

EMPLOYMENT LAW

Employer May Be Liable for Failing to Investigate Disability Needs

by Raul Cadena
Column Editor

*Raul Cadena is a partner at Cadena Churchill, LLP, where he represents plaintiffs in the areas of employment law, including wage and hour class actions, insurance bad faith and personal injury. Mr. Cadena received his Bachelor of Arts from Harvard University and his Juris Doctor from the University of California at Berkeley School of Law, Boalt Hall. Mr. Cadena also studied at the Universidad Complutense in Madrid, Spain. He is a member of the Board of Directors of CASD and has been the Employment Law Column Editor for **Trial Bar News** since 2006. He may be contacted by email at: rcadena@ccattorneys.com.*

Under Government Code §12940 subdivision (n), employers are required to engage in what is called an “interactive process” with disabled employees to determine if a “reasonable accommodation” would allow them to continue working. Late last year, the Second Appellate District held that an employer’s failure to engage in the interactive process is a distinct violation, separate and apart from the violation which occurs when an employer fails to provide a reasonable accommodation. Both of these provisions are found under California’s Fair Employment and Housing Act (“FEHA”) and prior to this decision it was widely believed that an employer could not violate its obligation to engage in the interactive process unless it had also failed to provide a reasonable accommodation.

Facts

In the late 1990's, Guy Wysinger was a district manager in Automobile Club of Southern California’s (“ACSC”) Santa Barbara Office. At about the same time, ACSC decided to implement a new compensation plan which ACSC’s older office managers opposed because they would receive a disproportionate reduction in pay. In response to the opposition, ACSC’s vice-president of district office operations told Wysinger that they would “crush” those opposing the plan. ACSC’s vice-president further told another senior manager who opposed the plan, that ACSC would not tolerate opposition to it. Wysinger nevertheless filed an age discrimination complaint in 1999 with the EEOC claiming ACSC committed age discrimination. Consequently, ACSC did not impose pay cuts.

Despite receiving favorable performance evaluations from ACSC during his first 25 years of employment, Wysinger’s work environment took a turn for the worse. ACSC treated him coldly and ignored him at management meetings. In addition, Wysinger suffered from lupus, a heart condition and rheumatoid arthritis. His daily commute to Santa Barbara aggravated his arthritis. Wysinger wanted to transfer to the Ventura office to avoid the long commute. However, ACSC ignored requests to accommodate his disabilities.

Wysinger began to receive unfavorable job evaluations. Wysinger’s immediate supervisor claimed that it was not about Wysinger’s performance, but rather involved one of Wysinger’s staff members who needed improvement. ACSC also transferred staff from Wysinger’s office which created a hardship for him.

In 2002, despite a recommendation from Wysinger's supervisor that Wysinger fill a manager position in Ventura, ACSC gave the position to a less qualified employee who had not applied for the position because ACSC wanted to "change the culture of the organization..."

Wysinger claimed that he became depressed and was unable to work. He sued for various discrimination claims under FEHA. The jury found ACSC liable for failure to engage in an "interactive process" with Wysinger to determine reasonable accommodations for his disability, but found it not liable for the claim that it failed to provide a reasonable accommodation. The jury awarded Wysinger compensatory damages of \$280,000 and punitive damages of \$1 million. ACSC appealed.

Appellate Court's Analysis

ACSC argued that because the jury found ACSC did not fail to provide a required reasonable accommodation for Wysinger's disability, but found that ACSC failed to engage in an interactive process regarding Wysinger's disability, the jury's verdict was inconsistent and must be reversed. The Second Appellate District Court disagreed and affirmed the verdict.

The court first noted that the two claims involved separate causes of action and proof of different facts. The court observed that an employer must engage in a good faith interactive process with the disabled employee to explore the alternatives to accommodate the disability and that an employee may sue an employer who fails to engage in the interactive process. The court further observed that the failure to engage in this process is a separate FEHA violation independent from an employer's failure to provide a reasonable disability accommodation. As the court noted, an employer that does not engage in the interactive process cannot know whether an alternate job would have been found and it is precisely the interactive process which has the potential of revealing solutions which neither party may have envisioned. Accordingly, the court held that the verdicts on the reasonable accommodation issue and the interactive process claim were not inconsistent because by refusing to engage in the interactive process ACSC prevented the parties from reaching the stage of deciding which accommodations were required.

ACSC next argued that as with the Americans with Disabilities Act ("ADA"), Wysinger had to prove a violation of the FEHA provisions regarding failure to provide reasonable accommodations in order to prevail on an interactive process claim. Under the ADA, there are no provisions which impose liability on employers who refuse to engage in the interactive process. However, the court noted that whereas ADA provisions are helpful in interpreting FEHA, they are not helpful when they undermine provisions of California law that provide more protections to employees than the ADA. Moreover, the court noted that FEHA specifically allows an independent cause of action for employees whose employers fail to engage in the interactive process.

The court noted that ACSC's position would make Government Code §12940, subdivision (n) superfluous. In particular, the court observed that employers who violate subdivision (n) by withholding information that could lead to a reasonable accommodation could avoid liability for violation of Government Code §12940, subdivision (m) which requires a reasonable accommodation. The Court further noted that even federal courts in ADA cases had concluded that "an employer who has received proper notice cannot escape its duty to engage in the interactive process simply because the employee did not come forward with a reasonable accommodation that

would prevail in litigation (citing to *Taylor v. Phoenixville School Dist.* (3d Cir. 1999) 184 F. 3d 296, 317).

ACSC further argued that the jury had to find that ACSC had no duty to engage in an interactive process after it rejected Wysinger's requested transfer because Wysinger did not request alternative accommodations. However, the court noted that ACSC did not offer any specific accommodation even after Wysinger's doctor wrote to the company on his behalf.

Finally, ACSC argued that reversal was required because the jury did not specify which damages were attributable to the interactive process claim and which were attributable to the retaliation claim. However, because ACSC did not request a specific finding, the court held that ACSC waived this argument.

CONCLUSION

What is clear from this decision is that an employer may no longer insulate itself from liability by arguing that an employee did not request alternative accommodations. Employees simply do not have at their disposal an employer's information concerning alternative accommodations. It is the interactive process that reveals potential solutions, some of which neither the employer or employee has considered. Accordingly, an employer which ignores its obligations under Government Code §12940 subdivision (n) to engage in an interactive process does so at its own peril.