

Make sure your supervisors are implementing employees' accommodations

In September 2009, the First Appellate District of the California Court of Appeal affirmed a Marin County trial court decision awarding an Albertson's employee \$200,000 in damages for a FEHA violation (CA Gov't Code Sections 12900-12996).

The employee, a cashier, sued Albertson's for failure to provide her with reasonable accommodations for her disability. She had notified Albertson's about one year prior to the event, due to side effects from her chemotherapy treatment, she needed to drink water constantly and, consequently, had to urinate frequently. Albertson's normally did not allow its employees to have beverages at the check-stand. However, when she told the managers what she needed, she was told it was not a problem and that she was to let the duty-managers know when she needed to go to the bathroom and they would cover for her.

In February 2005, while the employee was on duty at the check-stand, only one manager was in the store, along with a courtesy clerk. The employee called several times to the back of the store requesting a bathroom break, but was denied because the manager was too busy. Eventually the employee, unable to control the urinary urge, and unable to leave the check-stand, urinated on herself in front of customers. The employee left the store in tears and subsequently underwent a major depression and hallucinations of continuing body odor. She entered a psychiatric hospital. There is no evidence that the employee mentioned her accommodation to the on-duty manager that day, or that the on-duty manager was aware of the accommodation granted to the employee.

The jury heard evidence of the employee's susceptibility to emotional distress. She had grown up in El Salvador during a period of civil war, had seen people killed, had been robbed at gunpoint, and underwent a myriad of other stressful experiences. Albertson's position was that the employee was unusually susceptible to depression, contending that the February 2005 incident triggered a shift from general anxiety disorder to a more severe psychotic disorder. The jury disagreed.

Albertson's had a written procedure for processing employee requests for reasonable accommodation, and decisions about such accommodation were made by Albertson's HR managers for the Northern California district, not by store managers. If a store manager granted an ongoing accommodation to an employee, a record of such should be made to pass along to a new manager, but sometimes no record was made. None was used in the employee's case.

Under the FEHA, an employer that fails to make reasonable accommodation for an employee's known physical disability engages in an unlawful employment practice. 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 requests one. These two aspects are separate.

Albertson's argued that the employee had a continuing duty to notify managers of her disability and agreed-upon accommodation. The Court found otherwise. Once a reasonable accommodation has been granted, then the employer has a duty to provide it.

Employers need to make sure they are providing reasonable accommodations that do not pose an undue hardship to the employer. And as this case highlights, it is also important to continue engaging in the good faith interactive process to determine whether the accommodation is working and whether your supervisory personnel are properly implementing the accommodation.

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