

EMPLOYMENT LAW

Employer Liability for Single Failure To Make A Reasonable Accommodation

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 and Parliamentarian of CASD and has been the Employment Law column editor for **Trial Bar News** since 2006. He may be contacted by email at: rcadena@cadenachurchill.com.*

In *A.M. v. Albertsons, LLC*, 2009 Cal. App. LEXIS 1675, the First Appellate District recently ruled that a single failure to accommodate is sufficient to support a jury finding of employer liability. In *A.M. v. Albertsons*, an employee who required frequent bathroom visits was denied the right to leave the cash register and go to the bathroom despite her right to a reasonable accommodation that permitted frequent bathroom breaks. The employee soiled herself at the checkout stand and immediately became distraught. The employee alleged that she experienced emotional distress as a result of the incident. At trial, a jury awarded \$200,000 in damages based on the single incident. The court affirmed the jury's verdict and ruled that the trial court properly denied the employer's motion for nonsuit.

Facts

Plaintiff A.M. arrived in the United States from El Salvador in 1981. She began working for Albertsons in 1987. In January of 2003, she was working at the meat and deli department and as a cashier. Shortly thereafter, she underwent chemotherapy and radiation treatment which left her mouth very dry. A.M. had to constantly drink water and was consequently having to frequently urinate. *Id.* at 2.

When A.M. returned to work, A.M. told her managers what she needed and Albertsons gave her a reasonable accommodation which was water with her at all times when she was working and the ability to go to the bathroom when necessary. Albertsons told A.M. that she just needed to let managers know when she needed to go the bathroom and they would cover for her. Between January 2004 and February 11, 2005, when A.M. was working at a checkstand and needed to use the bathroom she asked a coworker to take her place. *Id.* at 3.

On February 11, 2005, A.M. worked her regular shift along with the person in charge named Kellie Sampson. Because Sampson had never worked with A.M. before she was not aware of the accommodation. Consequently, when A.M. asked to be relieved to go on break Sampson denied her request and asked her to wait because a delivery truck was arriving and Sampson had to unload it. *Id.* At 4.

After not hearing back from Sampson, A.M. told Sampson on the store intercom that she needed to go to the bathroom. Sampson told A.M. she would have to wait. A.M. again called Sampson on the

intercom explaining that she really needed to go. Sampson did not give A.M. permission to leave her checkstand. *Id.*

A.M. urinated at the checkstand. Because she was having her menstrual cycle, A.M. was very wet with both urine and blood. She felt humiliated. A.M. asked a courtesy clerk to find Sampson, but Sampson said she was busy and that A.M. had to wait. *Id.*

A.M. told Sampson that she was going home and walked into the bathroom to clean herself. A customer who saw A.M. crying asked what had happened. A.M. told the customer that she had wet herself because she was not allowed to go to the bathroom. After calling her union representative, A.M. went home. *Id.* at 5.

A.M. did not want to go home so filthy and smelling so badly and thought about killing herself. At home, A.M. was nervous, crying and sobbing. Thereafter, she felt depressed and a doctor prescribed medication to help sleep. The doctor also gave her a doctor's excuse not to go to work *Id.* at 6.

A.M. continued to be withdrawn. She feared that people could smell a bad odor on her despite assurances to the contrary. She was unable to sleep and had unusual dreams. In an effort to make the imagined smell go away, she shaved off all of her body hair. She also told the doctor that she had thought about killing herself.

Sampson left her job with Albertsons soon after the February 2005 incident. Thereafter, she continued having bad dreams and attended therapy sessions. *Id.* at 7. A.M. eventually returned to work at Albertsons and found the people in charge of her store were unwilling to work with her. A.M. claimed that she had trouble getting a shift that she needed in order to be able to attend her therapy sessions. However, by the time of the trial, A.M. regularly received bathroom breaks at the store whenever she asked for them. *Id.* at 8.

At trial, Albertsons argued to the jury that the single incident that occurred should be placed in the larger context of accommodation that had been provided to A.M. over more than a year's time. It further argued that A.M. was responsible for the incident, because she did not simply walk away from her checkstand to go to the bathroom

In June 2008, the jury found for A.M. on the ground that Albertsons failed to accommodate her in February 2005. The jury found in a special verdict that Albertsons knew that A.M. had a physical condition that limited a major life activity, it failed to provide reasonable accommodation for that condition on February 11, 2005 and that failure was a substantial factor in causing harm to A.M. The jury awarded A.M. \$200,000 in damages with \$148,000 of that amount for past emotional distress. Albertsons moved for a new trial on the ground of instructional error. The trial court denied the motion and Albertsons appealed.

Court's Analysis

On appeal, Albertsons argued that the trial court erred in refusing to give instructions that provided that an employer faces liability only when the employer, not the employee, bears responsibility for the breakdown in the interactive process. A.M. had opposed the giving of the instruction arguing that the interactive process was the process by which a reasonable accommodation was fashioned

and had nothing to do with delivering the promised accommodation.

Albertsons argued that A.M. had a continuing duty to communicate and act reasonably with respect to her accommodation. Albertsons further argued that it had fulfilled its obligation to accommodate A.M. and that the February 2005 incident occurred because A.M. did not simply leave her checkstand to use the restroom or at least mention to Sampson that she had been granted an accommodation. *Id.* at 15.

The appellate court noted that under the FEHA, an employer that fails to make a reasonable accommodation for an employee's known physical disability engages in an unlawful employment practice. *Id.* at 16. The court further noted that it is also an unlawful employment practice for an employer to fail to engage in a good faith interactive process with the employee to determine an effective reasonable accommodation if an employee with a known physical disability requests one. *Id.* The court also noted that the failure to accommodate and the failure to engage in the interactive process are separate, independent claims involving different proof of facts and that the interactive process is to determine what accommodation is required. *Id.* The court noted that once a reasonable accommodation has been granted, then the employer has a duty to provide that reasonable accommodation.

The court further observed that to graft an interactive process which was intended to apply to the determination of a reasonable accommodation onto a situation whereby an employer failed to provide a reasonable, agreed-upon accommodation was contrary to FEHA's apparent intent and would not support the public policies behind that provision. *Id.* at 18.

Albertsons argued that its February 2005 failure to accommodate was trivial and that it constituted a single incident in the context of a much longer period of successful accommodation. However, the court noted that the statute did not speak about a pattern of failure and further noted that, as demonstrated by A.M.'s case, a single failure to make a reasonable accommodation can have tragic consequences for an employee.

Albertsons also argued that the trial court erred in its instruction to the jury that A.M. did not bear the burden of proving whether she was unusually susceptible to emotional distress injuries. The trial court rejected this argument because Albertson's own experts had testified that A.M. was more susceptible to injury than a normally healthy person. *Id.* at 24. The court affirmed the trial court.

CONCLUSION

The disability protections under FEHA create employer liability when an employer fails to engage in the interactive process. It is only through this process that an employer may assess the type of reasonable accommodation necessary for the employee. What was unclear was whether one incident of a failure to accommodate was sufficient to create liability for an employer even though the employer had previously offered reasonable accommodations. As a result of this decision, employers would be wise to establish protocols that ensure new staff members are aware of employee accommodations. The risk of not doing so can be significant, particularly so under FEHA which awards the prevailing party his or her attorney's fees.