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Mark I. Schickman, Editor
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Freeland Cooper & Foreman LLP

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UNION REPRESENTATION

Public employees entitled to union rep at accommodation meetings

by Jeff Sloan and Elina Tilman
Renne Sloan Holtzman Sakai, LLP

Employers have a statutory obligation under the Americans with Disabilities Act (ADA) and the California Fair Employment and Housing Act (FEHA) to engage in an interactive process with disabled employees to identify potential reasonable accommodations. A recent decision by the Public Employment Relations Board (PERB)—the California public-sector equivalent to the National Labor Relations Board (NLRB)—has injected a new element of uncertainty and fresh concerns into the interactive process. Substantially expanding the role of unions in the public-sector workplace, the decision affords employees the right to have union representation during interactive process meetings.

Radical expansion of right to union representation

The case arose under the Trial Court Employment Protection and Governance Act, legislation substantially similar to other California public-sector collective bargaining laws administered by PERB. In *SEIU, Local 1021 v. Sonoma County Superior Court*, an employee who had been diagnosed with a disability asked her employer to permit her union representative to accompany her to an interactive process meeting to discuss reasonable accommodations. When the employer refused her request, the union filed unfair labor practice charges with PERB. The General Counsel dismissed the case, but PERB reversed on appeal.

In its famous 1975 decision *NLRB v. Weingarten*, the U.S. Supreme Court concluded that unionized employees have a right to union representation in investigatory interviews that could lead to discipline. In *Sonoma*, PERB observed that California public-sector employees and unions already have representational rights that extend beyond *Weingarten* guarantees—and then proceeded to expand those rights even further, announcing that employees have a right to be represented by a union during the interactive process.

PERB opined that a union representative could serve important functions, from advising an employee about the consequences of refusing offered accommodations, to advising the employer on possible conflicts between the suggested accommodation and the collective bargaining agreement (CBA).

California public employers are in an uproar

Public-sector employers are in an uproar about *Sonoma* because the decision threatens to undermine the effectiveness of the interactive process. Here's why.

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Mark I. Schickman, Editor
Freeland Cooper & Foreman LLP, San Francisco
415-541-0200 • schickman@freelandlaw.com

Cathleen S. Yonahara, Assistant Editor
Freeland Cooper & Foreman LLP, San Francisco
415-541-0200 • yonahara@freelandlaw.com

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Unions' lack of expertise. The interactive process is unlike all other performance, discipline, or contract-enforcement areas in which employees and unions have representational rights. It's different because it's a collaborative process that requires expertise in understanding a disabled employee's functional limitations in relation to her job's essential functions. But union representatives lack experience or expertise in identifying appropriate and workable reasonable accommodations. Thus, it's not surprising that FEHA's implementing regulations expressly limit the presence and participation of an employee's representative "when necessary because of the employee's disability or other circumstances" (Cal. Code Regs. tit. 2, § 11065(j)). PERB ignored this important qualifier, however.

Delays. The interactive process serves to promptly bring the employer and the employee together to identify a reasonable accommodation and put the employee back to work. However, delays often occur in securing union representation and scheduling meetings that all the parties can attend.

Contentiousness. In the past, union representatives who participated in interactive process meetings often took over the dialogue and prevented the employers from asking necessary questions. *Sonoma* overlooks that prospect.

Privacy. The interactive process is inherently private. However, a union's duty to represent all bargaining unit employees creates the specter of intended or unintended disclosure of an employee's private medical information, including potential violations of the Health Insurance Portability and Accountability Act (HIPAA).

Unions' conflict of interest. Unions have a duty to represent the entire bargaining unit and to defend their CBA. However, an employee's need for a specific reasonable accommodation may conflict with the strict provisions of a CBA, especially when an accommodation involves seniority rights, job restructuring, or schedule changes that may affect the bargaining unit. The prospect of a conflict of interest cannot be ignored. Perhaps recognizing that conflict, PERB shielded unions from liability, holding that a union's general duty to fairly represent its members doesn't apply when it represents employees in the interactive process! *SEIU, Local 1021 v. Sonoma County Superior Court* (Jan. 13, 2015), PERB Decision No. 2409-C.

Bottom line

The scope of PERB's decision is extremely broad. The Board concluded that the right to union representation applies to any meeting involving "matters potentially having an impact on significant terms and conditions of employment." That creates the possibility that *Sonoma* is only the beginning—not the outer limit, but the beginning—of a further expansion of employees' rights to union representation.

Moreover, while this decision involved the Trial Court Act, other collective bargaining statutes contain identical language addressing union representation in all employer-employee relations. PERB generally takes a consistent approach to issues under the various collective bargaining statutes it administers if a specific statute doesn't contain unique language applicable to the issue. Accordingly, PERB will likely find the same right to union representation during the interactive process under other statutes.

Lastly, *Sonoma* is further evidence of PERB's current tendency to be extremely union-friendly. PERB decided the case based on the parties' briefs, and because there was no hearing, Sonoma Superior Court didn't have the opportunity to fully explain and present evidence of how providing a right

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of representation during the interactive process would be burdensome, unworkable, and contrary to statutory design. PERB's decision has been appealed. (Fair disclosure: Our firm represents Sonoma Superior Court.)

The authors can be reached at Renne Sloan Holtzman Sakai LLP, jsloan@rshslaw.com and etilman@rshslaw.com. ✤