STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1021, Charging Party, v. SONOMA COUNTY SUPERIOR COURT, Respondent.	Case No. SF-CE-39-C PERB Decision No. 2532-C June 26, 2017

Appearances: Weinberg, Roger & Rosenfeld by Anthony J. Tucci, Attorney, for Service Employees International Union Local 1021; Renne Sloan Holtzman Sakai by Timothy G. Yeung and Erich W. Shiners, Attorneys, for Sonoma County Superior Court.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by both parties to a proposed decision (attached) by an administrative law judge (ALJ). The proposed decision concluded that the Sonoma County Superior Court (Court) violated 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 pursuant to its duty to provide reasonable accommodation to a disabled employee.

The Court excepts to the proposed decision, urging this Board to overrule its decision in *Sonoma Superior Court* (2015) PERB Decision No. 2409-C (*Sonoma*) wherein PERB held that the right to union representation applies to the interactive process meetings held as part of the

[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.

employer's duty to provide reasonable accommodation under California's Fair Employment & Housing Act (FEHA) and the Americans with Disabilities Act (ADA).[2]

Service Employees International Union Local 1021 (SEIU) excepts only to the proposed remedy, and urges PERB to order the Court to return to the status quo ante and to make the affected employee whole for the denial of her right to be represented in the interactive meeting.

The Board has reviewed the hearing record in its entirety, including the hearing transcript and exhibits, the parties' briefs to the ALJ, their exceptions and briefs in support thereof in light of the applicable law. Based on this review, the Board concludes that the proposed decision is adequately supported by the evidentiary record, and is well-reasoned and consistent with all relevant legal principles, except as to the remedy. Accordingly, except as to the remedy, the Board hereby affirms and adopts the proposed decision as the decision of the Board itself, as supplemented by the following discussion of the parties' exceptions.

PROCEDURAL BACKGROUND

This case began on December 20, 2013, when SEIU filed an unfair practice charge alleging that the Court refused to allow a union representative to attend an interactive process meeting held with Cyndi Nguyen (Nguyen), a trial court employee who had requested reasonable accommodation for a disability.

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

[2] FEHA is codified at Government Code section 12900 et seq. The ADA is codified at 42 U.S.C. section 12101 et seq. Because the duty to provide reasonable accommodation under both of these statutes is nearly identical, we will refer mainly to California's statute throughout this decision.

appealed the dismissal, and PERB issued *Sonoma*, *supra*, PERB Decision No. 2409-C which overruled *Trustees* and remanded the case to the OGC for the issuance of a complaint. A complaint issued alleging that Nguyen requested SEIU's representation at a meeting to discuss her request for reasonable accommodation for her disability and the Court denied the request. This conduct was alleged to have violated Trial Court Act sections 71631, 71633, and 71635.1 and PERB Regulation 32606, subdivisions (a) and (b).

An informal conference did not resolve the dispute and a formal hearing was held on May 29, 2015. On July 14, 2015, the ALJ issued his decision.

FACTUAL SUMMARY

Nguyen began working for the Court as a court reporter in April 2008. Within six months, she began to experience pain in her wrists. In 2009, she asked that her desk be lowered because of the pain in her hands. Other accommodations were made for her such as temporarily assigning her to a 4-day work week. In 2010, Nguyen asked to be demoted to the position of Legal Process Clerk (LPC) because of her hand pain, but ultimately did not take that position. In December 2012, she developed tendonitis in her elbow and the Court gave her less demanding assignments to allow her to take more rest periods.

By early March 2013, Nguyen could not perform the duties of a court reporter because of the pain in her hands had become intolerable. She sought medical help, and presented the Court's human resources department with a doctor's note explaining that she could only spend 20 minutes of every hour engaged in typing activities. Nguyen told Court management that she believed she could perform the clerical duties of an entry level LPC position. The Court then temporarily assigned Nguyen light clerical duties, while continuing to pay her the higher salary of a court reporter. Nguyen continued to be treated for her pain, seeing her doctor every four to six weeks between March and June 2013.

In June 2013, Nguyen's doctor made the restriction on her typing activities permanent, which meant that she could not return to her position as a court reporter, a job which requires almost constant typing.

On June 13, 2013, Nguyen presented the Court's Senior Human Resources Analyst, Tracy Rankin (Rankin), with the doctor's latest explanation of restrictions. Rankin informed the Assistant Court Executive Officer, Cindia Martinez (Martinez), of the doctor's permanent restrictions on Nguyen's keyboarding activity, and the Court set up an interactive process meeting for June 19, 2013, to be held in Martinez's office and attended by the two managers and Nguyen.

Nguyen then contacted her job steward, Kris Ridste (Ridste), and asked that she accompany her to the June 19, 2013 meeting. As Nguyen explained in her testimony, she wanted someone "on my side . . . somebody there to maybe catch what I wasn't getting." Nguyen continued: "I don't' know how to negotiate anything, I don't know anything about the law. I just wanted somebody in my corner." (Reporter's Transcript, pp. 26, 49.) Ridste informed Court management that Michael Viloria, the SEIU organizer/representative and she would be available to accompany Nguyen to the interactive process meeting on either June 18 or 19, 2013.

After an e-mail exchange between SEIU representatives and Court management personnel, Martinez ultimately responded that "We do not include union stewards in interactive [dialogues] as we view them as confidential, since we are discussing medical conditions." Martinez went on to explain that even if the employee waived confidentiality, the Court would still not permit SEIU to attend the meeting because it "does not fall under Weingarten Rights." (Proposed decision, pp. 8-9.) At the administrative hearing, Martinez described her concerns about permitting a union representative in the interactive meetings.

She did not believe that the shop stewards have the expertise to participate in the interactive meetings. She was concerned about potential delays in scheduling the meetings if a union representative had to be involved. Finally, meetings that she had attended with union representatives present, such as grievance meetings or disciplinary investigations, were adversarial. Because the interactive meetings were supposed to be collaborative endeavors, Martinez did not believe permitting a union representative in those meetings was appropriate.

The meeting between Nguyen, Martinez and Rankin occurred in Martinez's office on June 19, 2013, one of the days Viloria was available. Martinez described the purpose of the meeting: to determine whether the Court could accommodate Nguyen by assigning her to a job that she could perform with her existing restrictions. Because Nguyen could no longer perform the duties of a court reporter, the only positions under consideration at this meeting were in the LPC classification. The Court initially proposed to place her as an LPC I, but at the top of the salary scale for that class. Nguyen asked if she could instead be placed as an LPC II. Martinez denied this request and explained to Nguyen that all new hires started as an LPC I. Martinez assured Nguyen that after passing a six-month probationary period, she would advance to LPC II and get a 5 percent raise. The meeting concluded in less than a half-hour, with Nguyen grateful she still had a job, but "deflated" that she had to take such a large pay cut.[3] (Reporter's Transcript, p. 59.)

Although the Court has a Personnel Plan that sets forth provisions and rules for salary-setting after involuntary demotion, rules that are replicated in the parties' MOU, no grievance or appeal was filed by Nguyen or SEIU challenging her placement in the LPC I position. The Personnel Plan also has a reasonable accommodation policy which provides for a complaint

[3] Nguyen's salary was reduced by approximately 50 percent.

procedure if an employee believes he or she had been denied reasonable accommodation. Nguyen did not file any such complaint after the June 19, 2013 decision placing her as an LPC I. Nor is there anything in the record indicating that she filed any administrative charges with the Department of Fair Employment & Housing (DFEH) or the Equal Employment Opportunity Commission (EEOC) alleging that the Court had failed to provide her with reasonable accommodation.

PROPOSED DECISION

Based on *Sonoma*, *supra*, PERB Decision No. 2409-C, the ALJ concluded that the Court had violated the Trial Court Act by not permitting Nguyen to be represented by SEIU in the interactive process meeting. The ALJ noted that in *Sonoma* the Board had considered and rejected the same concerns expressed by the Court in the administrative hearing, i.e., the confidentiality of interactive process meetings, the delays caused by union involvement, the lack of expertise of union representatives, and the transformation of a collaborative process to one adversarial in nature. Consequently, the ALJ concluded: "the Court did not raise any new issues which have not already been considered and decided in *Sonoma*." (Proposed decision, p. 15.)

To remedy this violation, the ALJ ordered the Court to cease and desist from its unlawful conduct, but he rejected SEIU's request that the status quo be restored by ordering a new interactive process meeting between Nguyen and Court management with SEIU present. [4] In the ALJ's view, SEIU contended that it could have negotiated a better deal for Nguyen than

[4] The ALJ also rejected SEIU's request that a Court representative read a speech to employees drafted by SEIU explaining that the Court had violated the Trial Court Act. In the ALJ's words, "Such a 'shaming' remedy seems highly inappropriate for a case in which PERB prior precedent was just overturned. . . ." (Proposed decision, p. 17.) SEIU did not except to this ruling.

she was able to secure. The ALJ rejected this request because there were other avenues for SEIU to pursue such as the Court's complaint process or a grievance under the MOU, if it believed the Court had denied reasonable accommodation to Nguyen.

THE PARTIES' EXCEPTIONS

The Court

The Court filed no exceptions to the ALJ's factual findings, and notes that its exceptions "do not challenge the Chief Administrative Law Judge's ruling but rather the Board decision that forced him to rule as he did." (Court Exceptions, p. 1.) Thus we are presented with a welcome opportunity to correct the Court's misapprehension of *Sonoma, supra*, PERB Decision No. 2409-C, and to refine or correct points in our opinion in that case that may have led to misapprehensions.

The Court's exceptions can be grouped into three topics. First, taking issue with the Board's holding in *Sonoma, supra*, PERB Decision No. 2409-C, it asserts that the Trial Court Act does not grant a right to union representation at interactive process meetings because such meetings are neither disciplinary nor grievance meetings. The Court reads *Sonoma* as requiring union representation at any meeting that may have an impact on terms and conditions of employment, which in its view represents an unwarranted expansion of the right of representation.

Second, the Court asserts that requiring union representation in interactive process meetings is contrary to the purposes of FEHA and the ADA for several reasons. Because a union cannot waive employees' rights under the FEHA or ADA, the Court argues that "reasonable accommodation is outside the ambit of labor relations statutes such as the Trial Court Act." (Court's Exceptions, p. 10.) The interactive process is intended to be informal and collaborative, in contrast to grievance or disciplinary investigations, which are more

adversarial and more formal, according to the Court. Potential conflicts of interest between the employee engaged in the interactive process and the union's interests in representing other employees in the bargaining unit is another concern articulated by the Court in support of its claim that *Sonoma, supra*, PERB Decision No. 2409-C conflicts with the FEHA and ADA.

Finally, the Court asserts that it was denied due process because the Board's designation of *Sonoma, supra*, PERB Decision No. 2409-C as a precedential decision bound the ALJ to the conclusion he reached. The Court claims that by designating *Sonoma* as precedential, it "prejudged the merits of this case and forced the Court to go through the motions of a hearing with no realistic opportunity to prevail." (Court Exceptions, p. 16.) It urges PERB to vacate *Sonoma* and decide this case on the basis of the administrative record.

SEIU

SEIU objects that the ALJ's order did not completely cure the Court's violation of the Act. By merely ordering the Court to cease and desist from refusing to permit union representation in interactive process meetings, SEIU asserts that the proposed decision did not take into account that SEIU could have secured a better outcome for Nguyen if it had been present at the June 19, 2013 meeting. Specifically, it could have prevented a halving of her salary and put her in a better position to advance on the wage scale. It also could have explored higher paying classifications in which Nguyen would have been able to perform, according to SEIU. Therefore, SEIU requests that PERB order "a return of the *status quo ante* with make whole relief and, further, rescind the June 19, 2013 ADA interactive-process meeting" and order the Court to "re-engage in the interactive process meeting with Nguyen and her Union Representative, upon her request." (SEIU Exception, p. 12-13, italics in original.)

DISCUSSION

At the outset it is useful to reiterate what this case is not about and what issues PERB does not have authority to decide. At issue here is not whether the Court complied with FEHA/ADA requirements to provide reasonable accommodation to Nguyen.[5] Absent a claim that a refusal to provide reasonable accommodation was motivated by anti-union animus or in some other way violated any of the collective bargaining laws PERB administers, this agency has no authority to pass on the "reasonableness" of accommodation offered to Nguyen.

Nor does this case concern any alleged refusal to meet and confer over terms and conditions of employment. The complaint alleged a violation of Trial Court Act sections 71631 and 71633, which respectively secure the right of employees to be represented by employee organizations of their own choosing and the right of those organizations to represent employees.

Before turning to the parties' specific exceptions, we briefly review our decision in *Sonoma*, *supra*, PERB Decision No. 2409-C, which we incorporate herein to the extent it conforms with this opinion.

Sonoma - PERB Decision No. 2409-C

In directing that a complaint issue in this case, the Board explained the basis for concluding that *Trustees, supra*, PERB Decision No. 1853-H should be overruled and that SEIU had stated a prima facie case for denial of representation rights under the Trial Court Act. After examining PERB and judicial precedents regarding the right of representation, the Board observed that there were two strands of cases that considered representation rights in

[5] It is DFEH, the administrative agency charged with administering and enforcing FEHA, that has jurisdiction to initially consider claims regarding failure to provide reasonable accommodation. (Gov. Code, §§ 12930, subd. (f); 12940, subd. (m)(1)).

meetings with management. The first strand involves the typical *Weingarten*[6] scenario—an employer-initiated interview to investigate suspected employee wrongdoing—and adopted the *Weingarten* rule. (*Rio Hondo Community College District* (1982) PERB Decision No. 260.)

The second group of cases, based on the independent right of representation contained in the Educational Employment Relations Act (EERA),[7] confirmed a right to union representation in situations not involving the investigation of potential wrong-doing. For example, in *Mount Diablo Unified School District, et al.* (1977) PERB Decision No. 44, the Board concluded that EERA section 3543.1, subdivision (a) included the right of employee organizations to represent their members in a formal grievance proceeding. This right was extended to informal grievance meetings in *Rio Hondo Community College District* (1982) PERB decision No. 272 (*Rio Hondo II*). In that case, the Board clarified that there is an independent and broader right to representation in EERA than the parameters of *Weingarten*, and it was an error to dismiss the case simply because *Weingarten* did not apply. Instead, inquiry must be made as to whether the employees and their organizations had representation rights under EERA, independent of *Weingarten*.[8] These cases also held that the right of representation attached to meetings initiated by employees to discuss contractual entitlements

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[6] See *National Labor Relations Board v. Weingarten* (1975) 420 U.S. 251 (*Weingarten*) holding 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.

[7] EERA is codified at Government Code section 3540 et seq.

[8] The source of EERA's representation rights is found in EERA sections 3540 (employees' right to be represented by organizations in "their professional and employment relationships with public school employers"); section 3543 (employees' right to "participate in the activities of employee organizations . . . for the purpose of representation on all matters of employer-employee relations."); and section 3543.1, subdivision (a) (employee organizations have the "right to represent their members in their employment relations with public school employers").

(*Fremont Union High School District* (1983) PERB Decision No. 301; meetings initiated by employees to discuss with management an appeal of its denial of reclassification request (*Regents of the University of California* (1984) PERB Decision No. 403-H); and the right to consult with a union representative regarding the consequences of signing an acknowledgement of receipt of documents that potentially affected the employee's employment status (*Placer Hills Union School District* (1984) PERB Decision No. 377 (*Placer Hills*). (*Sonoma*, *supra*, PERB Decision No. 2409-C, p. 14.)

In *Redwoods Community College District* (1983) PERB Decision No. 293 (*Redwoods*), the Board determined that the employee's right to union representation in a meeting with a high-ranking management official concerning her evaluation was based on the language of EERA section 3540, which guarantees the right of employees "to join organizations of their own choice, to be represented by the organizations in their professional and employment relationships with public school employers." The *Redwoods* Board opinion then 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. (Emphasis added.)

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

The Board's *Redwoods* decision (*Redwoods*, *supra*, PERB Decision No. 293) reached the Court of Appeal, which affirmed the Board's holding that the employee was entitled to a union representative in the meeting in question under the circumstances of the case. However, the Court 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 Community College Dist. v. Public Employment Relations Bd. (1984) 159 Cal.App.3d 617*, 625 (*Redwoods v. PERB*.) The Court further noted:

> 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.)

Based on those cases that found a right to union representation in certain limited circumstances not involving disciplinary investigations, the Board in *Sonoma, supra*, PERB Decision No. 2409-C then explained why it did not believe comments made by the Court of Appeal cautioning against expanding the right of representation in *Redwoods v. PERB, supra*, 159 Cal.App.3d 617, 625, applied to grievance-type meetings and why it viewed this statement as dicta and not controlling the instant case.

> 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. The

> Court of Appeals decision did not question these underpinnings of the Board's *Redwoods* opinion.[9]

(*Sonoma* at pp. 11-12.)

In its review of various representation cases through the years since the *Redwoods* court decision (*Redwoods v. PERB*, *supra*, 159 Cal.App.3d 617), the Board noted in *Sonoma*, *supra*, PERB Decision No. 2409-C, that the two strands of representation rights cases had become conflated and that unfair practice charges were being dismissed because the alleged facts were analyzed only under the *Weingarten* analysis. For example, in *Berkeley Unified School District* (2002) PERB Decision No. 1481, the Board dismissed allegations that the employer had violated EERA when it refused union representation to a group of three employees who sought to discuss their caseload with their supervisor. Because there was no potential for discipline and no "highly unusual circumstances" present, the Board concluded there was no right to representation. Absent from the *Berkeley* decision was any analysis of *Rio Hondo II*, *supra*, PERB Decision No. 272 or any other of the cases that based the right of representation on EERA's broader articulation of that right.

The Board found the same fault in *Trustees*, *supra*, PERB Decision No. 1853-H, the case *Sonoma*, *supra*, PERB Decision No. 2409-C overruled. The charge alleging an unfair practice by the employer that denied requested union representation in an interactive process meeting was analyzed only under *Weingarten* and the "highly unusual circumstances" criteria of *Redwoods*, *supra*, PERB Decision No. 293.

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[9] 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.

Sonoma concluded: "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, [subd.] (a) and 3543.1, [subd.] (a)." (*Sonoma, supra*, PERB Decision No. 2409-C, p. 14.)

The Board then noted that the Trial Court Act contains a nearly identical provision to EERA regarding the purpose of the Act, i.e., "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 . . . be represented by those organizations in their employment relations with trial courts." (Trial Court Act, § 71630, subd. (a).) Based on this purpose and the right of trial court 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" (*Id*. at § 71631) and the right of employee organizations to represent their members in "their employment relations" (*Id*. at, § 71633), the Board concluded that it was appropriate to look to EERA in interpreting the Trial Court Act.

After considering the purposes of the interactive process and various FEHA regulations (*Sonoma*, *supra,* PERB Decision No. 2409-C, pp. 16-19), the Board concluded that the interactive process meetings was more like grievance-type meetings than investigatory-discipline meetings because: 1) both grievance-type meetings and the interactive process are initiated by the employee (or in the case of a grievance, the union), rather than the employer; 2) both the interactive process meeting and a grievance-type meeting envision a process of give-and-take, a mutual exploration of a resolution, rather than an investigation of suspected wrongdoing; 3) both the grievance-type meetings and interactive process meetings may involve terms and conditions of employment in which all parties have an interest. (*Id.* at p. 20.) Based on this analysis, PERB held that the employees' right of representation includes the

right to have a union representative attend interactive process meetings convened to explore possible reasonable accommodations for an employee's disability. The union's right to represent includes the same right, triggered only by the employee's request. (*Id.* at pp. 24-25.)

The issues decided in *Sonoma, supra*, PERB Decision No. 2409-C were solely legal matters, as the Board assumed the facts alleged in the unfair practice charge were true. (*San Juan Unified School District* (1977) EERB[10] Decision No. 12; *Trustees of the California State University (Sonoma)* (2005) PERB Decision No. 1755).

We remain persuaded of the merits of that decision and have no reason to revisit the Court's arguments previously considered. However, we take this opportunity to address new arguments and to clarify parts of *Sonoma* that the Court's exceptions have brought to our attention.

Sonoma Applies Only to Interactive Process Meetings

In its exceptions, the Court objects to that part of the analysis in *Sonoma* that characterized the interactive process as more like a grievance than an investigatory interview that could reasonably lead discipline. What the Board said in *Sonoma* was:

> 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-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

[10] Before January 1, 1978 PERB was known as the Educational Employment Relations Board.

> the interactive process.[11] 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.[12]

(*Sonoma*, *supra*, PERB Decision No. 2409-C, p. 19-20.)

According to the Court, the Board's reasoning on this subject was not sound because grievances involve an assertion of rights under collective bargaining agreements or the employer's grievance policy and because the interactive process is "collaborative while [the grievance process] is adversarial." (Court's Exceptions, p. 6.) The Court also excepts to the Board's purported reliance on *Placer Hills*, *supra*, PERB Decision No. 377 for the proposition that an employee has a right to union representation at any meeting with management to discuss matters having a potential impact terms and conditions of employment.

To characterize interactive process meetings as "collaborative" and grievance meetings as "adversarial" is a gross over-generalization based more on wishful thinking than empirical evidence. Of course the intent of interactive process meetings is collaborative, but a breakdown of hoped-for collegiality can be easily imagined when an insistent employee, who

[11] 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.

[12] 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.)

stands to be out of work if reasonable accommodations are not provided, is denied the accommodation he or she seeks. Similarly, not all grievance meetings result in an adversarial proceeding.

But whether the interactive process meeting is adversarial or collaborative or whether it is more similar to a grievance-type meeting than it is like a *Weingarten* meeting is a minor point. The reason employees are entitled to union representation in an interactive process meeting was summed up perfectly by the ALJ in the proposed decision:

> The instant case involves probably the most critical point in time in which an employee would have a need for a union representative for purposes of reasonable accommodation/fitness for duty; when medical restrictions on their face question the employee's ability to perform the essential functions of their position with or without reasonable accommodation. In such a situation, an employer may consider discharging an employee. . . . Indeed, other than a disciplinary action, one cannot imagine a greater need where an individual employee would request representation . . . or the exclusive representative would have the corresponding right to represent its members in their employment relations with the Court.

(Proposed decision, p. 15.)

As the Board explained in *Sonoma*, *supra*, PERB Decision No. 2409-C, regulations implementing the FEHA provide certain rights to both employees and employers, and a union representative "can serve a useful function of defending and asserting the employee's rights under the FEHA regulations" as well as explaining to the employee the employer's rights and possible consequences of refusing offered accommodations. (*Id.* at p. 19.) The basis for our conclusion that interactive meetings merit union representation on the employee's request is rooted in the statutory guarantee of the Trial Court Act section 71631: 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.*"

(Emphasis added.) Unlike a "shop floor conversation" or meetings held between management and employees for the purpose of giving direction, or conveying (as opposed to investigating) a disciplinary decision, the potential consequence of the interactive process can be the difference between an employee being able to continue earning a living or finding herself out of work. This is the essence of "employer-employee relations." That is why employees are entitled to representation in these meetings, regardless of how similar or dissimilar the meetings are to a grievance process.

The Court asserts that *Sonoma*, *supra*, PERB Decision No. 2409-C incorrectly relied on *Placer Hills*, *supra*, PERB Decision No. 377 for the proposition that an employee has a right to representation in any meeting with management to discuss matters potentially having an impact on significant terms and conditions of employment, noting that the holding in *Placer Hills* was narrower. We agree that *Placer Hills* held that an employee has the right to consult with a union representative prior to signing documents that were placed in his personnel file. Specifically, *Placer Hills* stated:

> We find that an employee's right to representation includes the right to consult with a union representative likely to be more knowledgeable when that employee is asked to supply immediate, written response to material placed in his/her personnel file. The right to such representation is justified when the employee reasonably believes the written response to such material will likely be reviewed by superiors when promotions, transfers or evaluations are prepared.

(*Id.* at p. 37.) The decision went on to explain the basis for this conclusion, explicitly disclaiming reliance on *Weingarten.* Instead, it noted: "The employee's right to prior consultation with a union representative derives from the right to participate in the activities of an employee organization, particularly the representation of its members in their employment relationship with the public school employer." (*Id*. at p. 40.) Although the Court correctly

notes that *Placer Hills* involved a right to consult with a union representative, it was not error for the Board in *Sonoma* to rely on that decision for the more general proposition that representation rights under EERA and the MMBA are rooted in statutory guarantee of the right to representation in the "employment relationship." (*Sonoma*, *supra*, PERB Decision No. 2409-C.) The Board's reliance on *Placer Hills* was especially appropriate because of the discussion in that case of the importance of the right of employees to consult with their union representative who is likely to be more knowledgeable than the employee about workplace rights. That is precisely why Nguyen wanted her union representative present in her interactive meeting.

We recognize that the right of representation on "all matters of employer-employee relations" is not limitless and is not a license to turn the workplace into a terrain where no conversation can occur between management and employees without a union representative being present.

There is no doubt that by overturning *Trustees*, *supra*, PERB Decision No. 1853-H, the Board expanded the right of representation to include union representation in such meetings upon the employee's request. However, in doing so, the Board did not jettison the language of *Redwoods*, *supra*, PERB Decision No. 293, that the independent right of representation does not apply to run-of-the-mill "shop floor" conversations.[13] Nor did we intend to call into question PERB's holdings in *City of Modesto* (2009) PERB Decision No. 2022-M, proposed decision, p. 10 or *San Bernardino County Public Defender* (2009) PERB Decision No. 2058-M

[13] In *Sonoma*, *supra*, PERB Decision No. 2409-C, p. 11, PERB quoted *Redwoods*, *supra*, PERB Decision No. 293 with approval: ". . . 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."

(no right to representation in meeting to give work directives). See also *State of California (Department of California Highway Patrol)* (1997) PERB Decision No. 1210-S, explaining the distinction between an investigatory meeting for which a right of representation attaches, and an informal meeting to give work performance direction in which there is no give and take regarding the consequences of the employee's conduct.

The Board explained in *Sonoma, supra,* PERB Decision No. 2049-C why interactive process meetings were not like routine, run-of-the-mill conversations between employees and supervisors. We noted first that the interactive process serves two purposes: 1) to determine whether reasonable accommodation is needed, and 2) if so, to identify what reasonable accommodation might be offered by the employer. (*Id.* at p. 17.) The Board then reviewed various FEHA regulations governing the interactive process, including those pertaining to the employer's duty to identify possible reasonable accommodations, taking into account the employee's preferences, and those that provide protections for the employee, such as the prohibition on the employer requiring the employee to be fully healed before he or she may return to work. (*Id*. at p. 18.) The Board noted that FEHA regulations protect the employer's interest as well, e.g., it may reassign an employee to a lower paid position if there are no funded vacant positions for which the disabled employee is qualified, and that an employee's refusal to accept the offered reasonable accommodation "may render the individual unable to perform the essential functions of the current position." (*Id*. at p. 18, quoting FEHA Reg., § 11068(f)).

The Board further explained how the FEHA regulations defining "reasonable accommodation" demonstrate an intersection with negotiable terms and conditions of employment. Reasonable accommodations include, but are not limited to paid or unpaid

leaves of absence, reassignments to vacant positions, transfers, job restructuring, part-time or modified work schedule, etc. (*Sonoma*, *supra*, PERB Decision No. 2049-C at p. 19.)

For these reasons, an interactive process meeting can be imbued with freighted consequence that is not present in a routine informal meeting to provide direction or correction. Unlike informal communication between management and an employee, the interactive process meetings are required by law and governed by the FEHA regulations discussed in *Sonoma*. (Sonoma, *supra*, PERB Decision No. 2049-C.) Most critically, the potential outcome of the interactive process could be a loss of income, or loss of a job, if the employee refuses a reasonable accommodation and is unable to perform the essential functions of the job. Simply stated, the stakes are much higher in an interactive process meeting than in informal meetings. As a general matter, routine "shop floor" conversations do not carry the potential for income reduction or a complete loss of employment. Thus, *Sonoma* cannot reasonably and should not be read to open the representation floodgates on all meetings between management and employees. Neither that case nor this decision stands for that proposition. We affirm our holding in *Sonoma* that employees are entitled to union representation upon request in interactive process meetings convened for the purpose of determining whether reasonable accommodation is needed, and if so, what that accommodation will be.

The Structure of the Trial Court Act Does Not Narrow Representation Rights

The Court asserts that under the Trial Court Act "employer-employee relations" is a term of art limited to labor relations and does not encompass every facet of the relationship between employee and employer. It points to other articles of the Act that govern relations between individual employees and the trial court employer, such as Article 2, 4, 5, and 6, which concern respectively the authority to hire, employment selection and advancement, employment protection, and personnel rules. According to the Court, "[t]hese other subjects

[classification and compensation, employment protection, personnel files, selection and advancement] are certainly part of the employment relationship but under the plain language of the Act they do not constitute matters of 'employer-employee relations,' which are exclusively governed by Article 3." (Court Exceptions, p. 9.)

The Trial Court Act, unlike the Meyers-Milias-Brown Act (MMBA)[14] or EERA, is both a collective bargaining law and an employment rights statute. For example, Trial Court Act section 71623.5 requires trial courts to provide workers' compensation coverage for court employees. Sections 71626 and 71626.5 address retirement benefits and retiree insurance benefits. Section 71650, et seq. requires trial courts to develop an employment protection system that includes progressive discipline and for-cause dismissal. Section 71652 decrees that layoffs shall be based on seniority in the class of the layoff. Section 71653 requires trial courts to establish due process for disciplinary decisions, including the appointment of an impartial hearing officer, the right to call witnesses, the right of the employee to representation in such process, and a right of judicial review of an adverse disciplinary decision.

The Court's argument is not well developed and very oblique, but it seems to claim that the employment subjects addressed in Articles 2, 4, 5, and 6 of the Trial Court Act are outside the purview of representation by an employee organization because they do not constitute matters of "employer-employee relations" which are "exclusively governed" by Article 3, Labor Relations. (Court Exceptions, p. 9.) What this argument misses is that the Trial Court Act consistently refers to the duty to meet and confer in good faith throughout, not confining that duty to matters described in Article 3. In Article 1, Definitions, such matters as personnel rules, promotions, and transfers are defined, "subject to meet and confer in good faith." (Trial

[14] The MMBA is codified at Government Code section 3500 et seq.

Court Act, § 71601, subds. (f), (g), (j).) The very implementation date of the Trial Court Act, January 1, 2004, was subject to a later date if mutually agreed to by a trial court and representatives of a recognized employee organization. (Trial Court Act, § 71615.)

Within Article 2, Authority to Hire, Classification and Compensation there are several references to the role of an exclusive bargaining representative. Trial Court Act section 71625, subdivision (c) provides that policies regarding leave accrual are subject to modification pursuant to the terms of a memorandum of understanding, or upon revision to personnel policies, "subject to meet and confer in good faith." Section 71629 provides that the implementation of the Trial Court Act shall not cause a modification of the level of employment benefits. With respect to employees "who are represented by a recognized employee organization, the level of . . . benefits . . . may not be modified until after the expiration of an existing memorandum of understanding," unless by mutual agreement otherwise. (Trial Court Act . § 71629, subd. (b).)

Article 4 of the Trial Court Act requires each trial court to establish a system of selection and advancement, and develop personnel rules regarding hiring, promotion, transfer and classification. Courts are further directed to meet and confer in good faith with representatives of recognized employee organizations on those rules that cover matters within the scope of representation. (Trial Court Act , §§ 71640 and 71641.) Section 71651, subd. (a) directs trial courts to include progressive discipline in personnel policies, "subject to meet and confer in good faith." The same is true for the development of procedures and rules governing layoffs (Trial Court Act , § 71652); for due process hearings, including a process for review of a hearing officer's report (Trial Court Act , §§ 71653, 71654); for rules regarding employees' access to their personnel files (Trial Court Act , § 71660).

In sum, the Trial Court Act read as a whole establishes a "floor" of certain guaranteed employment rights and benefits and assures the rights of employee organizations to meet and confer regarding those rights and benefits, provided they are within the scope of representation as defined in Trial Court Act section 71634. That scope is defined broadly: "[t]he scope of representation shall include *all* matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment." (Trial Court Act, § 71634, subd. (a), emphasis added.) As explained earlier, the very purpose of the interactive process relates to the seminal "employment condition,"—whether the employee can be accommodated in order to have employment.

Contrary to the Court's implication, the Legislature did not intend to confine collective bargaining rights to Article 3, but instead recognized that representative employee organizations must have a role in the development of policies and rules regarding all matters set forth in Articles 2, 4, 5, and 6 of the Trial Court Act. We therefore reject the Court's argument that the structure of the Trial Court Act suggests that an employee's right to representation and the employee organization's right to represent differs from those rights secured by the other statutes administered and interpreted by PERB.

Sonoma - PERB Decision 2409-C Does Not Conflict with FEHA Regulations

The Court asserts that PERB has misread FEHA regulations, which in the Court's view, permits a representative in an interactive process meeting only when necessary because of the employee's disability. According to the Court, "there is no support in the FEHA regulations for the Board's implication that they contemplate the assistance of a union representative in the

interactive process."[15] (Court Exceptions, p. 12.) What the Board actually said in *Sonoma* was, "The implementing regulations [of FEHA] do not preclude the presence of a representative for the employee during the interactive process." (*Sonoma*, *supra*, PERB Decision No. 2409-C, p. 17.) In other words, FEHA regulations do not prohibit union representation.

The right of representation was rooted in the Board's interpretation of the Trial Court Act and related precedent, not the FEHA regulations. *Sonoma*, *supra*, PERB Decision No. 2409-C referred to the FEHA regulations to demonstrate the purpose of the interactive process and to show how that process potentially intersects with matters related to employer-employee relations, including matters within the scope of bargaining, such as wages, transfers, leaves, reassignments, and the like.

The Court has failed to persuade us that the discussion in *Sonoma*, *supra*, PERB Decision No. 2409-C regarding FEHA regulations is incorrect or otherwise needs to be revisited or clarified. Accordingly we deny this exception.

Sonoma - PERB Decision No. 2409-C Does not Create Irreconcilable Conflicts of Interest

The Court renews its argument that potential conflicts between the interests of the individual disabled employee and the Union's interest in representing the entire bargaining unit requires the Board to reconsider *Sonoma*, *supra*, PERB Decision No. 2409-C. It urges reversal "to ensure that disabled employees can fully exercise their right to reasonable accommodation." (Court Exceptions, p. 14.) The Court speculates that because there is no duty under the MMBA to fairly represent an individual in enforcing statutory rights such as

[15] The Court has permitted an employee to bring a "support person" to an interactive process meeting in the face of a medical condition that required assistance. That support person happened to be the employee's union representative.

FEHA, a union would resist the individual employee's reasonable accommodation in order to "fulfill its duty to other employees, while leaving the disabled employee with no recourse against the union for doing so." (Court's Exceptions, p. 13.)

We disagree that such speculative concerns justify overruling *Sonoma*, *supra*, PERB Decision No. 2409-C. As a general rule, the exclusive representative has no duty under the duty of fair representation to represent an employee who seeks to enforce anti-discrimination statutes, absent a relevant provision in the CBA. (*Greene v. Pomona Unified School District* (1995) 32 Cal.App.4th 1216.) Yet the Court points to no evidence or other reasonable basis for its assertion that this supposed conflict of interest would prevent or undermine the purpose of the interactive process or an individual employee's right to reasonable accommodation. The ultimate decision as to what accommodation is "reasonable" is ultimately up to the employer, after going through the interactive process with a genuine attempt to accommodate the employee. If the employee believes he or she has not received reasonable accommodation, he or she can vindicate his or her rights to reasonable accommodation with the Department of Fair Employment & Housing.[16] The interactive process meeting is but one step in the process of obtaining reasonable accommodation, and as the Board's decision in *Sonoma* made clear, the union's presence at such meetings depends entirely on the employee's request for union representation. If the employee distrusts the union's motives or doubts its ability to be effective in the meeting, he or she need not request the union's assistance.

We considered the Court's concerns regarding potential conflicts of interest between the union and the individual employee in *Sonoma*, noting that the FEHA regulations and

[16] Labor organizations are also prohibited against discriminating against "any person employed by an employer" on the basis of physical or mental disability, among other reasons. (Gov. Code, § 12940, subd. (b).) The Court's assertion that an employee has no recourse against a union is flatly incorrect.

various court decisions have clearly articulated that when a requested accommodation conflicts with the provisions of an MOU, the request must yield to the MOU, unless the exclusive representative agrees to an exception. (*Sonoma*, *supra*, PERB Decision No. 2409-C p. 23.) Thus, the law has effectively resolved potential conflicts between MOUs and individual requests for reasonable accommodation. If the Court is concerned that SEIU will unreasonably withhold its agreement to a modification or exception to its MOU, we again note that such a possibility is entirely speculative. More importantly, nothing in the Board's decision alters an employee's remedies if that employee believes the employer or the union have violated the FEHA.

The Court renews in its exceptions its assertions that requiring union representation in interactive process meetings would delay the process and further asserts that there was no evidence in this case that the union representative has successfully negotiated a reasonable accommodation with an employer. This argument ignores the fact that the union representative was available on the very day the meeting took place with Nguyen, a fact that was communicated to the Court. Nor is it surprising or relevant that the union representative allegedly had not negotiated a reasonable accommodation, since this employer refused to permit union representatives to represent employees in the interactive process.

The Court Was Not Prejudiced by the Precedential Effect of *Sonoma* - PERB Decision No. 2409-C

The Court takes issue with the fact that PERB exercised its discretion to designate *Sonoma*, *supra*, PERB Decision No. 2409-C as a precedential decision pursuant to PERB Regulation 32320, subdivision (d).[17] The Court claims that by designating *Sonoma* as

[17] PERB Regulation 32320 subdivision (d) authorizes "a majority of the Board members issuing a decision or order pursuant to an appeal filed under Section 32635 [review of dismissals] shall determine whether the decision or order . . . shall be designated as

precedential, the Board "tied both the Chief ALJ's and the Court's hands in the subsequent evidentiary hearing," because the ALJ was bound to follow *Sonoma.* (Court's Exceptions, p. 15.) Therefore, the only way the Court could prevail was to establish facts different from those alleged in the unfair practice charge, according to the Court.[18]

We reject the Court's argument. Rather than taking issue with the proposed decision, the apparent purpose of this exception is to lecture this Board about its practice of designating certain decisions as precedential, urging the exercise of caution when setting out new rules of law in a decision remanding for a complaint.

The unfair practice charge in *Sonoma, supra*, PERB Decision No. 2409-C was dismissed by the Office of the General Counsel based on *Trustees, supra*, PERB Decision No. 1853-H, which held that there was no right to representation in interactive process meetings. By overruling *Trustees*, there is no doubt that *Sonoma* established a new law or policy and addressed a legal issue of continuing interest. The Board's designation of *Sonoma* as precedential was squarely within the regulatory parameters describing when a decision should be considered precedential.

In *Sonoma, supra*, PERB Decision No. 2409-C, the Board ruled on the purely legal question of whether the Trial Court Act provides a right of representation for employees in

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precedential." In determining whether the decision shall be precedential, the Board may consider several factors, including whether the decision "establishes new law or policy," modifies, clarifies or explains existing law of policy, or addresses a legal or factual issue of continuing interest.

[18] In the procedural posture of *Sonoma, supra*, PERB Decision No. 2409-C, the Board was required to accept as true the facts alleged by the charging party, SEIU. Once a complaint issued on the charge and a hearing convened, the Court had a full opportunity to establish any truthful facts it chose. Because the Court did not except to the ALJ's findings of fact, we presume the Court was satisfied with the record, and cannot be heard to complain that *Sonoma* prevented it from establishing the record as the Court saw fit.

interactive process meetings. The Board decided as a matter of law that the facts alleged in the unfair practice charge stated a prima facie case for a violation of representation rights. In order to allow the case to get to a hearing where a record could be fully developed, the Board had to overrule *Trustees* and reverse the dismissal of the charge.

The Court has not been disadvantaged by the procedural posture of this case, despite its implication that the Board has "prejudged the merits of this case." (Court's Exceptions, p. 16.) It urges the Board to vacate *Sonoma*, *supra*, PERB Decision No. 2409-C and decide "this appeal based on the record now before it." (Court's Exceptions, p. 16.) First, the Board has decided this appeal based on the record before it. Second, this argument is undermined by the fact that the Court has not pointed to a single fact in the record to support its argument that *Sonoma* was wrongly decided. By the Court's own admission (demonstrated by the absence of exceptions to any finding of fact), there was no evidence that provides any basis for the Board to vacate *Sonoma*. Instead, the Court disagrees with the Board's legal conclusions. The fact that those legal conclusions were first articulated in *Sonoma*, and followed by the ALJ when he reached his legal conclusions based on the evidence presented to him and affirmed by this Board, does not mean that PERB has prejudged the merits of this case. It simply means that the Court disagrees with the Board's decision in *Sonoma* and has been unsuccessful in persuading the Board to overrule that decision. This does not deprive the Court of due process.

The Remedy

SEIU excepts to the proposed remedy, asserting that the ALJ erred by not ordering a restoration of the status quo ante with make-whole relief. Specifically, SEIU asks that PERB "rescind the June 19, 2013 meeting" between Nguyen and the Court, and order the "Court and Nguyen to engage in the ADA interactive-process meeting with the presence of a Union Representative, upon her request." (SEIU Exceptions, p. 5.) According to SEIU, "[h]ad the

Union been present, Nguyen could have used her exclusive bargaining representative to negotiate on her behalf to prevent the Court from halving her wage. . . ." (*Id*. at p. 7.) It contends that the Court "continues to profit from its unlawful conduct by placing her in the lower job classification. . . ." (*Id*.) In sum, SEIU urges the Board to give the Union the opportunity to attempt to obtain the best deal for Nguyen. (SEIU Exceptions, p. 10.) While SEIU does not specify by what measure the Board should make Nguyen whole, it contends that some monetary remedy is the only way to assure that the Court not benefit from its unlawful conduct.

There is no doubt that PERB is empowered to:

> take any action and make any determinations in respect to these charges or alleged violations as the board deems necessary to effectuate the policies of this chapter.

(Trial Court Act , § 71639.1, subd. (b) and EERA , § 3541.3, subd. (i).) Yet, the Board also has discretion to withhold various remedies at its disposal when doing so effectuates the purpose of the labor relations statute, or when there is no evidence that the charging party was qualified for the requested benefit. (*San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 13; *Jurupa Unified School District* (2015) PERB Decision No. 2458, p. 8.) Such is the case here.

Since the interactive process meeting has already occurred, it is not possible to "rescind" the meeting. However, we agree with SEIU that Nguyen should be afforded an opportunity to attend a second interactive process meeting with her SEIU representative, if she chooses. This remedy would do as much as possible to restore Nguyen and SEIU to the position they were in prior to the unfair practice by providing them the opportunity to revisit reasonable accommodation matters with the Court. (*Redwoods*, *supra*, PERB Decision No. 293; *Eastern Sierra Unified School District* (1983) PERB Decision No. 312.)

SEIU also urges that PERB order "make-whole" relief based on the theory that, but for the wrongful denial of union representation at the interactive process meeting, Nguyen would have not suffered the demotion and salary reduction. (SEIU Exceptions, p. 7.) We deny this request for multiple reasons that are peculiar to this case. First, ordering back pay measured by Nguyen's salary as a court reporter would produce an unjustifiable windfall for Nguyen. It was established without contradiction that Nguyen could no longer perform the functions of a court reporter at the time the interactive process meeting occurred on June 19, 2013. Ordering the Court to compensate her as a court reporter for any period after that date would be unjustifiable. Likewise, it would also be entirely inappropriate for the Board to restore Nguyen to her former court reporter position prospectively as a remedy for this unfair practice, because such an order presumes that she was wrongfully removed from the court reporter position. The record established that Nguyen could not perform the essential functions of a court reporter and was therefore not entitled to the position after June 19, 2013.

A monetary make-whole remedy measured by reference to some position or wage classification other than the court reporter position is further unwarranted because there is no objective measure of wage loss for Nguyen. SEIU's assertion that it could have negotiated a better deal for Nguyen is total speculation. We cannot guess what the Court may have offered her if SEIU were present at the June 19, 2013 meeting. There is therefore no appropriate measure of damage. (*Regents of the University of California (Davis, Los Angeles, Santa Barbara and San Diego)* (1990) PERB Decision No. 842-H, p. 17 [back pay not appropriate remedy where the outcome of negotiations is speculative]; *City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 14.)

Moreover, any assertion that there is a monetary damage to remedy assumes that the Court's offer to place Nguyen as an LPC I was not a reasonable accommodation to her

disability. We have no jurisdiction to rule on that question and therefore cannot remedy any failure to provide reasonable accommodation.[19] For this reason, *Capistrano Unified School District* (2015) PERB Decision No. 2440 and *Placer Hills*, *supra*, PERB Decision No. 377 are inapposite precedents regarding a remedy in this case. As noted previously, this case is not about whether the Court-offered accommodation was "reasonable" within the meaning the FEHA. This decision is instead limited to determining that the Trial Court Act provides a right of representation in the interactive process meeting upon the employee's request. This is a right held by the employee and the exclusive representative, upon the employee's request. The only remedy that cures a denial of the respective representation rights in this case is to require a second interactive process meeting with an SEIU representative present, if requested.

We find appropriate and ample authority for the remedy ordered here in *Redwoods*, *supra*, PERB Decision No. 293, where an employee was improperly denied union representation in an employer-conducted meeting to answer questions about her negative performance evaluation. After concluding that she was entitled to union representation because the meeting with a high-level management official imbued it with a sense of appellate formality, PERB ordered that the employer provide the employee with a new opportunity to appeal her evaluation and permit union representation in the process. (*Id.* at p. 10.)

Because we assume that the Court provided Nguyen with a reasonable accommodation,[20] and because it was uncontroverted that she cannot perform the essential

[19] We note that the duty to provide reasonable accommodation does not require an employer to offer the "best" accommodation or the one favored most by the employee. (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 228; *Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 370; Cal Code Regs., tit. 2, § 11068, subd. (e).)

[20] Neither Nguyen nor SEIU pursued any remedy contained in the MOU or provided by the Court's appeal procedures to challenge the accommodation provided by the Court. Nor does the record reflect that Nguyen sought any remedy from the DFEH or EEOC concerning

functions of her former position as a court reporter, ordering a rescission of the accommodation previously provided could render Nguyen out of a job. Since the wrong we are authorized to remedy is the Court's denial of union representation in the interactive process meeting, not an alleged denial of reasonable accommodation, we conclude that as in *Redwoods*, *supra*, PERB Decision No. 293, it is most appropriate to restore to Nguyen and to SEIU their respective representation rights by ordering a second interactive process meeting upon Nguyen's request, at which she may be represented by SEIU, if she chooses.

Equitable considerations further counsel against a back pay remedy. *Sonoma*, *supra*, overturned what was a settled rule in *Trustees*, *supra*, PERB Decision No. 1853-H, and announced a new rule. That decision and this one is not merely applying established rules of law to new factual situations. Before *Sonoma*, the parties could not have anticipated that *Trustees* would be overturned. Under these circumstances and for the other reasons discussed above, a back pay remedy would not effectuate the purposes of the Trial Court Act and would not be fair to the Court. Back pay in this case would not serve a purpose of deterring the Court from wrongful conduct, because at the time it denied Nguyen union representation, it was acting in conformity with the rule set forth in *Trustees*.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Sonoma County Superior Court (Court) violated the Trial Court Employment Protection and Governance Act (Trial Court Act), Government Code sections 71631, 71633, and 71635.1 and PERB Regulation 32606, subdivisions (a) and (b), by

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an alleged failure by the Court to provide reasonable accommodation. Ordering back pay in this case would essentially reward SEIU and Nguyen for sleeping on their right to contend the accommodation was not reasonable.

interfering with its employees' rights to be represented by SEIU when it denied Nguyen's request to be represented by a Service Employees International Union Local 1021 (SEIU) representative at her June 19, 2013 interactive process meeting to explore possible reasonable accommodation alternatives.

Pursuant to section 71639.1 of the Government Code, it hereby is ORDERED that the Court and its representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with employees' right to have a union representative at interactive process meetings to explore possible reasonable accommodation alternatives.

2. Denying SEIU the right to represent its employees.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Upon request by Cyndi Nguyen (Nguyen), the Court shall conduct an interactive process meeting to consider her June 2013 request for reasonable accommodation. The Court shall permit SEIU to represent Nguyen at this meeting upon her request for such representation.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the Court customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the Court, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by

the Court to communicate with its employees in the bargaining units represented by SEIU.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on SEIU.

Chair Gregersen joined in this Decision.

Member Banks' concurrence and dissent begins on page 36.

BANKS, Member, concurring and dissenting: Consistent with our decision in *Sonoma County Superior Court* (2015) PERB Decision No. 2409-C (*Sonoma*), I agree with the majority that the representational rights guaranteed to employees and employee organizations by the Trial Court Employment Protection and Governance Act (Trial Court Act)[1] extend to interactive process meetings convened under state and federal reasonable accommodation laws. I also agree with the majority that the record in this case supports the findings and conclusions of the administrative law judge (ALJ) that the Sonoma County Superior Court (Court) violated these rights by refusing to engage in the interactive process with employee Cyndi Nguyen (Nguyen), unless she agreed to meet on June 19, 2013 without the representation and assistance of her exclusive representative, Service Employees International Union Local 1021 (SEIU). I likewise agree with the majority that, in addition to an order for the Court to cease and desist and post notice of its unfair practices, it is appropriate to direct the Court, upon request by Nguyen or SEIU as her designated representative,[2] to rerun the interactive process meeting with representation by SEIU to explore reasonable accommodations for Nguyen's permanent medical restrictions and inability to perform the essential duties of her previous position as a court reporter.

In addition to these remedial provisions, however, I would also remand this matter to the Office of the General Counsel for compliance proceedings to determine whether an award of

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

[2] Although not stated by the majority, our cases and private-sector precedents recognize that the exclusive representative may convey the request for representation to the employer on behalf of an employee (*Capistrano Unified School District* (2015) PERB Decision No. 2440 (*Capistrano*), p. 29, fn. 15, citing *Fremont Union High School District* (1983) PERB Decision No. 301, pp. 9-10), and that, in such circumstances, "it makes no difference" whether the employee or the representative invokes the representational rights. (*United States Postal Serv.* (1991) 303 NLRB 463, 467, enforced (D.C. Cir. 1992) 969 F.2d 1064.)

back pay is appropriate for the Court's denial of Nguyen's and SEIU's representational rights during the interactive process meeting held on June 19, 2013 and, if so, in what amount. I write separately to explain why a broader remedial order, including the possibility of back pay, is appropriate and consistent with the policies and purposes of the Trial Court Act and our precedents guaranteeing the representational rights of employees and employee organizations, including our previous decision in this case.

Factual Background

From her date of hire in April 2008 until early March 2013, Nguyen worked as a court reporter. Throughout this period, she experienced pain in her wrists and hands, which she and her doctors attributed to the typing duties associated with her position. In March 2013, Nguyen ceased performing the duties of a court reporter and began working temporarily as a legal processing clerk in the Court's family law and criminal law divisions. (Reporter's Transcript (R.T.), pp. 19, 22-23.) The legal processing clerk classification series includes three levels, designated as LPC I, LPC II, and LPC III, each of which has nine salary steps in increasing amounts from Step A through Step I. Although temporarily reassigned to perform LPC duties, as of March 2013, Nguyen was given no particular designation as to the level of work or pay within the LPC title, and she continued earning her court reporter salary, which at that time was $41.15 per hour. (R.T., pp. 28, 42.)

On or about June 13, 2013, Nguyen received a doctor's note indicating that her medical restrictions were permanent. (R.T., pp. 24-25.) Because there now appeared no likelihood that she could resume performing the essential court reporter duties, the Court's human resources department scheduled an interactive process meeting to identify what, if any, reasonable accommodations were available to allow Nguyen to continue working for the Court in some capacity. Nguyen requested that a SEIU representative accompany her to the meeting because

she "wanted somebody on [her] side" during the meeting "somebody there to maybe catch what I wasn't getting." Nguyen explained: "I don't know how to negotiate anything. I don't know anything about the law. I just wanted somebody in my corner." (R.T., pp. 26, 49.)

The Court denied Nguyen's request, asserting that it generally prohibits union representation in interactive process meetings. Although SEIU asked the Court to reconsider its position, the Court refused, and Nguyen had no choice but to attend the meeting by herself or forego the opportunity of receiving a reasonable accommodation altogether. For the reasons discussed by the ALJ, Nguyen was understandably apprehensive about attending the meeting without representation. Because her medical restrictions were permanent, Nguyen had no way of knowing whether she could continue her employment with the Court *in any capacity*. (R.T., pp. 25, 28.)

The meeting was held on June 19, 2013 in the office of Assistant Court Executive Officer Cindia Martinez (Martinez). Human Resources Analyst Tracy Rankin was also present. (R.T., p. 27.) As a result of the Court's refusal to permit SEIU to attend the meeting, Nguyen attended the meeting alone. Martinez presented Nguyen with an opening for an LPC I position in the Court's traffic department with an hourly rate of $19.77. (R.T., p. 27.) Nguyen asked if she could start instead as a LPC II, because the pay cut from her court reporter salary was so drastic, and Martinez responded that the Court starts "everybody" at level I. (R.T., pp. 29, 57-58) Martinez also informed Nguyen that she would need to complete the Court's standard six-month probation period applicable for new hires, after which she could advance to an LPC II and receive a 5 percent pay increase.

There is no dispute that the duties of the LPC I and LPC II positions are the same and there is some overlap in the pay rates for these positions. As of June 19, 2013, a position at the top of the LPC I scale had a pay rate of $19.77 per hour, while the pay rate at the bottom of the

LPC II scale was $18.83. Martinez explained to Nguyen that she would benefit from starting at the top of the LPC I scale, rather than at the bottom of the LPC II scale. However, it is unclear from the record why Nguyen was limited to starting at the lowest salary step in the LPC II scale, or why that was the only relevant point of comparison to the LPC I position offered by the Court and ultimately accepted by Nguyen.

Additionally, although Martinez testified that all new hires must start as an entry-level LPC I and complete the Court's standard six-month probation before advancing to LPC II and receiving a corresponding pay increase, Nguyen was not a new hire and was apparently not regarded as such, as evidenced by the fact that the reasonable accommodation options made available to her included so-called "frozen" positions, i.e., existing positions that were subject to a hiring freeze. Without representation, Nguyen did not ask Martinez to clarify these or other points during the meeting though she testified that she felt "deflated" after the meeting as a result of the drastic cut in pay associated with her new LPC I position. Upon completing her six-month probation as an LPC I in the traffic department, Nguyen advanced to an LPC II position. (R.T., pp. 29, 31.) At that time, her hourly pay rate increased by 5 percent from $19.77 to $20.76 per hour. (R.T., p. 32.)

<u>While Reinstatement as a Court Reporter is Unwarranted, Back Pay May Be Appropriate</u>

Our statutes, including the Trial Court Act, grant PERB broad authority to investigate, adjudicate, and remedy unfair practice allegations, as the Board deems necessary to effectuate the policies and purposes of the Trial Court Act. (§ 71639.1, subds. (b), (c); EERA,[3] §§ 3541.3, subds. (i), (n), 3541.5, subd. (c).) A Board-ordered remedy is generally designed to reverse the effects of any unfair practices and, to the extent possible, restore the parties and any affected

[3] The Educational Employment Relations Act (EERA) is codified at section 3540 et seq.

employees to their respective positions before the unlawful conduct occurred. (*City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 13; *City of Selma* (2014) PERB Decision No. 2380-M, pp. 24-26; *Desert Sands Unified School District* (2004) PERB Decision No. 1682a (*Desert Sands*), pp. 3-5; *Santa Clara Unified School District* (1979) PERB Decision No. 104 (*Santa Clara*), p. 26.) Our precedents thus provide for *both* broad cease-and-desist orders aimed at preventing *future* misconduct, *and* for such affirmative relief, including but not limited to the reinstatement of employees with or without back pay, as the Board deems necessary, to remedy *past* acts or omissions that the agency has determined constitute unfair labor practices. (Trial Court Act, § 71639.1, subds. (b), (c); EERA, §§ 3541.3, subds. (i), (n), 3541.5, subd. (c); *Rim of the World Unified School District* (1986) PERB Order No. Ad-161, p. 15, fn. 8; see also *Capistrano, supra,* PERB Decision No. 2440, p. 55.) What constitutes an appropriate remedy in any given situation therefore depends not only on the Board's discretion, but also on the nature and purpose of the rights that were violated or the duties that were breached. (*NLRB v. Rutter-Rex Mfg. Co.* (1969) 396 U.S. 258, 263.)

In the present case, there is no question that by June 2013, Nguyen could no longer perform her previous court report duties, and SEIU does not contend that her situation has since changed in any way that would allow her to resume her previous duties. Reinstatement to her former position as a court reporter is therefore not appropriate under the circumstances.

However, reinstatement and back pay are separate remedies. (*County of Riverside* (2013) PERB Decision No. 2336-M, p. 16.) Even where reinstatement is impractical or inappropriate, the Board may still order back pay, front pay or other forms of compensation necessary to make injured parties and/or affected employees whole for any out of pocket expenses resulting from an employer's unfair labor practices. (*Ibid.*; *San Diego Unified School District* (2007) PERB Decision No. 1883, p. 9; *Los Gatos Joint Union High School District* (1980) PERB Decision

No. 120, pp. 3-4; see also *Otay Water District* (2004) PERB Decision No. 1634-M, adopting proposed decision at pp. 8-9; *Great Atlantic & Pacific Tea Co*. (1963) 141 NLRB 1, 15; *New Madrid Mfg. Co*. (1953) 104 NLRB 117.) Thus, the fact that Nguyen is no longer able to perform the duties of a court reporter does not categorically preclude her from *some* back pay award, particularly where, as here, there is a dispute over whether she was appropriately placed in the Clerk I classification, the lowest possible classification available.

The Court argues that it placed Nguyen's salary at "the highest step" for an LPC I position but it is not clear from the record why the entry-level LPC I was the only position considered. Additionally, as explained below, whether the Court met its obligations under the Fair Employment and Housing Act (FEHA)[4] and the American with Disabilities Act[5] does not absolve it of liability under the Trial Court Act or bar PERB from ordering an effective remedy upon determining that the Court has engaged in unfair labor practices. Since there is no dispute that the duties of the LPC I and LPC II positions are *the same*, there is a legitimate question whether Nguyen could perform those same duties but receive the higher pay of an available Clerk II position. Instead of rejecting SEIU's exception, I would remand the matter to compliance proceedings to resolve any back pay issues, including whether back pay is appropriate and, if so, in what amount. To effectuate the purposes of the Trial Court Act, *some* restorative remedy is appropriate here, which may include not only an order directing the Court, at Nguyen's option, to rerun the interactive process meeting with representation by SEIU, but also a monetary award making Nguyen whole for any ascertainable losses suffered as a result of the Court's unfair practices.

[4] Codified at 42 U.S.C. section 12101 et seq.

[5] Codified at section 12900 et seq.

SEIU's exception raises at least two questions for consideration: Whether Nguyen has suffered ascertainable loss as a result of the Court's unfair labor practices, and if so, what is the appropriate measure of damages. Back pay, front pay and/or other monetary awards, plus interest, are an ordinary part of Board-ordered remedies where necessary to compensate injured parties or affected employees for out-of-pocket losses caused, in whole or in part, by an unfair practice. (*Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262 (*Fairfield-Suisun*), pp. 18-19; *Los Angeles Unified School District* (2001) PERB Decision No. 1469 (*LAUSD*), pp. 5-6, 11; *San Ysidro School District* (1997) PERB Decision No. 1198, p. 5; *Fresno County Office of Education* (1996) PERB Decision No. 1171 (*Fresno*), pp. 7-8, and proposed decision at pp. 1-2.) A back pay award and other forms of make-whole relief ensure that injured parties and employees are not effectively punished for exercising statutorily-protected rights. Back pay also provides a financial disincentive and thus serves a deterrent effect against future unlawful conduct. (*City of Pasadena, supra,* PERB Order No. Ad-406-M, p. 13, and authorities cited therein.)

Additionally, unlike most monetary judgments in civil litigation, which are designed to compensate individuals for loss or injury of a private nature, PERB-ordered remedies, including awards of back pay, are designed to vindicate public rights and effectuate the policies and purposes of our statutes. (*City of Pasadena, supra,* PERB Order No. Ad-406-M, p. 13; *United Teachers Los Angeles (Raines, et al)* (2016) PERB Decision No. 2475 (*UTLA*), p. 69, fn. 44; *Sandrini Brothers v. Agricultural Labor Relations Bd.* (1984) 156 Cal.App.3d 878, 883.) Since PERB's inception, the standard Board-ordered remedy for a bargaining violation has entailed restoration of the status quo ante, including reinstatement, back pay and back benefits for all affected employees *without regard* to their desires or their status as named parties. (*Santa Clara, supra*, PERB Decision No. 104, pp. 26-27.) So long as back pay or other monetary awards are

not a patent attempt to achieve ends other than those reasonably calculated to effectuate the policies of our statutes, they neither exceed PERB's authority nor improperly intrude on an employer's exercise of lawful discretion to conduct its operations or decide personnel matters. (*J. R. Norton Co. v. Agricultural Labor Relations Bd.* (1987) 192 Cal.App.3d 874, 902; *NLRB v. Rutter-Rex, supra*, 396 U.S. 258, 263; *City of Pasadena, supra*, PERB Order No. Ad-406-M, p. 12; see also *City of Selma, supra*, PERB Decision No. 2380-M, pp. 24-26; *Desert Sands, supra*, PERB Decision No. 1682a, pp. 3-5; *Capistrano, supra*, PERB Decision No. 2440, pp. 44-46.)

Because an employee is not entitled to back pay for a period when he or she would not or could not have been in the position for reasons unrelated to the employer's unlawful conduct (*County of Riverside, supra*, PERB Decision No. 2336-M, p. 16), I can agree with the majority that Nguyen's previous salary as a court reporter is not a presumptively appropriate measure of damages here. Unlike the majority, however, I am not prepared to rule out *any possibility* of back pay as an appropriate remedy under the circumstances. Rather, I believe these remedial issues should be resolved in PERB's compliance proceedings.

Upon a Finding of Liability for Unfair Labor Practices, PERB Compliance Proceedings Are Appropriate for Resolving Disputes over What, if any, Back Pay is Owed

Like California and federal courts, our precedents teach that back pay or other monetary awards are not recoverable where the proof does not show with reasonable certainty both that the charging party or affected employees suffered loss, and that such loss resulted from the respondent's wrongful act or omission. (*Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 153; *Calkins v. F.W. Woolworth Co.* (8th Cir.1928) 27 F.2d 314, 319-320, cert. denied in (1928) 278 U.S. 645; *Regents of the University of California (Davis, Los Angeles, Santa Barbara and San Diego)* (1990) PERB Decision No. 842-H, p. 17.) However, "the fact that the amount

of damage may not be susceptible of exact proof or may be uncertain, contingent or difficult of ascertainment does not bar recovery." (*Pulaski & Middleman, LLC v. Google, Inc.* (9th Cir. 2015) 802 F.3d 979, 989, cert. denied (2016) 136 S.Ct. 2410; accord, *City of Pasadena, supra*, PERB Order No. Ad-406-M, p. 13.) Nor must recovery be denied simply because it is difficult to apportion the degree of fault between the respondent's unfair practices and other causes contributing to any losses suffered by the charging party or affected employees. (*Capistrano, supra*, PERB Decision No. 2440, pp. 44-46, 50, fn. 24, 53, 54 citing *Redwoods Community College District* (1983) PERB Decision No. 293, affd. in relevant part at 159 Cal.App.3d 617; *Lake Elsinore Unified School District* (2004) PERB Decision No. 1648, p. 8; see also *California Orange Co. v. Riverside Portland Cement Co.* (1920) 50 Cal.App. 522.)

I acknowledge that this case presents difficult issues as to the appropriate remedy, including what affirmative relief is necessary to make whole and, to reverse the effects of the Court's unlawful conduct insofar as is possible, without producing a windfall or excessive result that punishes the Court. However, this problem strikes me as neither unprecedented nor impossible to resolve within the framework of the Board's usual remedial powers and PERB's administrative process. Once unfair practice liability has been determined, our cases say that, if a controversy arises over any aspect of the remedy, a compliance proceeding is the proper forum in which to resolve the controversy. (*LAUSD, supra*, PERB Decision No. 1469, p. 7; see also *UTLA, supra*, PERB Decision No. 2475, p. 94; *County of Riverside, supra*, PERB Decision No. 2336-M, p. 16; *Fresno, supra*, PERB Decision No. 1171, pp. 2, 3-5.) Our precedents also say that, because the respondent has already been found to have engaged in unlawful conduct, uncertainties as to the appropriate remedy for an unfair labor practice, including the measure of back pay, are resolved against the respondent whose unlawful conduct made such doubts possible. (*Capistrano, supra,* PERB Decision No. 2440, p. 53; *City of Pasadena, supra*,

PERB Order No. Ad-406-M, pp. 12-13, 26-27; *County of Riverside, supra,* PERB Decision No. 2336-M, p. 16; *LAUSD, supra,* at p. 3; *Fresno, supra,* at p. 8; see also *J. H. Rutter-Rex Mfg. Co.* (1971) 194 NLRB 19, 24.)

Although PERB has discretion to withhold as well as pursue the various remedies at its disposal (*San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 13), it may not do so arbitrarily by ignoring its own relevant precedent or without at least explaining why analogous cases have been decided differently. (*California Teachers Assn v. Public Employment Relations Bd*. (2009) 169 Cal.App.4th 1076, 1087; *LeMoyne-Owen College v. NLRB* (D.C. Cir. 2004) 357 F.3d 55, 61; *National Federation of Federal Employees, FD-1 v. Federal Labor Relations Authority* (D.C. Cir. 2005) 412 F.3d 119, 124.) The majority opinion cites no statutory provision nor offers any persuasive policy reason to depart from our precedents holding that where the Board has found liability and the extent of the harm is unknown but can be reasonably and objectively determined, compliance proceedings are appropriate to resolve the controversy. (*City of Pasadena, supra,* PERB Order No. Ad-406-M, pp. 12-13, 26-27; *UTLA, supra,* PERB Decision No. 2475, p. 94; *County of Riverside, supra,* PERB Decision No. 2336-M, p. 16; *Fresno, supra,* PERB Decision No. 1171, pp. 2, 3-5.)

Rather than dismiss the back pay issues as "speculative," resolve uncertainty as to the appropriate remedy *against* SEIU and Nguyen, and effectively reward the Court for its unlawful conduct, I would remand this case to the Office of the General Counsel to determine in compliance proceedings what, if any, amount of back pay is owed to Nguyen as a result of the Court's unfair practices. (PERB Reg. 32980;[6] *City of Pasadena, supra,* PERB Order No. Ad-406-M, pp. 12-13, 26-27; *Fresno, supra,* at pp. 2, 3-5.)

[6] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Contrary to the majority's contention, a back pay award would not exceed PERB's authority or necessarily intrude on reasonable accommodation matters. Since its earliest days, PERB has had to decide unfair practice allegations that overlap with matters governed by other laws. (*Jefferson School District* (1980) PERB Decision No. 133, pp. 7-10; *Pajaro Valley Unified School District* (1978) PERB Decision No. 51, p. 11.) The rule that has emerged, and which enjoys the approval of our Supreme Court, is that, unless an external law or regulation sets an inflexible standard or mandates a specific action affecting wages, hours or working conditions, or unless the statutory scheme otherwise indicates that the Legislature intended to "occupy the field," PERB should attempt to harmonize its statutes with overlapping areas of external law. (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 866; *Fremont Unified School District* (1997) PERB Decision No. 1240; *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375, pp. 6-7; *Exxon Shipping Co.* (1993) 312 NLRB 566, 567-568; *Murphy Oil USA* (1987) 286 NLRB 1039, 1042.) For example, where external law, such as the state or federal reasonable accommodation statutes, leaves discretion in how it will be implemented, an employer would, logically, need to provide notice and opportunity to the exclusive representative before the employer may exercise its discretion to affect negotiable subjects. (*Healdsburg, supra,* at p. 13; *Trustees of the California State University* (2004) PERB Decision No. 1656-H; *Regents of the University of California* (2010) PERB Decision No. 2094-H, p. 19; see also *Warren Unilube, Inc.* (2012) 358 NLRB No. 92, p. 8; *Standard Candy Co.* (1964) 147 NLRB 1070, 1074.)

While an employee seeking a reasonable accommodation decides whether he or she will be accompanied by a union representative when meeting with the employer (*Sonoma, supra,* PERB Decision No. 2409-C, pp. 24-25), an employer violates the organization's right to

represent, and perhaps the employer's duty to bargain as well,[7] when it bypasses the representative and meets individually with the employee over terms and conditions of employment or seeks to obtain a waiver of collectively-bargained rights. (*Lake Elsinore School District* (1987) PERB Decision No. 646, pp. 7-8; *Lake Elsinore School District* (1986) PERB Decision No. 563, pp. 3-4; *North Sacramento School District* (1981) PERB Decision No. 193, p. 8.)[8]

We need not decide here whether or to what extent the accommodation chosen by the Court has a generalized effect on wages, hours or working conditions or implicates the duty to bargain. It is enough that the Court has been found to have violated SEIU's right to represent employees in their employment relations to recognize that the protected rights at issue, and thus

[7] The fact that a reasonable accommodation decision affects "only" one employee does not necessarily preclude it from the scope of representation. (*Modesto City Schools and High School District* (1985) PERB Decision No. 552, p. 8; *Jamestown Elementary School District* (1990) PERB Decision No. 795, p. 6.) Even an employer's one-time action affecting only one employee may have a generalized effect or continuing impact on negotiable terms and conditions of employment, particularly where, as in the context of a reasonable accommodation request, the employer asserts that it was legally authorized to act unilaterally under the circumstances. (*County of Santa Clara* (2015) PERB Decision No. 2431-M, p. 19; *Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186, p. 4.)

[8] Similar to adjusting grievances without providing notice to the exclusive representative, which constitutes unlawful direct dealing, granting, denying or altering an employee's request for a reasonable accommodation may likewise affect not only the employee's right to representation, but also the organization's independent right to represent employees, if the decision affects negotiable matters or amounts to a waiver or modification of an existing policy applicable to unit employees. (*Lake Elsinore School District, supra,* PERB Decision No. 563, p. 5; *City of San Diego (Office of the City Attorney)* (2010) PERB Decision No. 2103-M, p. 7; *Bethlehem Steel Co.* (1950) 89 NLRB 341; *Van Can Co.* (1991) 304 NLRB 1085, fn. 5.) Thus, even if the employee has chosen to forego union representation in the interactive process, an employer's reasonable accommodation decision affecting negotiable matters may require notice to the exclusive representative and opportunity for the union to meet *separately* with the employer in order for the organization to fulfill its duty to represent all unit employees fairly. (*United States Postal Serv.* (1986) 281 NLRB 1015, 1018-1019; ¶ 30,799 GENERAL COUNSEL'S MEMORANDUM ADDRESSES AMERICANS WITH DISABILITIES ACT, NLRB Cas. Handling Man. (CCH) P 30799; see also *So. California Edison Co.* (1987) 284 NLRB 1205, 1210-1212; and *Jones Dairy Farm* (1989) 295 NLRB 113, 113-116.)

the appropriate remedial measures, should vindicate not only Nguyen's right to representation but also SEIU's organizational right to represent her and other unit employees. Because the reasonable accommodation laws were never intended to preclude or supersede the public-sector labor relations statutes, including the independent right of employee organizations to represent employees in their employment relations with the Court, I see no reason for the Board to acquiesce to the Court's decision to deny SEIU the right to represent and assist Nguyen in the interactive process meeting. To the extent Nguyen has suffered some loss as a result of the Court's unfair practices, a back pay award may be appropriate to vindicate *both* her right to representation and SEIU's right to represent her and other unit employees. Rather than consider this possibility, the majority's discussion conflates an employer's discretion, under the reasonable accommodation laws, to select among various "reasonable" accommodations, with PERB's authority and obligation under the Trial Court Act to investigate unfair labor practice allegations and, where appropriate, order remedies which effectuate the purposes of the statute. (§ 71639.1, subd. (b); *State of California (Department of Transportation)* (1983) PERB Decision No. 361-S, pp. 17-18.)

It is well-settled that for every wrong there is a remedy. (Civ. Code, § 3523.) While PERB lacks authority to review discipline or other adverse actions *unrelated* to the commission of an unfair labor practice (EERA, § 3541.5, subd. (b); *Jurupa Unified School District* (2012) PERB Decision No. 2283, p. 13; *Alisal Union Elementary School District* (1998) PERB Decision No. 1248, pp. 5-6), nothing prevents PERB from exercising its broad remedial powers to declare an employer's personnel actions void and to order any other affirmative relief designed to "undo" the effects of unfair labor practices within PERB's jurisdiction. (*City of Palo Alto v. Public Employment Relations Bd.* (2016) 5 Cal.App.5th 1271, 1351, review den. (Mar. 15, 2017); *Fairfield-Suisun, supra,* PERB Decision No. 2262, pp. 18-19.) Even where a public

employer has unfettered discretion under the common law or other statutes to hire, re-hire, discipline or discharge employees with or without cause, or take other personnel actions, such discretion does not insulate its conduct from PERB's scrutiny and from a Board-ordered remedy, if such conduct constitutes an unfair practice within PERB's jurisdiction. (*McFarland Unified School Dist. v. Public Employment Relations Bd.* (1991) 228 Cal.App.3d 166, 169; *Berkeley Unified School District* (2003) PERB Decision No. 1538, p. 5; *San Diego Community College District* (1983) PERB Decision No. 368, pp. 25-26.)

The Availability of Other Remedies Does not Oust PERB of its Jurisdiction Nor Relieve PERB of its Duty to Order an Effective Remedy in this Case

Whether Nguyen or SEIU pursued any other remedies available under the parties' Memorandum of Understanding or state or federal non-discrimination statutes does not affect whether PERB should order an effective remedy for the Court's unfair labor practices. Because the Legislature has vested PERB with exclusive, initial jurisdiction to determine what conduct is protected and prohibited by the Trial Court Act, we have both the power and the duty to order an effective remedy upon finding that the Court has engaged in unfair labor practices. (Trial Court Act, § 71639.1, subds. (b), (c); *Fresno Unified School Dist. v. National Education Assn*. (1981) 125 Cal.App.3d 259, 263-264; *San Diego Teachers Assn. v. Superior Court*, *supra*, 24 Cal.3d 1, 15.) Under our precedents, "[a] cease-and-desist order alone is inadequate because its exclusive focus on prohibiting *future* violations effectively rewards the employer for its past misconduct, without attempting to restore the conditions and relationships that existed or would have existed, but for the commission of the unfair practice." (*Capistrano, supra*, PERB Decision No. 2440, p. 55, emphasis in original.)

Nor has there been any showing of waiver here. Because a waiver of statutory rights is disfavored (*City of Escondido* (2013) PERB Decision No. 2311-M, p. 13; *Metropolitan Edison*

Co. v. NLRB (1983) 460 U.S. 693, 708), a charging party does not lose its access to the Board's administrative process and, where appropriate, to a Board-ordered remedy, unless it has entered into a settlement agreement that clearly and unmistakably resolves the unfair practice issues or explicitly waives its right to pursue the charge. (*Oakland Unified School Dist. v. Public Employment Relations Bd.* (1981) 120 Cal.App.3d 1007, 1011; *City & County of San Francisco* (2009) PERB Decision No. 2041-M, pp. 4-5; see also *Lake Elsinore School District* (1986) PERB Decision No. 603, pp. 2-3.)

The majority refuses to entertain even the possibility of a back pay award, reasoning that to do so would require PERB to determine whether the Court had complied with the reasonable accommodation statutes, a determination which PERB has no authority to make. The majority also "assume[s] that the Court provided Nguyen with a reasonable accommodation," because the record does not reflect "that Nguyen sought any remedy from the DFEH or EEOC concerning an alleged failure by the Court to provide reasonable accommodation." Additionally, because "[n]either Nguyen or SEIU pursued any remedy contained in the MOU or provided by the Court's appeal procedures to challenge the accommodation provided by the Court," the majority concludes that "[o]rdering back pay in this case would essentially reward SEIU and Nguyen for sleeping on their [sic] right to contend the accommodation was not reasonable."

The majority's reasoning is faulty for several reasons. If, as the majority points out, the Court's compliance with state and federal reasonable accommodation statutes is not an issue properly before PERB, then there is no reason for the majority to conclude, much less *to assume*, one way or the other, whether the Court has complied with those statutes. Rather than demonstrating that Nguyen or SEIU failed to pursue remedies that may or may not have been available before other tribunals, the absence of evidence on this point *before PERB* presumably reflects SEIU's recognition that the issue is indeed not within PERB's expertise or authority, and

therefore not relevant to these proceedings. Consequently, it is, or should be, equally irrelevant for determining whether back pay or any other remedial provisions are appropriate for the Court's violation of the Trial Court Act.

SEIU, as Nguyen's collective-bargaining agent, has no legal duty or independent right under the reasonable accommodation statutes to contest any accommodation provided to Nguyen by her employer, nor to pursue a Department of Fair Employment & Housing action that Nguyen has chosen not to pursue. However, as discussed above, the majority categorically refuses to consider any back pay award for Nguyen, even if such an award were also necessary and appropriate to vindicate SEIU's independent right under the Trial Court Act to represent unit employees in their employment relations with the Court.

More fundamentally, the majority fails to explain why, when fashioning an appropriate remedy for an unfair labor practice, it should matter to PERB whether a party, or an employee it represents, has pursued other remedies provided by statutes outside PERB's jurisdiction. PERB is charged with administering the Trial Court Act. (71639.1, subds. (b), (c).) Except in limited circumstances involving deferral to arbitration (which are clearly not at issue here), whether a party before PERB has pursued remedies before other tribunals has no bearing on whether a particular remedial measure is appropriate for remedying an unfair labor practice. (See also *Rojo v. Kliger* (1990) 52 Cal.3d 65, 74–75 [employment discrimination claims under FEHA intended to supplement, not supplant, other administrative or judicial remedies].)

Echoing the Court's arguments, the majority points out that, under the reasonable accommodation statutes, an employer may consider an employee's preferred accommodation, but retains ultimate authority to select and implement an accommodation that is effective for both the employee and the employer. However, the employer's authority under the reasonable accommodation statutes to choose among various reasonable accommodations is not at issue, nor

dispositive of the remedial issues in PERB's unfair practice proceedings. In fact, the Trial Court Act's "meet-and-confer" requirement and settled PERB precedent likewise recognize the authority of the Court, after considering fully the presentations made by a recognized employee organization, to reject the union proposals and "arriv[e] at a determination of policy or course of action." (Trial Court Act, § 71634.2, subd. (a); *City of San Jose* (2013) PERB Decision No. 2341-M, pp. 39-40, and authorities cited therein.) Yet an employer's ultimate authority to impose terms assumes good-faith bargaining and no one, including the majority, has questioned PERB's authority to order to restore the prior status quo, return to the table to rerun the process, and to make any affected employees whole, where the employer has failed or refused to bargain with the employees' representative on matters within scope. (*Lake Elsinore School District, supra*, PERB Decision No. 646, p. 35; see also *City of Sacramento* (2013) PERB Decision No. 2351-M, pp. 48-50.) In short, the fact that an employer retains ultimate authority to make operational decisions affecting reasonable accommodation or collective bargaining matters does not divest PERB of its authority, nor its duty, to remedy violations of the Trial Court Act.

Having found the Court engaged in unfair labor practices, the Board should utilize its power and fulfil its duty to order an effective remedy. I therefore do not adopt that portion of the proposed decision appearing at pages 16-17 in which the ALJ denied SEIU's request for restoring the prior status quo and/or awarding Nguyen back pay *because* no evidence was presented that a grievance or separate administrative complaint was pursued in another forum.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SF-CE-39-C, *Service Employees International, Local 1021 v. Sonoma County Superior Court*, in which all parties had the right to participate, it has been found that the Sonoma County Superior Court (Court) violated the Trial Court Employment Protection and Governance Act (Trial Court Act), Government Code sections 71631, 71633, and 71635.1 and PERB Regulation 32606, subdivisions (a) and (b), when it interfered with its employees' rights to be represented by Service Employees International Union, Local 1021 (SEIU) by denying a unit employee's request to be represented by a SEIU representative at an interactive process meeting to explore possible reasonable accommodation alternatives.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Interfering with employees' right to have a union representative at interactive process meetings to explore possible reasonable accommodation alternatives.

2. Denying SEIU the right to represent its employees.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE TRIAL COURT ACT:

1. Conduct an interactive process meeting upon Nguyen's request at which she may be represented by SEIU.

Dated: _____ SONOMA COUNTY SUPERIOR COURT

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1021, Charging Party, v. SONOMA COUNTY SUPERIOR COURT, Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-39-C PROPOSED DECISION (July 14, 2015)

Appearances: Weinberg, Roger & Rosenfeld, by Anthony J. Tucci and Matthew J. Gauger, Attorneys, for Service Employees International Union, Local 1021; Renne Sloan Holtzman Sakai, by Timothy G. Yeung, Attorney, for Sonoma County Superior Court.

Before Shawn P. Cloughesy, Chief Administrative Law Judge.

INTRODUCTION

The case alleges that a Court employer refused to permit union representation requested by an employee at an interactive process meeting in violation the Trial Court Employment Protection and Governance Act (Trial Court Act) and PERB Regulations.[1] The Court employer denied any violation of the Trial Court Act.

PROCEDURAL HISTORY

On December 20, 2013, Service Employees International Union, Local 1021 (Local 1021) filed an unfair practice charge against the Sonoma County Superior Court (Court) alleging that the Court refused to permit union representation requested by an employee at an interactive process meeting and violated the Trial Court Act. On March 20, 2014, the Office of

[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. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

the General Counsel of the Public Employment Relations Board (PERB or Board) dismissed the charge pursuant to *Trustees of the California State University* (2006) PERB Decision No. 1853-H (*Trustees*). On April 9, 2014, the dismissal was appealed to the Board. Both parties filed briefs with the Board.

On January 13, 2015, the Board overturned *Trustees*, *supra*, PERB Decision No. 1853-H, and, in summary, found:

> 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 Community College District* (1982) 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.

(Emphasis added, *Sonoma County Superior Court* (2015) PERB Decision No. 2409-C, pp. 24-25, (*Sonoma*).)

The Board then ordered the dismissal to be reversed and the matter be remanded to the PERB Office of the General Counsel for the issuance of a complaint.

On February 24, 2015, the PERB Office of the General Counsel issued a complaint, which stated in pertinent part:

> 3. Cyndi Nguyen (Nguyen) is a trial court employee within the meaning of Government Code section 71601(l).
>
> 4. On June 19, 2013, Nguyen met with Respondent's agent, Cindia Martinez (Martinez), to discuss reasonable accommodations for Nguyen's disability.

> 5. Nguyen requested that her employee organization representative be present for the meeting. Respondent, acting through its agent, Martinez, refused to permit the representative to attend the meeting.

The complaint alleged that the Court's refusal denied Nguyen's right to be represented by Local 1021 and denied Local 1021 right to represent its members in violation of Trial Court Act sections 71631, 71633 and 71635.1 and PERB Regulation 32606, subdivisions (a) and (b).

On March 16, 2015, the Court filed an answer admitting to allegations in paragraphs three through five of the complaint, but denied that Nguyen had a reasonable belief that the meeting could lead to a disciplinary action. The Court further avers that the meeting was neither disciplinary in nature, nor could a reasonable person believe the meeting to be disciplinary in nature. The Court also alleged other affirmative defenses such as: the right to representation does not flow to employees who want to discuss potential reasonable accommodation, PERB lacks jurisdiction to decide such a representational issue; and that the Court's actions were justified under the Fair Employment and Housing Act[2] (FEHA), and the Americans with Disabilities Act of 1990[3] (ADA), and other operational necessities.

An informal conference was conducted on March 26, 2015, but the matter was not resolved.

On March 31, 2015, a formal hearing notice was issued scheduling the formal hearing for May 29, 2015.

On May 29, 2015, a formal hearing was held. After Local 1021 rested its case-in-chief, the Court moved to amend its answer to plead an affirmative defense that the filing of the

[2] FEHA is codified at Government Code section 12900 et seq.

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

unfair practice charge was untimely.[4] Over Local 1021's objection, the amendment was allowed. On July 6, 2015, post-hearing briefs were submitted.

Petition for Writ of Mandate

On March 5, 2015, the Court filed a Verified Petition for Writ of Mandate (Code of Civil Procedure section 1085) as to PERB's issuance of *Sonoma*, *supra*, PERB Decision No. 2409-C with the Sacramento Superior Court (Case No. 34-2015-80002035) seeking that the Superior Court vacate PERB Decision No. 2409-C and dismiss the unfair practice charge. The writ hearing was set for November 6, 2015. Both Local 1021 and the PERB Office of General Counsel filed demurrers to the writ arguing that the Court had not exhausted its administrative remedies and that it was filed in the wrong court. No stay of the instant administrative hearing was sought or ordered.

FINDINGS OF FACT

Local 1021 is the exclusive representative of an appropriate unit of employees working for the Court pursuant to PERB Regulation 32033, subdivision (b), and the Court is a trial court within the meaning of Trial Court Act section 71601, subdivision (k), and PERB Regulation 32033, subdivision (a). Nguyen is a trial court employee within the meaning of 71601, subdivision (l).

Background

Martinez is the Assistant Court Executive Officer of the Court. Since October 2012, Martinez has assumed the duties of the Court Human Resources Director, including immediate

[4] The Court did not include an argument of the charge being untimely filed in its post-hearing brief.

oversight over the reasonable accommodation process,[5] and has engaged in the interactive process with Court employees as the Court's representative on over 20 occasions.[6] Tracy Rankin (Rankin) is a Senior Human Resources Analyst and keeps track of each employee's workplace injury and accommodation chronological timeline. Raul Riefkohl (Riefkohl) is the Court Operations Manager who supervises all Court Interpreters and Court Reporters. Nguyen works under Riefkohl's supervision as a Court Reporter.

Martinez explained that the reasonable accommodation−interactive process is usually initiated by the employee bringing a physician's note setting forth medical work restrictions to the Court's attention brought about by an employee's injury or pain. The Court attempts to engage employees quickly in an interactive process dialogue to determine whether they can perform the essential functions of their position without or without reasonable accommodation. These interactive process discussions can range from a simple ergonomic evaluation, where their work location is modified, to permanent medical restrictions which may cause them to be transferred/demoted from their current employment. On almost every occasion, the Court has

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[5] Government Code section 12926, subdivision (p)(1) and (2), define "reasonable accommodation" as:

> (1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.
>
> (2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

[6] Martinez explained that these interactive process communications had been resolved by "quick email" exchanges, phone calls, and/or ergonomic evaluations. Many times these communications were numerous.

disallowed a union representative at such an interactive process meeting.[7] Martinez stated that the past practice of the Court was to disallow union representation, unless the employee was incapacitated or needed assistance to be able to understand the proceedings.

Nguyen

Nguyen was hired as a probationary Court Reporter on April 8, 2008. She started feeling pain in her wrists within the first six months of her employment. She chose to endure the pain rather than file a workers' compensation claim. In 2009, she again complained of pain in her hands and wanted her desk to be lowered. Over her early years, she had some accommodations such as working four days a week (instead of five) for approximately three months because of her anxiety. In 2010, she requested to be demoted to a Legal Process Clerk (LPC) position,[8] but eventually did not demote to that position. In December 2012, Nguyen complained of tendonitis of the elbow for which she was given lighter assignments to allow for more rest periods.

March 2013 Meeting in Martinez Office

In early March 2013, Nguyen was in too much pain to perform her duties as a court reporter and told Riefkohl that she was experiencing excruciating pain. Riefkohl asked her if she needed to see a physician and she replied in the affirmative. Nguyen went to see a workers compensation physician at Kaiser Permanente who issued her a note placing her on modified duty regarding keyboarding.

[7] Martinez recalled on one occasion where the accommodation was that the Court provide the employee with a support person, and that support person was her union representative.

[8] The LPC classification series has a LPC I, LPC II, and LPC III. Each classification in these series has salary steps from Step A through I. A Court Reporter earned $41.15 an hour during the time.

On or about March 11, 2013, Nguyen presented Rankin with a physician's note indicating that she had a 20-minute cumulative per hour keying restriction. Nguyen met with Martinez and Riefkohl. Nguyen believed that she could perform some of the clerical duties of the entry level LPC positions. As a result of the meeting, Nguyen was assigned to the Family Law Division to perform light clerical duties to accommodate her physician's work restrictions.[9] After approximately a week, she transferred to the Criminal Division. She received her Court Reporter salary during this time.

In May 2013, Nguyen received a physician's note from May 2 to June 14, 2013 which restricted her repetitive keyboarding motions to no more than 20 minutes an hour. She presented the note to Rankin. Nguyen was allowed to continue performing LPC work while being compensated as a Court Reporter.

Permanent Restrictions

On June 13, 2013, Nguyen went to her physician who informed her that her restrictions regarding keyboard for no more than 20 cumulative minutes per hour had become "permanent" and she was later provided with a physician's note setting forth these restrictions. After receiving the note, Nguyen knew that she could not return to her court reporter duties and was deeply concerned that she may not have a job. On the other hand, she was relieved, as she knew her condition regarding her hands would not deteriorate further.

When Nguyen came to work that day, she presented Rankin with the physician's note. Rankin brought the physician's note to Martinez's attention and Rankin set up an interactive process meeting with Martinez, Nguyen, and Rankin at Martinez's office on June 19, 2013.

[9] These duties included setting up new case files, filing, and other basic clerical work.

Nguyen contacted Local 1021 job steward Kris Ridste (Ridste) as she wanted Ridste to come with her to the June 19, 2013 interactive process meeting. Nguyen wanted Ridste with her as she wanted somebody that was "on her side" who she could discuss the issues with. Nguyen was unfamiliar with her rights in this area and did not want to "miss anything" important.

On June 14, 2013, Ridste emailed Riefkohl stating that Michael Viloria (Viloria), Local 1021 organizer/representative, and she were available June 18 and 19, 2013, to accompany Nguyen when the Court would meet with her about her permanent work modifications. Riefkohl responded:

> Thanks for your email. I checked with HR. Indeed, the Court did receive a note from Cyndi's doctor yesterday. HR needs to follow up and get more information. They will likely set up a meeting with Cyndi next week. My understanding is that [u]nion representation is not appropriate during this interactive [dialogue] with Cyndi.

That same day Ridste forwarded Riefkohl's response to Viloria. Nguyen then sought Viloria's assistance in order to provide her with representation at the interactive process meeting. Viloria said he would work on it.

On June 18, 2013, Viloria sent an email to Riefkohl asking to explain why the Court was not allowing Nguyen to have union representation at the meeting concerning her "medical condition and employment status." Viloria believed the union's involvement would help facilitate the process and the matter involved Nguyen's conditions of employment.

On June 19, 2013, Martinez responded:

> We will be engaging in an interactive [dialogue] with the employee which does not involve disciplinary matters that would involve the union. We do not include union stewards in interactive [dialogues] as we view them as confidential, since we are discussing medical conditions. While an employee might

> choose to waive any confidentiality, it still does not fall under Weingarten Rights. At this point[,] we are not discussing employment status, but engaging in an interactive [dialogue] under [the] ADA.

Viloria responded that he disagreed with Martinez that Nguyen had the right to be represented at such a meeting.

June 19, 2013 Meeting in Martinez's Office

Before Nguyen came to the interactive process meeting, she did not know what to expect. She was not sure whether she would have a job, would be given another job, or the amount she would be paid.

On June 19, 2013, Martinez and Rankin met with Nguyen in Martinez's office. Martinez testified that the purpose of the meeting was engage in an interactive dialogue to determine whether the Court could accommodate her by assigning her to a job to which she could work with her existing permanent restrictions.

At the meeting, Nguyen did not renew her request for a representative. After discussing the permanent restrictions with Nguyen, Martinez asked Nguyen whether she believed she could continue as a court reporter. Nguyen responded that she thought she could not. Martinez then started to discuss what Court positions Nguyen could work with her current permanent restrictions. They discussed Nguyen being able to work as an LPC. Martinez discussed an LPC I position in the Traffic Division in which she could be appointed at the top step of the salary scale (Step I, $19.77 an hour). While there was not an "open" position as the Court was under a hiring freeze, the Court did have positions which they could not hire from the public as they were "frozen" positions. Nguyen asked if she could be placed in a LPC II position instead of an LPC I position. Martinez explained that all new hires started as a LPC I,

the entry-level position, and after passing a six-month probation,[10] she would be advanced to a LPC II classification and receive a five percent raise.[11] Martinez explained that the Court would appoint her to a top-step LPC I position, which was better than being appointed at the Step-A salary step at the LPC II classification ($18.83). At the end of the meeting, Nguyen stated that the meeting was not as bad as she thought it would be. She was glad that she still had a job and would not become homeless. On the other hand, she felt "deflated" as she was going to experience a large pay cut. The meeting lasted less than a half-hour.

Nguyen testified that the duties she performed in the Family Law Division and Criminal Division were similar to those she performed in the Traffic Division.

Court Personnel Plan and MOU

The Court has a Court Personnel Plan authorized under Trial Court Act section 71640 et seq. and 71650 et seq., which sets forth numerous sections as to the salary an employee is to receive after involuntary demotion, voluntary demotion and transfer from another classification. (Court Personnel Plan Sections 3002.8, 3002.9, and 3002.11.) The Memorandum of Understanding (MOU) between Local 1021 and the Court have the exact same sections. (MOU Articles 8.12, 8.13, and 8.15.) The MOU has a grievance procedure which covers violations of these salary-setting procedures (MOU Article 18.2.) and end in final and binding arbitration (MOU Article 18.13.)

[10] Court Personnel Plan Section 2001.1 (12), which defines "probationary employee," only lists one exception to serving a probationary period upon a new appointment: when a permanent employee transfers to another position in the same class within the same or different department.

[11] Nguyen would advance to Step E of the LPC II classification ($20.76 an hour). The top step for LPC classification (Step I) was $22.89 an hour.

Additionally, Court Personnel Plan Sections 1006 and 1007 provide:

> **1006 Reasonable Accommodation Policy**
>
> The Court will comply with the employment-related reasonable accommodation requirements of the California Fair Employment and Housing Act and the Americans with Disabilities Act (ADA). Requests for accommodation should be directed to the ADA Coordinator.
>
> An employee or applicant who alleges a denial of a reasonable accommodation may file a complaint pursuant to the Court's Complaint Procedure for Complaints of Denial of Reasonable Accommodation (Section 1007).
>
> **1007 Complaint Procedure for Complaints of Denial of Reasonable Accommodation**
>
> Complaints of denial of reasonable accommodation shall be directed to the Court's designated ADA Coordinator. Applicants and employees are encouraged to bring such complaints to the Court's attention promptly.
>
> The ADA Coordinator shall investigate the complaint and make recommendations to the Court Executive Officer as to whether a reasonable accommodation can be provided. 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. The Court Executive Officer shall have the authority to determine which reasonable accommodation, if any, shall be provided.

The Court's Concerns about Granting Union Representation at Interactive Process Meetings

Martinez testified that the Court had a number of concerns about being compelled to grant union representation for Court employees who request union representation at interactive process meetings. Specifically, Martinez was concerned that a union representative would not treat the subject matter of these meetings as confidential; that union stewards did not have the expertise to be of assistance to employees in the area of reasonable accommodation; a union representative would delay the Court's ability to conduct a timely interactive process meeting;

the likelihood of multiple meetings with employee in coming to a determination of reasonable accommodation would be further delayed with the insertion of a union representative; and that union representatives would change the interactive process meetings from a collaborative to an adversarial meeting.

ISSUES

1. Was the filing of the charge untimely?

2. Did the Court violate the Trial Court Act by refusing to grant Nguyen's request for a union representative during her June 19, 2014 interactive process meetings?

CONCLUSIONS OF LAW

Timeliness of Charge

PERB has described the statute of limitations both as an aspect of the charging party's burden and as an affirmative defense that the respondent has the burden to prove. (*South Placer Fire Protection District* (2008) PERB Decision No. 1944-M, warning letter, pp. 2-3.) In *Los Angeles Unified School District* (2014) PERB Decision No. 2359, the Board elaborated on this issue, stating:

> Charging party's duty to provide the [PERB] Office of the General Counsel with sufficient facts upon which to make a determination of timeliness is a bedrock principle. We do not disturb that principle here. We hold that the charging party's duty to establish timeliness has been discharged at the point at which the Office of the General Counsel has determined that the charge is not subject to dismissal for lack of timeliness and issues a complaint. Where the matter goes to a formal hearing, the presentation of evidence and allocation of burdens flow from the operative pleadings, the complaint and the answer. At this stage of the proceedings, we see no justification for treating the statute of limitations as anything but a "true" affirmative defense, which the respondent has the burden to plead and prove.

(*Id*. at p. 3.[12])

Put another way, the charging party has the burden to demonstrate the timeliness of its claims during the PERB Office of the General Counsel's investigation of that charge. If a complaint issues on those claims, then the respondent has the burden to prove the charge's untimeliness at hearing.

Trial Court Act section 71639.1, subdivision (c), prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.) The six-month limitation period commences on the date that the conduct constituting an unfair practice was discovered, and not the date of discovery of the legal significance of that conduct. (*Compton Unified School District* (2009) PERB Decision No. 2016; *Empire Union School District* (2004) PERB Decision No. 1650.) In computing the six-month period, the period of time begins to run after the day the act or occurrence took place or, if the last date to file a document falls on a Saturday or Sunday, or when PERB offices are closed, the time period is extended to the next regular PERB business day. (PERB Regulation 32130, subdivisions (a) and (b).)

On June 14, 2013, Riefkohl emailed Ridste stating that "[m]y understanding is that [u]nion representation is not appropriate during this inactive [dialogue] with [Nguyen]." Six months from this date is December 14, 2013. However, December 14 and 15, 2013, fell on a

[12] When interpreting the Trial Court Act, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, p. 616; *Santa Clara County Superior Court* (2014) PERB Decision No. 2394-C.)

Saturday and Sunday. December 16, 2013 fell on a Monday, which is when the charge was filed. Therefore, the filing of the charge is found to be timely. (See *Santa Monica Community College District* (1979) PERB Decision No. 103.)

Interference with Employee and Employee Organization Rights

The Trial Court Act provides the following pertinent provisions, in part:

> 71631 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. . . .
>
> 71633 Recognized employee organizations shall have the right to represent their members in their employment relations with trial courts as to matters covered by this article. . . .
>
> 71635.1 Trial courts and employee organizations shall not interfere with, intimidate, restrain, coerce, or discriminate against court employees because of their exercise of their rights under Section 71631.

(Emphasis added.)

In *Sonoma, supra*, PERB Decision No. 2409-C, the Board recently overturned its prior precedent in *Trustees, supra*, PERB Decision No. 1853-H, that there was no right to union representation in interactive process meetings convened to explore possible reasonable accommodation of an employee with a disability. The Board in coming to this conclusion discussed and rejected the same concerns expressed by the Court in that decision: the confidentiality of the interactive process meetings (*Sonoma, supra*, PERB Decision No. 2409-C, p. 23-24); the delays created by union involvement (*Id*, pp. 20-21); the lack of expertise of union representatives assisting their members in this area (*Id*, pp. 18-20); and the transformation of interactive process meetings from collaborative to adversarial (*Id*,

pp. 19-20). As a result, the Court did not raise any new issues which have not already been considered and decided in *Sonoma*.

Additionally, while some of the interactive process communications may have been historically resolved by email, phone call, or ergonomic evaluation, the instant case involves probably the most critical point in time in which an employee would have a need for a union representative for purposes of reasonable accommodation/fitness for duty; when medical restrictions on their face question the employee's ability to perform the essential functions of their position with or without reasonable accommodation. In such a situation, an employer may consider discharging an employee. (Government Code section 12940, subdivisions (a)(1) and (2).) In the alternative, the employer may consider to reassigning the employee to a vacant position (Government Code section 12926, subdivision (p)(2)), which may result in a demotion and resulting decrease in pay. Indeed, other than a disciplinary action, one cannot imagine a greater need where an individual employee would request representation from an exclusive representative in representing one's employment relations with the Court or the exclusive representative would have the corresponding right to represent its members in their employment relations with the Court. (Trial Court Act sections 71631 and 71633.)

Therefore, the Court's refusal to allow Nguyen a union representative at her June 19, 2013 interactive process meeting to explore possible reasonable accommodation alternatives constitutes a violation of Trial Court Act sections 71631, 71633 and 71635.1 and PERB Regulation 32606, subdivisions (a) and (b).

REMEDY

Pursuant to section 71639.1, subdivision (b), PERB under section 3541.3, subdivision (i), is empowered to:

> [T]ake any action and make any determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of this chapter.

It has been found that the Court violated the Trial Court Act sections 71631 and 71635.1 and PERB Regulation 32606, subdivision (a), by interfering with its employees' rights to be represented by Local 1021 when it denied Nguyen's request to be represented by a Local 1021 representative at her June 19, 2013 interactive process meeting to explore possible reasonable accommodation alternatives. By this same conduct, the Court also denied Local 1021 the right to represent its employees in violation of Government Code section 71633 and PERB Regulation 32606, subdivision (b). Accordingly, it is appropriate to order the Court to cease and desist from such unlawful conduct. (*Rio Hondo Community College District* (1983) PERB Decision No. 292.)

Local 1021 requested that PERB restore the status quo by rescinding the interactive-process meeting of June 19, 2013, and ordering the Court to engage in a new interactive meeting with Nguyen with her union representative. In a sense, Local 1021 contends that it could have negotiated a better result for Nguyen than she received by possibly getting her appointed to a LPC II position, and thereby increasing the salary she would have earned. However, if Local 1021 wanted to pursue this avenue of advocacy, it still could have done so either through the complaint process set up for complaints of denial of reasonable accommodation (Court Personnel Plan Section 1007) or through the MOU grievance process as to demotions or transfers from one classification to another (MOU Article 8.12, 8.13, and

8.15). No evidence was provided that such a grievance or complaint was pursued and therefore such a remedy is denied.

Local 1021 requested that PERB order a Court representative to read a speech written by Local 1021 of 250 words or less explaining that the Court violated the Trial Court Act and that Local 1021 would have the ability to record and distribute such speech. Such a "shaming" remedy seems highly inappropriate for a case in which PERB prior precedent was just overturned and as such, this requested remedy will therefore be denied.

It is the ordinary remedy in PERB cases that the party found to have committed an unfair practice be ordered to post notice incorporating the terms of the order. Such an order ordinarily is granted to provide employees with a notice signed by an authorized agent that the offending party has acted unlawfully, is being required to cease and desist from its unlawful activity, and will comply with the order. Thus, it is appropriate to order the Court to post a notice incorporating the terms of the order herein at its buildings, offices, and other facilities where notices to bargaining unit employees are customarily posted. Posting of such notice effectuates the purposes of the Trial Court Act that employees be informed of the resolution of this matter and of the Court's readiness to comply with the ordered remedy. (*Placerville Union School District* (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Sonoma County Superior Court (Court) violated the Trial Court Employment Protection and Governance Act (Trial Court Act), Government Code sections 71631, 71633, and 71635.1 and PERB Regulation 32606, subdivisions (a) and (b), by interfering with its employees' rights to be represented by Local 1021 when it denied Nguyen's

request to be represented by a Service Employees International Union Local 1021 (Local 1021) representative at her June 19, 2013 interactive process meeting to explore possible reasonable accommodation alternatives.

Pursuant to section 71639.1 of the Government Code, it hereby is ORDERED that the Court and its representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with employees' right to have a union representative at interactive process meetings to explore possible reasonable accommodation alternatives.

2. Denying Local 1021 the right to represent its employees.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the Court customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the Court, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the Court to communicate with its employees in the bargaining units represented by Local 1021. Pursuant to *City of Sacramento* (2013) PERB Decision No. 2351 and other applicable authority, the Court shall identify and include in its electronic posting any and all affected employees who are no longer employed by the Court as of the date of posting, or use personal delivery or some alternative means of notification reasonably devised to ensure that

any and all affected employees who are no longer employed by the Court are advised of their rights and remedies under this Decision. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material;

2. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Local 1021.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135,

subdivision (d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)