



## The Personnel File

NEWS AND DEVELOPMENTS IN EMPLOYMENT LAW FOR CALIFORNIA'S EMPLOYERS

### **Supermarket Employee's Disability Adequately Accommodated-- Except For One Night--And Wins \$200,000 In Damages**

A supermarket employee, whose physical disability had been adequately accommodated by her employer for more than one year, nonetheless received a \$200,000 damage award from a jury because the employer failed to provide the accommodation on only one night.

Albertsons Supermarkets hired the employee, identified by the Court of Appeal only as A.M., in 1987. In 2003, she took medical leave because of tonsil and larynx cancer. Her treatment affected her salivary glands, resulting in a very dry mouth. This required her to drink water constantly and, as a result, to urinate frequently. She returned to work as a cashier in January 2004 with a requirement that she have water with her at all times, resulting in her need to go to the bathroom when necessary, sometimes as often as every 45 minutes. Albertsons accommodated her in these respects although normally the company did not allow employees to have beverages at cashiering stations. She was allowed to ask a co-worker to take her place whenever she needed to use the bathroom. Albertsons accommodated A.M.'s needs from her return to work for more than one year.

The events of the evening of February 11, 2005, led to the litigation and to the damage verdict in A.M.'s favor.

An individual named Kellie Sampson began working at the same store as A.M. in February 2005. Sampson was in charge of store operations when more senior managers were not present. A.M. was scheduled to work from 1:00 p.m. to 10:00 p.m. on February 11. By 7:00 p.m., only three employees were left in the store: A.M., who was the only cashier, another employee who was a courtesy clerk, and Sampson, who was in charge. Albertson's policy was that a checker could never leave the front end of the store unattended and that a courtesy clerk was not allowed to operate a register. Therefore, the clerk could not relieve A.M. at the check stand; only Sampson could do that. Sampson had never before worked with A.M. and there was no evidence she had knowledge of A.M.'s disability or the accommodation that had been granted by store managers.

At about 8:00 p.m. A.M. told Sampson that she needed to take a break. However, A.M. did not mention that she needed to go to the bathroom. A delivery truck was arriving and Sampson asked A.M. if she could wait. A.M. agreed to do so. Soon thereafter, a line of customers was waiting to be checked out by A.M. at the cash register. She called Sampson on the store intercom and told her she needed to go to the bathroom. Sampson explained that she was unable to relieve her because she was unloading merchandise from the delivery truck. She

told A.M. that she would have to wait. A.M.'s need to go to the bathroom increased. A few minutes later A.M. still had customers waiting for her to check them out and she called Sampson again on the intercom, explaining that she really needed to go. Sampson again answered that she was busy and unable to come to the front of the store. A.M. said she was just going to go. Sampson did not give her permission to leave her check stand; she simply hung up the phone. Unable to control herself, A.M. urinated while standing at the check stand. She was having her menstrual cycle at the time so she became very wet with both urine and blood. She told the courtesy clerk what had happened and instructed her to find Sampson and tell her that A.M. needed her. The courtesy clerk returned, reporting that Sampson had indicated that she was still busy and that A.M. had to wait.

When Sampson finally went to the front of the store, she asked if A.M. was taking her break. A.M. answered in the negative stating that she was going home. She left the check stand and walked into the bathroom to clean herself. She changed into oversized pants that the courtesy clerk had found for her and left the store crying. A customer walked A.M. to her car and stayed with her for a while. A.M. remained off work for a number of months and received an excuse from her doctor not to go to work. She suffered significant emotional symptoms including suicidal ideation.

A.M. tried returning to work three months later, in May 2005, but the store was unable to offer her a schedule that allowed her to attend therapy meetings, which had begun after she had spent several days in a psychiatric hospital. The therapy meetings were a condition of her return to work. Her physician extended her time off but eventually she was able to return to work. Apparently the people now in charge of her store were unwilling to work with her. She had trouble getting a shift that allowed her to attend her therapy sessions. The store was not certain it could accommodate her. Eventually she did return to work at an Albertsons store where she regularly received bathroom breaks whenever she asked for them. Subsequently, she sued Albertsons for damages, claiming that the company had failed to provide her with a reasonable accommodation for her disability and that it had failed to engage in the interactive process during the Summer of 2005 when she attempted to return to work, all in violation of the Fair Employment and Housing Act (FEHA).

The jury found in favor of A.M. on the claim of failure to accommodate. The jury specifically found that Albertsons knew A.M. had a physical condition that limited a major life activity but failed to provide reasonable accommodation for her disability on February 11, 2005, the date of the incident described above. The jury awarded her \$200,000 in damages, comprising approximately \$50,000 in past lost wages and future medical expenses, with the balance awarded for emotional distress.

Under FEHA, an employer that fails to make reasonable accommodations for an employee's known physical disability has committed an unlawful employment practice. It is also an unlawful 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. The failure to accommodate and the failure to engage in the interactive process are separate, independent claims under FEHA involving different proof of facts. The purpose of the interactive process is to determine what accommodations are required.

Once a reasonable accommodation has been granted, the employer must then provide that accommodation.

Albertsons' primary defense theory was that it had already fulfilled its obligation to accommodate A.M. and that the February 11, 2005, incident occurred because A.M. did not communicate to request accommodation on that specific occasion.

In essence, Albertsons' claim was that, even though it had previously accommodated A.M.'s disability for more than one year, it had no obligation to grant her any accommodation on February 11, unless and until she asked for it. The court rejected this argument, concluding the statute did not require A.M. to seek "the interactive process" after the employer had already provided the reasonable accommodation. Here, Albertsons had provided acceptable accommodations for more than one year but did not provide them on February 11.

Albertsons next argued that its failure to accommodate on that date was "trivial, because it constituted a single incident in the context of a much longer period of successful accommodation beginning in January 2004." The Court quickly disposed of this allegation, finding that this interpretation of a failure to accommodate would be inconsistent with FEHA. Here, the Court noted, "A single failure to make reasonable accommodation can have tragic consequences for an employee who is not accommodated. To the extent that a single failure to accommodate could be trivial within context of a larger pattern of accommodation," the court noted that the jury did not agree, and that its award of \$200,000 in damages suggested that the jury "found the failure to accommodate to be substantial, not trivial." Accordingly, the appellate court affirmed the judgment which awarded damages to A.M.

Albertsons' liability flowed from the fact that it had entrusted Sampson with the task of managing the store that night without making her aware of the accommodation provided to A.M. The Court's decision also indicates that Albertsons had failed in this case to comply with its own formal procedure for providing reasonable accommodation to its disabled employees. Albertsons had a written procedure for processing employee requests for reasonable accommodation. Decisions about reasonable accommodation were made by the company's regional human resources managers and not by individual store managers. This procedure was not used in A.M.'s case. Further, even in situations where Albertsons had granted a reasonable accommodation, those situations were not always documented. The lack of documentation was problematic because store management positions were transient and there was no procedure for passing on information about accommodations from manager to manager as managers changed. As noted, there was no evidence that Sampson had been made aware either of A.M.'s disability or the store's accommodation. Indeed, Sampson apparently believed, after A.M.'s second call, that she had gone to the bathroom, even though such an action would have violated the company rule against leaving a courtesy clerk in charge of the cash register.

Albertsons was entitled to be commended for having accommodated A.M.'s disability for a substantial period of time. However, the company's failure to document its action was an invitation for disaster, especially in a business where managers change frequently and the company had no system for passing on this sort of information from manager to manager. Hence, Sampson had no idea the problem existed. There was no evidence she had any particular

bad feelings toward A.M. or any indifference to her condition. However, these circumstances on this one particular occasion in February 2005 led to a disaster which resulted in a significant adverse jury verdict against Albertsons.

The lesson to be learned from this decision is that, notwithstanding the best of intentions in accommodating an employee's needs, the lack of a system of documentation and a procedure for passing information from manager to manager can, and in this case did, lead to a significant liability.

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