**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1021,<br><br>Charging Party,<br><br>v.<br><br>SONOMA COUNTY SUPERIOR COURT,<br><br>Respondent. | Case No. SF-CE-39-C<br><br>PERB Decision No. 2409-C<br><br>January 13, 2015 |

Appearances: Weinberg, Roger & Rosenfeld by Anthony J. Tucci, Attorney, for Service Employees International Union, Local 1021; Administrative Office of the Courts by Linda Lu Castronovo, Attorney, for Sonoma County Superior Court.

Before Martinez, Chair; Huguenin and Winslow, Members.

## DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Service Employees International Union, Local 1021 (SEIU or Union) of a dismissal of its unfair practice charge which alleged that the Sonoma County Superior Court (Court) violated various sections of the Trial Court Employment Protection and Governance Act (Trial Court Act)[1] when it refused to permit union representation at a meeting convened by the Court and an employee pursuant to the employee's request for a reasonable accommodation for her disability.

The Office of the General Counsel dismissed the charge based on its reading of *Trustees of the California State University* (2006) PERB Decision No. 1853-H (*Trustees*) which held that there is no right to union representation in interactive process meetings

[1] The Trial Court Act is codified at Government Code section 71600 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

convened to explore possible reasonable accommodations to enable an employee with a disability to perform essential job functions.

After reviewing the unfair practice charge, the warning and dismissal letters and the parties' briefs on appeal, we reverse the dismissal and remand this case to the Office of the General Counsel for the issuance of a complaint. For reasons discussed more fully below, we overrule *Trustees, supra,* PERB Decision No. 1853-H.

## FACTUAL ALLEGATIONS[2]

SEIU is a recognized organization that represents employees in the Court in several bargaining units, including clerical, court service and technical support units. Cyndi Nguyen (Nguyen) is an employee within the meaning of Trial Court Act section 71601(l) and a member of the clerical unit represented by SEIU.

On June 13, 2013, Nguyen was diagnosed with a physical impairment that substantially limited her ability to perform a "major life activity."[3] On June 19, 2013, Nguyen met with Deputy Court Executive Officer Cindia Martinez (Martinez), as part of the interactive process under the Americans with Disabilities Act (ADA).[4] We presume that this meeting followed Nguyen's request for reasonable accommodation for her disability.

Some days before the June 19, 2013 meeting, Nguyen requested that her SEIU representative be present at the meeting because she believed that the result of the meeting

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[2] At this stage of the proceedings, we assume that the essential facts alleged in the unfair practice charge are true. (*San Juan Unified School District* (1977) EERB Decision No. 12 [prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB]; *Trustees of the California State University (Sonoma)* (2005) PERB Decision No. 1755-H.)

[3] "Major life activities" include, but are not limited to caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, thinking, communicating, interacting with others and working. (2 Cal. Code of Regs., § 11065 (l).)

[4] The ADA is codified at 42 U.S.C. section 12101 et seq.

would affect her wages, hours and working conditions. Martinez denied the request for representation and explained to the SEIU representative, Michael Viloria (Viloria), that because the meeting did not involve discipline, he was not entitled to represent Nguyen at the meeting. Instead, according to Martinez, the meeting was to "engage in an interactive dialog" which the Court viewed as confidential, "since we are discussing medical conditions." Even if the employee waives confidentiality, no union representative would be permitted because the meeting "does not fall under Weingarten Rights."[5] (Ex. 1 to Unfair Practice Charge.)

At the June 19, 2013 meeting, Martinez offered to place Nguyen in a legal process clerk (LPC) Level 1 position, which was a demotion. Nguyen requested, unsuccessfully, to start at Level 2, because she had been performing many of the duties of the Level 2 in her prior position.

SEIU alleges that if Viloria had been able to represent Nguyen in the interactive meeting, he would have been able to highlight her employment history and qualifications to perform at a higher level, and propose terms to address any management concerns related to her transition and training.

The Court's sworn statement filed in response to the unfair practice charge provided additional facts, the following of which are not contradicted by SEIU. Section 1007 of the Court's Personnel Plan, Complaint Procedure for Complaint of Denial of Reasonable Accommodation, does not address the employee being accompanied by a union representative in his or her meetings with the Court concerning a denial of reasonable accommodation. The

[5] See *National Labor Relations Board v. Weingarten* (1975) 420 U.S. 251 (*Weingarten*), which held that an employee who has a reasonable fear that discipline may result from an investigatory or disciplinary meeting with the employer has a right to union representation at such a meeting.

Court asserts that reasonable accommodation meetings have been attended only by the Court and the employee.[6]

According to the Court, SEIU has not sought to meet and confer over its alleged exclusion from meetings convened under section 1007. Nor had SEIU sought to be present at any reasonable accommodation meetings between the Court and Nguyen prior to June 19, 2013.

WARNING LETTER AND DISMISSAL

The Office of the General Counsel issued a warning letter on March 6, 2014, to SEIU explaining that based on *Trustees, supra,* PERB Decision No. 1853-H, the charge failed to state a prima facie case. In *Trustees*, PERB upheld the dismissal of an unfair practice charge that complained of the employer's denial of union representation in a meeting with an employee concerning his injured worker status and possible reasonable accommodation. According to *Trustees,* PERB recognizes the right to union representation in individual meetings with the employer only in investigatory or disciplinary meetings: "Without the discipline and investigatory components, the right to union representation only exists under 'highly unusual circumstances.' (*Redwoods Community College District* [citation omitted].)" (*Trustees*, Warning Ltr., p. 6.) Based on *Trustees,* the Office of the General Counsel noted that PERB has held that the *Weingarten* right does not apply in an ADA interactive process meeting, and there is no right to representation at such meetings.

Because Board agents are bound by the Board's precedent, the Office of the General Counsel warned SEIU that unless it could amend the charge to correct factual inaccuracies or correct the deficiencies identified in the warning letter, the charge would be dismissed. SEIU

[6] The section of the Court's complaint procedure highlighted by the Court reads:

> The Court encourages the applicant/employee and a Court representative to meet and discuss potential reasonable accommodations to try and agree to a specific reasonable accommodation.

did not amend the charge and requested that the Office of the General Counsel dismiss the charge. From that dismissal, issued on March 20, 2014, SEIU appeals.

## THE APPEAL

In its appeal, SEIU argues that because the Trial Court Act guarantees to employees the right to "form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations," the right of representation is to be broadly conceived.[7] In its view, California case law creates a penumbra of protected rights which include union representation at "investigatory interactive-process meetings for a reasonable accommodation for a disability when the employee requests representation and reasonably believes that the meeting will lead to an adverse employment action." (Appeal, p. 5.)

Even under the *Weingarten* test, SEIU argues, the charge should not have been dismissed because all three *Weingarten* requirements were met here. Nguyen requested a union representative for a meeting that was investigative in nature because the Court was investigating what was needed to offer her reasonable accommodation. Nguyen reasonably believed that the interactive process would result in an employment action adverse to her, and SEIU argues that adverse action in the form of a demotion is tantamount to discipline. The rationale for the rights enunciated in *Weingarten* apply equally to an interactive meeting, according to SEIU: "The presence of a union representative could have assisted the employer by focusing on appropriate reasonable accommodation while mitigating adverse impacts to the

[7] See Trial Court Act section 71631 which provides, in pertinent part:

> Except as otherwise provided by the Legislature, trial court employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

terms and conditions of Nguyen's employment . . . . More, a union representative could have assisted in making any side agreements necessary to the collective-bargaining agreement [CBA]." (Appeal, p. 9.) SEIU also asserts that Nguyen was entitled to representation under the rationale of *Redwoods Community College Dist. v. Public Employment Relations Bd.* (1984) 159 Cal.App.3d 617 (*Redwoods v. PERB*) for the same reasons the representation would be justified under *Weingarten.*

SEIU also argues that a complaint should have issued because it articulated a viable competing theory of law, citing *City of Pinole* (2012) PERB Decision No. 2288-M, p. 12. According to SEIU, *Trustees, supra,* PERB Decision No. 1853-H was wrongly decided because it too narrowly construed California's law concerning the right to representation. SEIU urges PERB to re-evaluate whether interactive meetings pursuant to the ADA are in fact "investigatory" and whether a reasonable belief that the meeting will result in an adverse employment action is equivalent to a reasonable belief that discipline will follow the meeting.

The Court's Response to Appeal

The Court disagrees that *Weingarten* should be expanded to include the interactive process because, according to the Court, that process is a "creative, problem-solving process between the employer and the employee" that calls for collaboration, time, and sometimes trial and error as the employer and employee may explore different accommodations to settle on one that works. It is not an adversarial, disciplinary process. Therefore, the Court contends, *Trustees, supra,* PERB Decision No. 1853-H was correctly decided.

According to the Court, because the purpose of the interactive process is to exchange ideas, SEIU, "with neither medical expertise nor the employee's experience of working with her limitations," has nothing to contribute to the process. (County's Response to Exceptions, p. 5.) Further, according to the Court, it was unreasonable for Nguyen to have a reasonable

belief that she would be disciplined as a result of the June 13, 2013 meeting, because she and the Court had been in the interactive process to find a reasonable accommodation for her since 2008, and she had not suffered any disciplinary actions as a result of earlier meetings. The Court asserts that Nguyen no longer wanted to work as a court reporter, and preferred to be assigned as a LPC, a job that paid less than that of a court reporter. Assigning her to the job she allegedly requested is not a demotion and did not trigger *Weingarten* rights.

The Court argues that it is not appropriate to apply *Weingarten*, which protects collective rights, to a situation in which individual rights are paramount. According to the Court, if the Union were brought into the interactive process, where the goal is to find a reasonable accommodation for an individual, the Union could be faced with a conflict of interest if the reasonable accommodation agreed upon by the individual employee and the employer conflicts with seniority rights, or other collectively bargained rules. (*U.S. Airways v. Barnett* (2002) 535 U.S. 391, 406 (*Barnett*).) For this reason, the Court urges that SEIU has no place in the interactive process.

The Court also asserts that union involvement in the interactive process would create delays that are always present when more people are required to attend meetings. Because the employer is obligated by ADA and Fair Employment and Housing Act (FEHA) regulations to engage in the interactive process expeditiously, the Court fears that permitting union representation in the interactive process meetings would adversely impact its ability to comply with these statutory schemes.

Finally, the Court contends that permitting union representation in the interactive process meetings will compromise medical privacy of other employees who have sought reasonable accommodation.

We address each of the Court's arguments below.

## DISCUSSION

Both parties argue their case as if *Weingarten* were the lodestar, the only guiding framework within which to view this controversy. We sympathize with the Court's complaint regarding SEIU's attempt to "shoehorn the interactive process meetings into the *Weingarten* requirements." (Court's Response, p. 2.) We need not stretch the interactive process meeting into the Procrustean bed of the *Weingarten* "investigative" or "potentially disciplinary" meetings in order to conclude that the right to representation in all matters of employer-employee relations includes the right to have a union representative present at an interactive process meeting upon the employee's request.

### PERB's Precedential Interpretations of the Right to Representation

From its earliest days, PERB has recognized that an employee's right to representation and the exclusive representative's right to represent in meetings with the employer extended beyond investigatory or disciplinary interviews.

In *Mount Diablo Unified School District, et al.* (1977) EERB Decision No. 44 (*Mount Diablo*), the Board concluded that the Educational Employment Relations Act (EERA) section 3543.1(a)[8] included the right of employee organizations to represent their members in a formal grievance proceeding. This right was construed to include informal grievance meetings in *Rio Hondo Community College District* (1982) PERB Decision No. 272 (*Rio Hondo*). In that case, PERB reviewed an administrative law judge's (ALJ) dismissal of a charge in which

[8] EERA is codified as Government Code section 3540 et seq. EERA section 3543.1(a) provides: "Employee organizations shall have the right to represent their members in their employment relations . . . ." Employees are guaranteed the right to ". . . participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations" in EERA section 3543(a). (Emphasis added.) It is appropriate for PERB to apply precedents developed under other acts administered by the Board. (*Service Employees International Union, Local 790 (Banks, et al.)* (2004) PERB Decision No. 1636-M.)

the employee organization complained that it and its members were denied representation rights when the employer refused to permit the union to represent employees in an informal grievance meeting. The ALJ reasoned that the *Weingarten* right did not apply because the meeting was not an investigatory interview which might reasonably result in disciplinary action, and therefore, if *Weingarten* did not apply, there was no right to representation. Overruling that conclusion, the Board stated: "[the ALJ] erroneously relied on *Weingarten* to conclude that no right to representation existed, ignoring the independent right to representation in grievance proceedings." (*Rio Hondo,* p. 8.) The Board then concluded that the right of employees guaranteed by EERA section 3543 to "form, join and participate in the activities of employee organizations . . . for the purpose of representation on all matters of employer-employee relations" protects the right of employees to be represented by their employee organization in grievance proceedings. The extent of this right is congruent with the guarantee of EERA section 3543.1(a), which provides that employee organizations "shall have the right to represent their members in their employment relations with . . . employers."

In *Redwoods Community College District* (1983) PERB Decision No. 293 (*Redwoods*), PERB was presented with a charge that the employer had improperly denied an employee union representation in a meeting to which she was summoned to answer questions about her negative performance evaluation.[9] The Board concluded that the employee had a right to union representation at this interview that was initiated by the employer, attended by more than one higher level administrator, and imbued with a sense of "appellate" formality that

[9] The employee had complained to the college administration about her performance evaluation and the District granted her request that the evaluation be reviewed by an independent reviewer. Before the administrator designated to conduct the independent review accepted his assignment, the employee, represented by her union, agreed to a proposal that she be re-evaluated in 60 days, and she withdrew her complaint. Nonetheless, the independent reviewer insisted on conducting a review of her withdrawn complaint, as he viewed the complaint as a challenge to the evaluation process itself. (*Redwoods, supra,* PERB Decision No. 293, p. 3.)

distinguished it from a "shop floor" conversation. The Board found the source for the employee's right in *Redwoods* in EERA section 3540, which states the purpose of the EERA to include: "the right of public school employees to join organizations of their own choice, to be represented by such organizations in their professional and employment relationships with public school employers . . . ."

The Board in *Redwoods, supra,* PERB Decision No. 293 explained the difference between the *Weingarten* rule and the broader right of representation under EERA:

> *Weingarten* was intended only to clarify one uncertain aspect of the right of representation which has been established under the language of section 7 of the National Labor Relations Act [NLRA], namely, the extent of that right during a preliminary investigative procedure conducted by the employer. Certainly, that case need not be relied upon to establish the right of representation in grievance processing or arbitration of disciplinary action.

(*Redwoods, supra,* PERB Decision No. 293, pp. 8-9.)

*Redwoods, supra,* PERB Decision No. 293 was appealed to the California Court of Appeal, which affirmed PERB's decision. The Court noted:

> On its face the EERA language on which PERB relies is considerably broader than that of the National Labor Relations Act (NLRA), section 7, on which [*Weingarten*] turned . . . . The NLRB and the United States Supreme Court relied on NLRA section 7, which has no direct counterpart in EERA. Section 7 provides . . . that 'Employees shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.'

(*Redwoods v. PERB, supra,* 159 Cal.App.3d 617, 623.)[10]

[10] Judicial interpretations of the Meyers-Milias Brown Act (the MMBA is codified at Gov. Code, § 3500 et seq.), the statute on which much of the Trial Court Act is based, also recognize the broader scope of California's labor law, and that the right of representation is not derived only from *Weingarten* or section 7 of the NLRA. (*Social Workers Union, Local 535 v. Alameda County Welfare Department* (1974) 11 Cal.3d 382 [federal authorities do not necessarily establish the limit of California public employees' representational rights; employees' right to effective union representation guaranteed by MMBA section 3500 et seq., includes the right to union representation at a meeting called by the employer when employee

Even recognizing that under California law, representation rights were not necessarily tethered to the *Weingarten* rule, the Court nevertheless stated:

> Although the precedents do not compel a conclusion that the discipline element is invariably essential to a right of representation, under EERA and other California labor statutes representation should be granted, absent the discipline element, only in highly unusual circumstances.

(*Redwoods v. PERB, supra*, 159 Cal.App.3d 617, 625.) The Court agreed that "highly unusual circumstances" pertained under the facts before it and affirmed PERB's decision. It further noted at the conclusion of its opinion:

> Insofar as . . . Decision No. 293, . . . states or necessarily implies that under the Educational Employment Relations Act the right of union representation at individual employee-management interviews will never depend upon a showing that the employee reasonably believes that the interview may result in disciplinary action against him or her it is disapproved.

(*Id.* at p. 626.)

This is a curious statement very akin to dicta. The Board's decision in *Redwoods, supra,* PERB Decision No. 293 did not state that discipline would never be a factor in deciding when an employee is entitled to have a union representative at an investigatory interview convened by management. Further, the Board's decision established limiting parameters. It explained that the right of representation would not attach to routine "shop floor" conversations, and probably not to initial evaluation meetings between an employee and supervisor. The Board's decision was based on its precedent, *Rio Hondo, supra,* PERB Decision No. 272, which held that EERA sections 3543 and 3543.1(a) guaranteed an employee's right to have union representation at an informal step of a grievance procedure.

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reasonably anticipates meeting would include investigation into union activities]; *Civil Service Association, Local 400 v. City and County of San Francisco* (1978) 22 Cal.3d 552 [MMBA confers on employees the right to union representation in informal pre-disciplinary hearing].)

The Court of Appeals decision did not question these underpinnings of the Board's *Redwoods* opinion.[11]

A few months after the court's decision in *Redwoods v. PERB, supra,* 159 Cal.App.3d 617, the Board decided *Regents of the University of California* (1984) PERB Decision No. 403-H (*Regents*) in which it determined that an employee had a right to a union representative at a meeting called by her supervisor to discuss the employee's request for job audit forms. The Board determined that the facts surrounding the meeting reflected unusual circumstances that entitled the employee to union representation at the meeting. The Board offered further rationale: "Liebman was similarly entitled to a representative when she made her request for [the job audit] forms since a job audit might entail a salary adjustment or a change in classification and thus involves matters of employer-employee relations." Therefore, the right to representation "derives directly from the HEERA section 3565 and subsection 3560(d)." (*Regents*, p. 10.)[12] *Regents* found the right to representation based on the *Redwoods* unusual circumstance rationale, and also on the fact that the subject of the

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[11] It is also worth noting that the judicial decisions reviewed by the Court of Appeal in *Redwoods v. PERB, supra,* 159 Cal.App.3d 617 involved only disciplinary situations—either investigations or disciplinary proceedings. For these reasons we conclude that the Court did not intend to disturb PERB's earlier rulings in *Rio Hondo, supra,* PERB Decision No. 272 or *Mount Diablo, supra,* EERB Decision No. 44.

[12] The Higher Education Employment Relations Act (HEERA) is codified at Government Code section 3560 et seq. HEERA section 3565 mirrors EERA section 3543 in giving higher education employees "the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations."

HEERA section 3560(d), part of the legislative findings and declarations, provides:

> The people and the . . . higher education employers each have a fundamental interest in the preservation and promotion of the responsibilities granted by the people of the State of California. Harmonious relations between each higher education employer and its employees are necessary to that endeavor.

meeting involved matters of employer-employee relations such as salary or classification changes.[13] (See also *Santa Paula School District* (1985) PERB Decision No. 505 (*Santa Paula*), adopting the ALJ decision, p. 59, decided after *Redwoods v. PERB, supra,* 159 Cal.App.3d 617 reaffirming right to union representation at informal grievance meeting.)[14]

Taken as a whole, Board precedent dealing with the right to union representation divides into two strands of cases. The first involves an employer-initiated interview to investigate circumstances which reasonably causes the employee to fear disciplinary action. In such cases, *Weingarten* applies. (*Rio Hondo Community College District* (1982) PERB Decision No. 260 (*Rio Hondo I*).) The employee is also entitled to representation in such employer-initiated investigations and interviews, absent the discipline element, only in highly unusual circumstances. (*Redwoods, supra,* PERB Decision No. 293; *San Diego Unified School District* (1991) PERB Decision No. 885.)

The second strand of authority, based on EERA's independent right to representation and not on *Weingarten,* recognizes the right to union representation in formal or informal grievance meetings (*Rio Hondo, supra,* PERB Decision No. 272; *Santa Paula, supra,* PERB

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[13] In *Berkeley Unified School District* (2002) PERB Decision No. 1481 (*Berkeley*), the Board apparently ignored *Regents, supra,* PERB Decision No. 403-H, when it summarily affirmed the regional attorney's conclusion that there was no right to union representation at a meeting initiated by three employees who sought to discuss caseload issues with their supervisor. The Board noted that the meeting was neither disciplinary nor conducted under "highly unusual circumstances," nor an attempt to bypass the union by making proposals on negotiable subjects directly to employees. There was no discussion of *Regents* in this decision. Nor was there any analysis of *Rio Hondo, supra,* PERB Decision No. 272 and the other cases holding that EERA establishes a broader and independent right to union representation, especially in grievance-type meetings.

[14] Other PERB decisions finding a right to representation in non-disciplinary, non-investigative circumstances include: *Fremont Union High School District* (1983) PERB Decision No. 301 (*Fremont)* (discussion of leave entitlements); *Placer Hills Union School District* (1984) PERB Decision No. 377 (*Placer Hills*) (right to consult with union representative prior to signing documents to be placed in personnel file, likely to be reviewed by superiors when determining promotions or transfers).

Decision No. 505); or in meetings initiated by employees to discuss terms and conditions of employment with the employer (*Regents, supra,* PERB Decision No. 403-H, but cf. *Berkeley, supra,* PERB Decision No. 1481); or in other meetings to discuss matters concerning contractual entitlements (*Fremont, supra,* PERB Decision No. 301); or matters potentially having an impact on significant terms and conditions of employment (*Placer Hills, supra,* PERB Decision No. 377). These meetings are generally initiated at the employee's and/or union's request or pursuant to a negotiated grievance procedure.

The source of representation rights in both types of meetings derives from the EERA-created rights of employees to participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations and from the right of the employee organization to represent its members. The right to representation in the grievance-type meetings also obviously flows from the fact that the grievance procedure is a product of collective bargaining and the mechanism by which the collective bargaining agreement (CBA) is enforced. The right of the exclusive bargaining representative to represent unit members in the process of enforcing the CBA is beyond cavil.

Given the differences between an employer-initiated investigatory meeting and a grievance-type meeting, we do not believe that the comments by the Court of Appeal in *Redwoods v. PERB, supra,* 159 Cal.App.3d 617, regarding "highly unusual circumstances" apply to grievance meetings or other meetings initiated by the employee or his/her representative. There is a right to represent and be represented at grievance-type meetings, regardless of whether the circumstances are "highly unusual," because of the rights guaranteed by EERA sections 3540, 3543(a) and 3543.1(a). EERA and other statutes PERB administers have as their purpose the improvement of employer-employee relations and communication between employees and public agency management through representation by employee

organizations on all matters of employee-employer relations. Such purpose cannot be achieved unless employees have a right to summon their employee organization representatives to represent them in meetings convened to discuss enforcement of the CBA.

The Trial Court Act contains provisions that mirror the sections in EERA that are the source of employee and employee organization rights. Trial Court Act section 71630 states the purpose of the article is to promote full communication between trial courts and their employees and to "promote the improvement in personnel management and employer-employee relations . . . by providing a uniform basis for recognizing the right of trial court employees to join organizations of their own choice and be represented by those organizations in their employment relations with trial courts." Likewise, Trial Court Act section 71631 secures the right of employees to "participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." The employee organizations' right to represent members in "their employment relations" is found in Trial Court Act section 71633. Thus, it is appropriate to look to EERA in interpreting the Trial Court Act.

*Trustees*

Despite the difference between investigatory meetings and those convened by an employee or an employee organization in grievance-type situations, some PERB decisions conflated the two and analyzed the right to representation at meetings only under a *Weingarten* analysis. These decisions ignored *Rio Hondo, supra,* PERB Decision No. 272 and *Redwoods, supra,* PERB Decision No. 293, both of which clearly declared that *Weingarten* should not be relied on to establish the right to representation in grievance processing and arbitration. *Berkeley, supra,* PERB Decision No. 1481 was one such case that failed, without explanation,

to recognize the broader right to representation under the PERB-administered statutes. *Trustees, supra,* PERB Decision No. 1853-H was another.

In 2006, the Board decided *Trustees, supra,* PERB Decision No. 1853-H, summarily affirming the dismissal of an unfair practice charge that alleged that the employer illegally denied union representation at a meeting to discuss reasonable accommodation and other job-related issues. The Office of the General Counsel analyzed the charge only with respect to *Weingarten* and *Redwoods v. PERB, supra,* 159 Cal.App.3d 617. Because the employee had no reason to believe that the meeting could result in discipline against him, and in the absence of highly unusual circumstances, he was not entitled to representation under those cases. This conclusion unreasonably conflates the *Weingarten* right to representation in employer-initiated investigatory meetings with the independent right to representation applicable in other settings.

We turn next to consider the interactive process and explain the basis for our determination that the rights guaranteed to employees and their employee organizations by Trial Court Act sections 71630, 71631 and 71633 include union representation, upon request, in the interactive process.

The Reasonable Accommodation Process

We agree with the Court that meetings held between employers and employees seeking reasonable accommodation (interactive process) pursuant to the ADA or California's analog, the FEHA, are not "investigatory" meetings within the meaning of *Weingarten* and its progeny. However, such a conclusion does not end the inquiry under our collective bargaining statutes, including the Trial Court Act, because, as explained earlier, the right to representation is not limited only to the employer's investigation of suspected employee misconduct.

As the Court points out, the purpose of the interactive process is to ascertain what reasonable accommodation the employer can make in the workplace to permit the qualified

employee to perform the essential functions of her job. It is not a formal process, but one in which "good faith communication between the employer and . . . the employee or, . . . his or her representative to explore whether or not the . . . employee needs reasonable accommodation . . . and if so, how the person can be reasonably accommodated." (Cal. Code. Regs., tit. 2, § 11065(j).)[15] In other words, the interactive process operates as both a gate-keeper function to determine whether reasonable accommodation is needed, and if so, as a way to identify what reasonable accommodation might be offered. The implementing regulations do not preclude the presence of a representative for the employee during the interactive process.[16]

An employer is required to initiate the interactive process either when an employee requests reasonable accommodation or when the employer becomes aware of an employee's need for reasonable accommodation. (FEHA Reg., § 11069(b)). The process consists of the employer identifying possible reasonable accommodations and taking into account the employee's preferences. (FEHA Reg., § 11069(c)(7) and (8).)

During the process, the employer may reject the requested accommodation, but if it does, it must initiate discussion with the employee regarding alternative accommodations. (FEHA Reg., § 11069(c)(1).)

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[15] Hereafter, citations to California Code of Regulations, title 2 shall be described as FEHA Regulations, followed by the section.

[16] FEHA Regulation section 11069(a) states:

> ". . . the FEHA requires a timely, good faith, interactive process between an employer . . . and an . . . employee, or the individual's representative. . . . Both the employer . . . and the . . . employee or the individual's representative shall exchange essential information . . . without delay or obstruction of the process."

(Emphasis added.)

The FEHA regulations governing reasonable accommodation and the interactive process provide numerous protections for the employee. The interactive process therefore presents opportunities for a representative to assist the employee in the process of obtaining an accommodation. For example, although the employer may seek medical documentation of the need for the accommodation, it may not require the employee to disclose his or her underlying medical cause of disability. (FEHA Reg., § 11069(c)(3).) Nor may the employer ask the employee to produce his or her complete medical records. (FEHA Reg., § 11069(d)(5)(B).) FEHA regulations also prohibit the employer from requiring a "fully healed" policy before permitting an employee to return to work after illness or injury. (FEHA Reg., § 11068(i).) A union representative can assert these important rights, among others, as part of its role in the interactive process.[17]

Likewise, the FEHA regulations protect the employer's interests. For example, in the definitions of "reasonable accommodation," the regulations make clear that the employer is not required to compromise quality or quantity standards, if such standards are an essential job function. (FEHA Reg., § 11068(b).) If there are no funded, vacant positions for which the disabled employee is qualified, the employer may reassign the individual to a lower graded or lower paid position. (FEHA Reg., § 11068(d)(2).) The employer may also inform the employee that refusing an accommodation "may render the individual unable to perform the essential functions of the current position." (FEHA Reg., § 11068(f).)

[17] We do not imply here a retreat from our cases holding that an employee organization's duty of fair representation applies only to negotiations (*Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124) and enforcement of its memorandum of understanding (MOU), and not to the enforcement of statutory rights. (*Bay Area Air Quality Management District Employees Association (Maurillo*) (2006) PERB Decision No. 1808-M; *Service Employees International Union Local 1021 (Harris)* (2012) PERB Decision No. 2275).

Just as a union representative can serve a useful function of defending and asserting the employee's rights under the FEHA regulations, the representative can also serve an important function in explaining to the employee the employer's rights and the possible consequences of refusing offered accommodations.

FEHA regulations defining reasonable accommodation show how the interactive process can intersect with negotiable terms and conditions of employment. FEHA Regulation section 11065(p)(2) lists several examples of reasonable accommodations, including but not limited to, paid or unpaid leave of absences, reassignments to vacant positions, transfers, job restructuring, part-time or modified work schedule, modifying employer policy, additional training, or other similar accommodations.

These regulations recognize the potential tension between reasonable accommodation obligations and seniority provisions. Although the disabled employee is entitled to preferential consideration for a vacant position, the employer is ordinarily not required to accommodate the employee by ignoring its bona fide seniority system. (FEHA Reg., § 11068(d)(5).)[18]

Given that several potential reasonable accommodations could intersect with terms of an MOU, the presence of a union representative in the interactive meetings is even more important. The representative can bring to the meeting a familiarity with the MOU, and could actually assist the employer in identifying conflicts, or the lack of conflicts, between a proposed accommodation and the MOU.

The interactive process differs from those meetings that PERB has previously held trigger the right to representation. It is clearly not a traditional *Weingarten* meeting, because it is not convened by the employer for the purpose of investigating suspected employee wrong-

[18] This is in accord with the federal rule as determined in *US Airways, Inc. v. Barnett* (2002) 535 U.S. 391 (*Barnett*).

doing. Nor is it, strictly speaking, a grievance meeting because it does not arise out of a negotiated grievance procedure or other claim that the employer has violated the MOU. However, unlike an employer-initiated meeting pursuant to its investigation of employee conduct, the interactive process more closely resembles the grievance process. Most frequently, it is the employee's request for reasonable accommodation that triggers the employer's obligation to initiate the interactive process.[19] Both the interactive process and grievance procedures involve orderly dialogue between employer and employee (or exclusive representative) that envisions give-and-take and compromise in the spirit of reaching resolution after each side considers in good faith the other's position. Both the grievance procedure and the interactive process may involve terms and conditions of employment in which all parties have an interest. For the employee, a successful interactive process may mean the difference between full employment or being unemployed. He or she could benefit from union representation in the process for reasons similar to those the Board cited in *Redwoods, supra,* PERB Decision No. 293.[20]

The Court argues that including the Union in the interactive process would add layers of delay. We disagree. Such dire prediction fails to recognize the interest that each of the three parties share in a successful interactive process. The Union has an interest in representing the employee and assisting her in obtaining her goal and protecting her rights.

[19] We recognize that the employer may also initiate the interactive process even if the employee has not requested a reasonable accommodation. That fact does not change our analysis, however, because the purpose and scope of the interactive process remains the same.

[20] The reasons cited in *Redwoods* included assisting the employee in presenting "clear, cogent arguments and facts supporting his/her point of view . . . [to] act as a buffer in a confrontation that is filled with potential acrimony, a function obviously beneficial to both sides." (*Redwoods, supra,* PERB Decision No. 293, p. 7.)

This interest works against the Union engaging in obstruction and delay because the member's interests are ill-served by such conduct. The employee has an interest in the process concluding as fairly and efficiently as possible, since the sooner reasonable accommodation can be made, the sooner the employee can return either to her full employment potential, or at least receive the accommodations she needs to do her job. It is the employee's interest in prompt resolution of his or her request for reasonable accommodation that assures the Union will not cause delay. The Court's perceived concerns about delay do not defeat the right of representation in these meetings.

An employer, too, may benefit from a union's participation in the interactive process, because the union may offer options not contemplated by the employee or the employer, and may be well-positioned to know which accommodations are more likely to succeed. Reasonable accommodation measures in many workplaces can be viewed by non-disabled employees as a zero-sum proposition—one employee's reasonable accommodation is another's increased workload. By participating in the interactive process meeting, the union could assist in reducing workplace friction and resentment. Moreover, the union representative could assist an employer by identifying possible conflicts a proposed reasonable accommodation may create with the MOU and facilitating an adjustment or exception to the MOU, if necessary and desirable.

The Court also asserts various policy considerations that weigh against the Union's participation in the interactive process. In its view, *Weingarten* manifests the purpose of the NLRA and the Trial Court Act, both of which "support employees in engaging in concerted activity for mutual aid and protection." (Employer's Response to Exceptions, p. 7.)[21] In contrast, according to the Court, the interactive process is an individualized process that

[21] The Trial Court Act does not contain the language of section 7 of the NLRA, regarding engaging in concerted activity for mutual aid and protection.

focuses on making exceptions in the workplace to accommodate an individual employee, whereas labor relations focuses on ensuring uniformity in the terms and conditions of employment for a group of represented employees.

We believe this view of the representation purposes and activities of employee organizations is overly narrow. One of the purposes of the Trial Court Act is to "promote the improvement of personnel management and employer-employee relations . . . by providing a uniform basis for recognizing the right of trial court employees to . . . be represented by . . . organizations in their employment relations with trial courts."[22] (Trial Court Act, § 71630.) In addition, the purpose of the Trial Court Act is to provide to employees the right to meet and confer in good faith over matters within the scope of representation. (*Ibid.*) Both individual representation (the right of employees to be represented by their organizations in their employment relations), and collective bargaining rights (meet and confer rights) are conferred by the Trial Court Act. We conclude, therefore, that distinguishing between individual rights and collective rights is a false dichotomy. The role of the employee organization in protecting both types of rights and interests is apparent in the breadth of the right guaranteed by Trial Court Act section 71631 to employees to participate in the activities of employee organizations "for the purpose of representation on <u>all</u> matters of employer-employee relations." (Emphasis added.) "All matters" include an individual's request to the employer for reasonable accommodation that will ideally enable the employee to continue productive employment.

The Court is also concerned that requiring union representation in the interactive process could create conflicts of interest for the union, if, for example, the reasonable accommodation requires an assignment that may violate the seniority system agreed to in an MOU. *Barnett, supra,* 535 U.S. 391, 406, held that the ADA does not require an employer to

[22] The term "employment relations" is not defined in the Trial Court Act and has no other terms of limitation in the Trail Court Act.

make the accommodation requested by a disabled employee if that accommodation would violate the seniority system. Likewise, California's FEHA regulations include the same principle. FEHA Regulation section 11068(d)(5) provides, in pertinent part:

> An employer is not required to accommodate an employee by ignoring its bona fide seniority system, absent a showing that special circumstances warrant a finding that the requested accommodation is reasonable on the particular facts, such as where the employer . . . reserves the right to modify its seniority system or [its] practice is to allow variations to its seniority system.

The Court's expressed concern about potential conflicts of interest ignores the very distinct possibility that the Union's presence in the interactive process could make more probable the Union's willingness to consider adjustments or exceptions to MOU provisions in order to make the employee's requested accommodation feasible. In any event, the law virtually eliminates conflicts between reasonable accommodation and collectively-bargained seniority systems. Absent special circumstances, a requested accommodation that conflicts with provisions of an MOU must yield to the MOU, unless the exclusive representative agrees to a modification or exception. (*Barnett, supra,* 535 U.S. 391; FEHA Reg., § 11068(d)(5).)

Finally, the Court contends that union participation in the interactive process meetings could interfere with the Court's duty to protect privacy of medical information of other employees. By way of example, the Court offers a hypothetical situation in which the Union challenges an accommodation offered to Nguyen, pointing out that a different and more desirable accommodation was offered to another employee. The meeting would have to be delayed while the Court sends Nguyen out of the room and answers the Union's question, as the medical privacy of the other employee could not be revealed to Nguyen. Should such a situation arise, the privacy interest of the other employee could be protected as the Court suggests. This minor delay in the meeting is not sufficient to defeat the equally important right

of employees seeking reasonable accommodation to have, at their request, union representation in the interactive meeting.

The National Labor Relations Board (NLRB) had occasion to consider employee privacy issues in the context of the ADA reasonable accommodation requirement in *Roseburg Forest Products Co.* (2000) 331 NLRB 999, and its resolution is instructive. In that case, the employer was charged with failing to provide the union with relevant information necessary to process a grievance, viz., medical information regarding a junior employee who had been assigned a highly desirable position that more senior employees were entitled to. The union claimed that it needed the information to assess whether the reasonable accommodation to the junior employee was necessary and to assess the union's position concerning the grievance. Relying on an opinion letter from the Equal Employment Opportunity Commission, the NLRB held that the union was entitled to the confidential information, but only to the limited extent that the information showed the employee had an ADA-covered disability and stated the related functional limitations that necessitated an accommodation. Because the union, like the employer, is an entity covered by the ADA, it too had a duty to keep the medical information confidential.

Having addressed the Court's arguments, we conclude that the right of representation guaranteed by Trial Court Act sections 71630, 71631, and 71633 includes an employee's right to have a union representative assist him or her in the interactive process by attending meetings with the employer convened to explore possible reasonable accommodations to an employee's disability. The union has a concurrent right to represent the employee in the interactive process. (*Rio Hondo 1, supra,* PERB Decision No. 260.) Recognizing the employee's right to privacy and his or her right not to participate in the activities of employee organizations (Trial

Court Act, § 71631), we conclude that the union's right to represent in the interactive process attaches only if the employee requests union representation.

*Trustees, supra,* PERB Decision No. 1853-H, is hereby overruled, and this case is remanded to the Office of the General Counsel for the issuance of a complaint in accordance with this decision.

ORDER

It is hereby ORDERED that the dismissal of the Unfair Practice Charge in Case No. SF-CE-39-C is REVERSED and the matter REMANDED to the Office of the General Counsel for issuance of a complaint in accordance with this decision.

Chairperson Martinez and Member Huguenin joined in this Decision.