



Employment Auditor's Notepad

PROTECTING YOUR TRADE SECRETS

Recent California decisions have placed limitations on an employer's ability to contractually protect its investment in customers and employees by using noncompetition agreements. With the validity of noncompetition agreements in a state of disfavor and uncertainty, at best, employers should revisit their practices to protect their trade secrets and confidential information:

- Determine the Company's high value information that should be protected from competitors – customer lists, customer preferences, price lists, technical know-how, marketing strategies, etc.;
- Reveal that information on a need-to-know basis;
- Build strong customer relationships so that if essential employees leave those customers remain;
- Do not permit employees to remove copies of such information from Company premises;
- Reward high-value employees with retention bonuses so they do not have an incentive to leave and compete with your Company.

New Guidance from the California Supreme Court

EVIDENCE IN HARASSMENT CASES AND PUNITIVE DAMAGES LIMITS

The California Supreme Court recently decided the disability discrimination and harassment case, *Roby v. McKesson Corp.* In *Roby*, the employee worked for the employer for approximately 25 years. Starting in 1997, Roby began experiencing panic attacks. As a result, she needed to take time off work without notice because of severe panic symptoms, including digging her nails into her skin, which produced open sores on her arms. Roby was also on medication which made her produce a bad odor.

The employer had an absentee policy which had a disparate impact on people like Roby who needed to take time off without the ability to give 24-hours notice and who frequently needed time off to deal with a disability. The employer's stringent absentee policy resulted in disciplinary action being taken against Roby. In addition, Roby's supervisor made comments about her body odor, knowing it was a result of her medication, expressed disapproval when Roby needed to take a rest break because of a panic attack, ostracized Roby, and excluded Roby from gifts and parties given for other employees.

A jury found the employer discriminated against Roby and subjected Roby to unlawful harassment awarding Roby \$3.5 million in compensatory damages and \$15 million in punitive damages. The California Supreme Court's opinion addressed two major issues: (1) whether evidence of discrimination could be used as evidence of unlawful harassment; and (2) whether the punitive damages award was excessive in violation of the federal constitution.

As to the first issue, the Court decided that evidence of discrimination could be used to support a harassment claim. Discrimination under the Fair Employment and Housing Act is unlawful official employment actions motivated by improper bias. Individual supervisors cannot be held liable for discrimination. Harassment, by contrast, is unlawful hostile social interactions in the workplace that affect the workplace environment because of the offensive message they convey. Individual supervisors may be held liable for harassment. This decision blurs the line between discrimination and harassment, opening up new vulnerability for suit against individual supervisors.

Second, the Court held that because the conduct had low reprehensibility and the plaintiff was awarded substantial noneconomic damages, the punitive damages award should be reduced to a 1 to 1 ratio with compensatory damages. The Court reduced the plaintiff's judgment accordingly, which is good news for employers.

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