

## **PERB Expands Scope of Union Representation Rights in Cases Involving ADA Accommodation**

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Overturning its own precedent, the Public Employment Relations Board (PERB) ruled recently that an employee has the right to union representation in meetings with the employer to determine whether a reasonable accommodation is available under the Americans with Disabilities Act. The right under the Meyers-Milias-Brown Act to representation in all matters affecting the terms and conditions of employment now includes the right to have a union representative present at an ADA interactive process meeting. The decision is important because it redefines the scope of union representation rights to include all matters related to employee-employer relations instead of limiting representation to matters involving discipline.

When a public employee suffers a disability affecting a “major life function”, the employer is obligated by the Americans with Disabilities Act (“ADA”) to engage in an “interactive process” to determine whether the employee can perform the essential functions of the job or can be accommodated in another assignment. “Major life functions” include seeing, hearing, speaking, learning, performing manual tasks, walking, sleeping, eating, and a host of other life activities and bodily functions. The “interactive process” requires the employer to review medical information and meet with the disabled employee to find accommodations that will allow the employee to continue to work without causing an undue hardship on the employer.

### ***ADA “Interactive Process” Deemed to Affect Working Conditions***

Local agencies often use the ADA interactive process to force injured peace officer employees into limited-duty or non-sworn assignments, disability retirement, or even unemployment. In *SEIU Local 1021 v. Sonoma County Superior Court (2015) PERB Decision No. 2409-C*, an employee who feared the ADA interactive process would adversely impact her wages requested union representation at her meeting with the employer. PERB’s general counsel dismissed the unfair practice charge the employee filed when her request was denied.

PERB previously had held, in *Trustees of the California State University (2006) PERB Decision No. 1853-H*, that there was “no right to union representation in interactive process meetings convened to explore possible reasonable accommodations to enable an employee with a disability to perform essential job functions.” PERB found that employees do not have the right to union representation in the interactive process because the process does not involve disciplinary action.

In this case, however, PERB overruled *Trustees* and expanded union representation rights to include the ADA interactive process and any other “non-disciplinary meetings affecting the employee’s wages and working conditions.” The Board found a union representative could provide the parties to the interactive process with information about available positions, salaries and benefits or interpretation of relevant MOU provisions.

### ***Union's Duty of Fair Representation Not Affected***

PERB was careful in its decision to avoid burdening unions with additional duties related to individuals seeking representation in non-disciplinary matters. A union has the right to represent its member in the ADA interactive process only if the member so requests. The union has no concurrent, enforceable duty to represent the member, however, because the duty of fair representation extends only to collective bargaining and disciplinary actions.

Over the years, I generally have advised probation peace officer associations and other unions not to get involved in the ADA interactive process on behalf of members. There is a risk the union representative will compromise potential claims the employee may have under the Americans with Disabilities Act.

The *Sonoma* decision does not require unions to afford representation to employees in interactive process meetings under the ADA. I still counsel restraint before a union representative becomes involved in the ADA interactive process on behalf of a member. Union representatives may want to obtain from the member a written understanding or waiver that the representative's role is limited to providing information about possible accommodations and does not include speaking for the employee, evaluating medical records, or witnessing documents.

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