eventually would "f*** her one way on another," the allegations did not rise to the level of pervasive sexual harassment because they were not so egregious as to alter the conditions of the underlying professional relationship. Similarly, the Court found that the alleged conduct was not severe because, although vulgar and highly offensive, it did not amount to a physical assault or the threat thereof.

Since *Hughes*, at least one court of appeal has confirmed this high standard. In *Haberman v. Cengage Learning, Inc.*, 180 Cal. App. 4th 365 (2009), an employment case that cites heavily to the *Hughes* decision, the 4th Appellate District held that a plaintiff's allegations of 19 separate incidents of alleged harassment by two supervisors, including conversations about one of the supervisor's sex life and references to third parties having the "hots" for the plaintiff, did not amount to unlawful sexual harassment because the allegations were not sufficiently severe or pervasive as to alter the conditions of employment and create a work environment that qualifies as hostile or abusive based on sex. Although neither *Hughes* nor *Haberman* changed the "severe or pervasive" standard required to prove actionable sexual harassment, these cases certainly raised the bar in California for the types of facts and allegations necessary to prove sexual harassment, particularly given that both cases dismissed the plaintiff's harassment claims as a matter of law.

On the other hand, *Roby v. McKesson Corp.* expands the type of evidence a plaintiff may use in order to prove that an alleged harassment claim meets the "severe or pervasive" standard addressed in *Hughes* and *Haberman*. More specifically, prior to *Roby*, California courts had divided the types of allegations that typically make up a discrimination or harassment claim into two categories. The first category includes official actions taken by an employer, such as hiring, firing, failing to promote, official disciplinary actions, etc. These types of allegations traditionally fall into the realm of discrimination, and thus could properly be excluded from the proof of a harassment claim. The second category addresses non-official actions involving the social environment of the workplace, such as verbal, physical or visual communications (or inappropriate physical contact) that allegedly send an offensive message to an employee. These types of allegations traditionally fall into the realm of harassment.

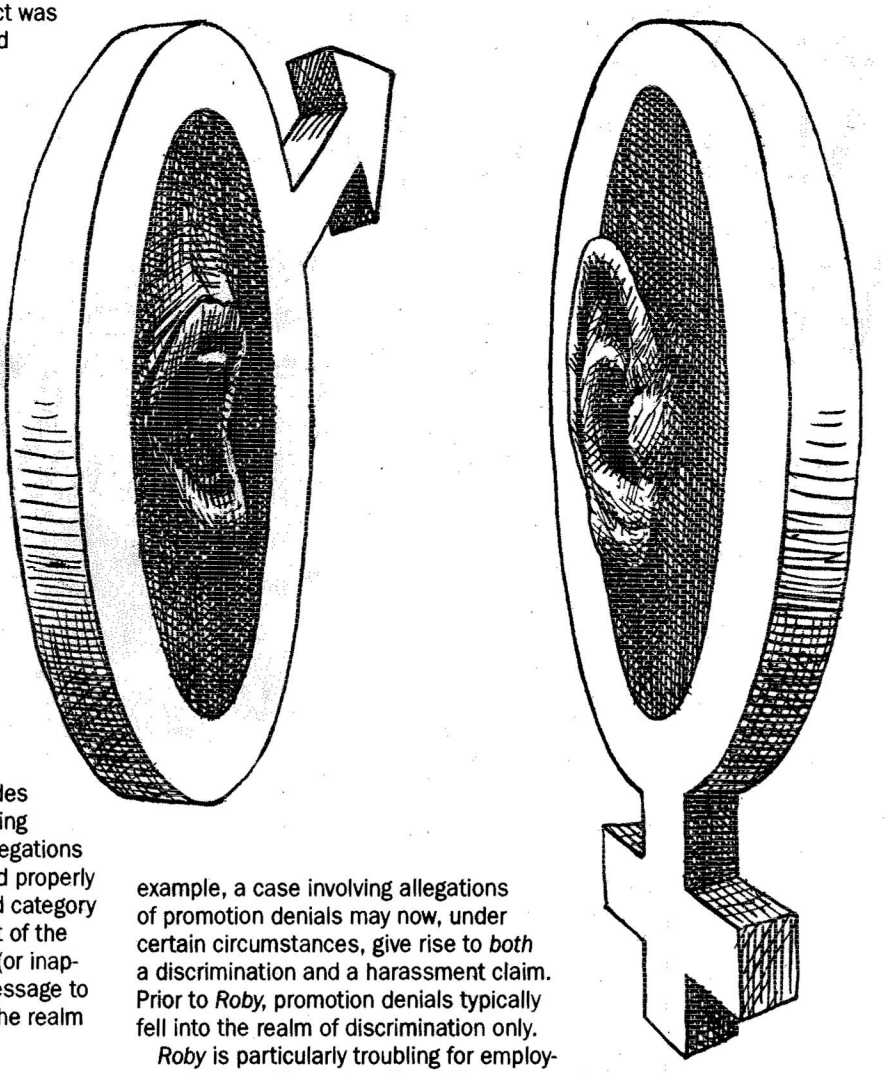
ROBERT S. SHWARTS is an employment law partner in Orrick's San Francisco office. His experience includes defending claims of wrongful discharge, retaliation, sexual harassment, wage-and-hour violations (including class actions) and breach of contract.



ERIN CONNELL is an employment law senior associate in Orrick's San Francisco office. She has represented and counseled clients on a variety of employment-related matters, including discrimination and harassment claims, retaliation claims, and wrongful termination claims.

Roby begins to breakdown the divide between the types of actions that traditionally were considered acts of discrimination, and holds that, in certain circumstances, such acts may also evidence unlawful harassment. In *Roby*, the plaintiff's discrimination claim was based on official acts such as progressive disciplinary warnings, a decision to assign the plaintiff to answer the office telephones during office parties, and the termination of her employment. The plaintiff's harassment claim was based on allegations such as her supervisor's refusal to respond to her greetings, demeaning facial expressions and gestures by her supervisor, and her supervisor's practice of regularly giving out gifts to others in the office and not to the plaintiff. The Court held that where the official acts that make up the discrimination claim are done is a way that sends a demeaning or offensive message to the plaintiff, these acts may also constitute evidence of harassment.

The result in *Roby* means that employers can no longer automatically compartmentalize the types of allegations that form the basis of a discrimination claim, and keep them separate from a harassment claim. For example, a case involving allegations of promotion denials may now, under certain circumstances, give rise to *both* a discrimination and a harassment claim. Prior to *Roby*, promotion denials typically fell into the realm of discrimination only.



Roby is particularly troubling for employers when read in conjunction with cases such as *Raghavan v. Boeing Co.*, 133 Cal. App. 4th 1120 (2005), which holds that a prior grant of summary adjudication as to one claim does not limit the evidence that is admissible on another claim. In *Raghavan*, the trial court granted summary adjudication as to the plaintiff's defamation claim, but the plaintiff's wrongful termination claim proceeded to trial. The *Raghavan* court held that even though the grant of summary adjudication was based on a finding that the alleged defamatory statement (a written reprimand) was true, that finding did not limit the plaintiff from arguing at trial that the reprimand was retaliatory and *false* as part of the evidence on which the plaintiff based his wrongful termination claim.

When applied in the harassment arena and read in connection with *Roby*, *Raghavan* could mean that even if a court has granted summary adjudication as to a plaintiff's discrimination claim, the evidence on which that dismissed discrimination claim was based may still go to the jury on a remaining harassment claim if the plaintiff can show that the conduct at issue was done in a way that sent a demeaning or offensive message. Thus, the far-reaching effects of *Roby* may prove to be worse for employers than the seemingly employer-friendly decisions of *Hughes* and *Haberman*.

As employment lawyers and trial courts alike continue to grapple with the implications of *Roby* and *Hughes*, employers must ensure that all employees, particularly managers, are properly trained on anti-harassment policies, and that any and all complaints of harassment are properly and promptly investigated and addressed. Indeed, until the California Supreme Court addresses these issues again, cautious trial courts likely will give cases like *Roby* and *Raghavan* broad interpretation so as to avoid reversal on a topic that undoubtedly will be debated further in the higher courts.