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Memo to: All Staff

From: Roger Stalcup

Date: March 1, 1982

Subject: Weingarten

Attached is a fairly lengthy but very comprehensive review of the history of Weingarten subject. This information is reprinted from the November 1981 Labor Law Journal. Also attached is a reprint of additional information on the same subject which expands the right of a union representative to speak during an investigatory interview. This additional information was not yet available at the time the article was published in the Labor Law Journal and is therefore not mentioned. It is very significant inasmuch as it affirms the position of the NLRB and was done by the U.S. Court of Appeals, Ninth District, San Francisco.

This material should provide you with an answer to every question you could think of relating to Weingarten, at least until the NLRB or the courts provide further interpretations.

RWS/rlm
Attach.

Weingarten:

An Old Trumpet Plays the Labor Circuit

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MORE THAN TWENTY YEARS AGO, Clarence Gideon stood before a state court in Florida. Penniless and charged with breaking and entering a poolroom, he asked the judge to appoint an attorney to represent him. The judge denied his request. Mr. Gideon took his case to the Supreme Court. In its landmark decision in *Gideon v. Wainwright*,[1] the Supreme Court held that the Constitution of the United States guaranteed an accused the right to a legal representative in a criminal prosecution in a state court.[2]

Nearly a decade later, Leura Collins was called to an interview with her employer's store manager and security specialist. They were investigating a report that Ms. Collins had stolen $1.95 worth of chicken. Several times during the interview Ms. Collins asked that her shop steward or other union representative be brought to the interview. Each request was denied.

Collins complained to the National Labor Relations Board that the denial of her request for a union representative at the interview by her employer, Weingarten, Inc., was unlawful. Ultimately, the Supreme Court agreed with her.

In *Weingarten v. U. S.*,[3] the Court held that an employee's right to engage in protected concerted activity under the National Labor Relations Act included the right to have representation at an investigatory interview. The Court agreed with the Board that an employer who denies an employee this right violates Section 8(a)(1) of the Act.

The Court acknowledged that the employee's right to representation was not absolute. In defining the employee's rights, the Court approved the "contours and limits" which had been shaped previously by the Board. These guidelines follow.

First, the right to representation is inherent in the Section 7 (of the National Labor Relations Act) guarantee of the right of employees to act in concert for mutual aid and protection. Second, the right arises

[1] (1963), 372 U. S. 335.

[2] Mr. Gideon's road from the Florida court to the Supreme Court is detailed in the much-acclaimed book *Gideon's Trumpet*, by Anthony Lewis.

[3] 420 U. S. 257 (1975), 76 LC ¶ 10,662.

only in situations where the employee requests representation. Third, the employee's right to request representation as a condition of participation in an interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action. Fourth, exercise of the right may not interfere with legitimate employer prerogatives. Fifth, the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview.

Since *Weingarten,* the scope of an employee's right to representation at an invesigatory interview has been refined through many cases before the Board and courts of appeals. The analysis by these tribunals frequently invokes a balancing of rights—the right of the employee to representation and the employer's right to investigate misconduct by interviewing employees. Our objective is to examine this plethora of cases and define the rights of employers and employees in a *"Weingarten"* interview.

Who is Entitled?

What are *Weingarten* rights? Generally, an employee who requests representation at an interview that the employee reasonably believes may result in discipline—a *"Weingarten"* interview —is entitled to representation. Must there be a recognized union for *Weingarten* rights to exist? No. An employee's *Weingarten* rights emanate from Section 7 of the Act. This section affords protection to employees regardless of the presence of any union.[4]

Who is entitled to representation under *Weingarten*? The representation rights afforded by *Weingarten* are given specifically to "employees." Since supervisors and managerial employees are not "employees" under the National Labor Relations Act, they would not have *Weingarten* rights. Thus, if a supervisor tells his employer that he or she wants representation at an investigatory interview, the employer may deny the request and continue the interview.

Nonemployees, including prospective employees and former employees, are similarly unprotected by the *Weingarten* rule. In *Polson Industries,*[5] an employee had resigned and, later the same day, reapplied for his former position. At the reinstatement interview, the employer began asking the former employee questions concerning the circumstances of his resignation. The former employee requested representation at the interview; the employer denied the request. The Board stated that the person being interviewed was an applicant and *not* an employee. Thus, the individual did not have a right to representation at the interview.

In *Party Cookies, Inc.,*[6] a supervisor discharged an employee for incompetence. Soon after the discharge, a higher level supervisor called the individual into his office to confirm the discharge. The individual requested union representation; his request was denied. The Board held that the individual was not entitled to representation since the individual was no longer an employee.

Are probationary employees entitled to *Weingarten* rights? Probably. The Board has not yet addressed the specific issue of whether a probationary employee is entitled to *Weingarten* rights. However, the Board has held repeatedly that probationary employees

[4] *Glomac Plastics,* 234 NLRB 1309 (1978), 1978 CCH NLRB ¶ 19,087.

[5] 242 NLRB 1210 (1979), 1979-80 CCH NLRB ¶ 15,972.

[6] 237 NLRB 612 (1978), 1978-79 CCH NLRB ¶ 15,275.

are entitled to the protections afforded by the National Labor Relations Act.[7]

Is an employee entitled to representation at every interview with the employer? No. In *Baton Rouge Water Works,*[8] the Board reversed its previous position and stated that an employee is not entitled to representation *"at a meeting with the employer held solely for the purpose of informing the employee of and acting upon a previously made disciplinary decision."* On the other hand, where the employer is conducting an interview with an employee to seek evidence or investigate facts to support a decision, the employee is entitled to representation.

In *Amoco Oil Co.,*[9] a supervisor intended to conduct a *Weingarten* interview. The employee demanded union representation at the beginning of the meeting. The supervisor responded: "I'll make it short and simple, you are suspended as of 4 P. M. indefinitely; if and when you return to work you will receive a white slip."

The Board held that the supervisor acted lawfully. The Board stated that when a supervisor conducting a *Weingarten* interview is presented with a request for representation, the supervisor may stop the investigation immediately and inform the employee of the discipline without violating *Weingarten.*

Is a conversation "on the floor" concerning production a *Weingarten* interview? It depends. The Board draws a distinction between "run-of-the-mill" shop-floor conversation about production and conversations where the employee reasonably expects discipline to result. Where the employee has no reasonable fear of discipline in a discussion concerning production, he is not entitled to representation.[10] Where the employee has this reasonable fear, the employee is entitled to representation.

In *Stewart Warner Corp.,*[11] the supervisor told the employee that he wanted to explain company rules to her and to clarify her job duties. The Board held that this interview was not a *Weingarten* interview.

How is the "reasonableness" of an employee's fear of discipline measured? "The reasonableness of the fear of discipline is to be determined by objective standards. . . . [*Weingarten*] does not require a probe into an employee's subjective motivations."[12] The objective factors present must be analyzed on a case-by-case basis. Some factors that should be considered include: the employee's prior disciplinary record; the events leading to the interview; the location of the interview; the company representatives present at the interview; and the company's opening words at the interview.

Must an employer grant a *Weingarten* request? No. The Supreme Court did not say that an employer *must* allow the presence of a representative at an investigatory interview. The Supreme Court *did* say that, *if* an employer desires to continue an investigatory interview once a request for representation is made, it has three options. The employer may grant the request. Or, the employer may deny the request *and* stop the investigatory part of the interview immediately. Or, the employer may give the employee the option of continuing the interview

[7] See, e.g., *General Battery Corp.,* 241 NLRB 1166 (1979), 1978-79 CCH NLRB ¶ 15,843.

[8] 246 NLRB No. 161 (1979), 1979-80 CCH NLRB ¶ 16,607.

[9] 238 NLRB 551 (1978), 1978-79 CCH NLRB ¶ 15,046.

[10] *Glomac Plastics,* cited at note 4.

[11] 253 NLRB No. 16 (1980), 1980-81 CCH NLRB ¶ 17,615.

[12] *Brown & Connolly,* 237 NLRB 271 (1978), 1978 CCH NLRB ¶ 19,496.

without a representative or discontinuing the interview altogether.[13] If the interview is discontinued, the employee would not receive the benefit of any information that he could have supplied at the interview.

An employer may *not* discipline an employee for refusing to accede to the employer's demand that a *Weingarten* interview be conducted without a union representative or discipline union agents because they seek to provide the requested representation. In *International Ladies Garment Workers' Union v. Quality Mfg.*,[14] the companion case to *Weingarten*, the Supreme Court held that *Weingarten* rights would be meaningless if the employer could lawfully impose such discipline. An employer who does so violates Section 8(a)(1) of the Act, the Court stated.

May an employee refuse to report for a *Weingarten* interview without a representative? No. In *Roadway Express*,[15] the Board held that an employee may not refuse to report to the supervisor's office when summoned. There, the supervisor told an employee to report to the office. The employee said he would report to the office "when [my] steward gets here," which would be in about four hours. The employer made a second request which was ignored by the employee. The supervisor suspended the employee for the rest of the day. In upholding the supension, the Board stated that "while an employee may make a request for union representation on the plant floor . . . he may not refuse to report to the office as directed."

Who can assert the employee's *Weingarten* rights? Generally, only the employee can request representation for himself. The Supreme Court in *Weingarten* cited with approval the Board's position that an "employee may forego his guaranteed right, if he prefers, and participate in an interview unaccompanied by his union representative." The decision belongs to the employee.

In *Appalachian Power Co.*,[16] the employer was conducting a *Weingarten* interview with an employee. The shop steward approached the area where the interview was taking place and advised three other supervisors that "I'm here for the meeting." The supervisors refused to let the shop steward into the interview. The Board held that the union has no right to assert the employee's *Weingarten* rights and that, if the employee wanted the union representative there, the employee should have and could have asked.

Are union representative-employees entitled to representation? Yes. In *Keystone Steel & Wire*,[17] two employees who were members of the union's in-plant committee were summoned to a *Weingarten* interview. Each of them requested representation; each request was denied. The Board held that the employer acted unlawfully by denying the requests.

To whom must the employee make the request for representation? The employee must make the request to the supervisor who is in the position to assess the request and determine whether to grant it, forego the interview, or offer the employee the option of continuing without representation or having no interview.

In *Appalachian Power Co.*, an employee was directed to report to the office. He immediately called his shop steward and asked the steward to attend the meeting. The employee reached the office first and began the *Weingarten* interview without requesting represen-

[13] *Appalachian Power Co.*, 253 NLRB No. 135 (1980), 1980-81 CCH NLRB ¶ 17,739.
[14] 420 U. S. 276 (1975), 76 LC ¶ 10,663.
[15] 246 NLRB No. 180 (1979), 1979-80 CCH NLRB ¶ 16,606.
[16] Cited at note 13.
[17] 217 NLRB 995 (1975), 1974-75 CCH NLRB ¶ 15,750.

tation. The steward arrived at the office and was not allowed into the interview. The Board held that the employer acted lawfully by conducting the interview since it was the responsibility of the individual being interviewed to ask the supervisor conducting the interview for representation.

In *Lennox Industries,*[18] an employee asked his immediate supervisor for representation at a meeting with a higher level supervisor, Boenker. The employee did *not* repeat his request to Boenker at the interview; the immediate supervisor did not attend this meeting. The Board held that the request to the first supervisor was not sufficient to trigger *Weingarten* rights.

However, where an employee makes his request for representation to one supervisor and then goes to a meeting with a second supervisor, where the first supervisor is present, the employee need not repeat his request.[19]

Must the employee make his request at each interview? It depends. If there are a series of meetings relating to a "single, interrelated episode," a proper request at one meeting will be considered a request for representation at subsequent meetings.[20] The more time between each meeting and the more diverse the topics of such meetings, the more likely the Board to find that a request at the initial meeting did not constitute a request for representation at the subsequent meeting.

Representatives

Who can an employee request to be his representative? An employee may request that a coemployee or a union representative represent him.[21] In *Illinois Bell Telephone,*[22] an employee requested that a coemployee represent him at a *Weingarten* interview. The employer offered representation by the shop steward or no one. The Board held that the employer acted unlawfully in denying representation by a coemployee.

What if the employee requests a union representative and there are none on the premises? One of the "contours and limits" of *Weingarten* is that the employee's rights shall not interfere with "legitimate employer prerogatives." The Board has held that, if a union representative or shop steward is not available, the employer need not wait to conduct the interview until such a person is available.

In *Pacific Gas Co.,*[23] an employee refused the assistance of a union representative who was on the premises and insisted on the presence of a steward who was at least a twenty-minute car ride away. The Board held that the employer acted lawfully in denying the employee's request for a specific steward. The employee's right is "to the presence of a union representative designated by the union to represent all employees" and not to a specific steward, the Board held.[24]

Is the request for a lawyer a request for *Weingarten* rights? In the only case in which the Board has addressed this issue, it has answered "no." In *Levingston Shipbuilding,*[25] an employee, in the

[18] 244 NLRB No. 88 (1979), 1979-80 CCH NLRB ¶ 16,202, enforced 106 F. 2d 340 (5th Cir. 1981), 90 LC ¶ 12,560.

[19] *Ibid.*

[20] *Ibid.*

[21] *Good Samaritan Nursing Home,* 250 NLRB 207 (1980), 1980 CCH NLRB ¶ 17,102.

[22] 251 NLRB No. 128 (1980), 1980 CCH NLRB ¶ 17,389.

[23] 253 NLRB No. 154 (1981), 1980-81 CCH NLRB ¶ 17,771.

[24] See *Crown Zellerbach,* 239 NLRB 1124 (1978), 1978-79 CCH NLRB ¶ 15,406; *Coca-Cola Bottling Co.,* 227 NLRB 1276 (1977), 1976-77 CCH NLRB ¶ 17,787.

[25] 249 NLRB No. 1 (1980), 1980 CCH NLRB ¶ 17,032.

midst of a *Weingarten* interview, said to the interviewer: "I am not a lawyer and I don't appreciate being brought in here and questioned like this. If you got something you want to charge me with [or] you got something you want to accuse me of, you go ahead and do it, and I will get a lawyer and we will sit down and talk it out; but you are not going to get me in here and rabble-rouse me and pick over me without any kind of representation."

The Board stated that the employee's statements concerning representation "went to legal representation at the interview and not a request for any type of representation at the interview itself. Consequently, the holding in *Weingarten* does not apply."

Must the employer let a union representative on the premises to represent an employee if there has been no election and a union is not recognized? The Board has not yet confronted this specific issue. The Board has generally held that a nonunion employer may enforce its nondiscriminatory no-trespassing rule to exclude union officials from its premises. The Board has made exceptions to this general rule where employees are picketing on private property that is generally open to the public, such as shopping malls.[26]

In *dicta,* in a case denying enforcement of a Board order, the Fifth Circuit stated that, if a representation election has not been held, an employer need *not* allow a union representative onto its premises to represent an employee in a *Weingarten* interview. Requesting a union representative, as opposed to a coworker, is not concerted activity since the union representative is not charged with safeguarding the interest of the entire bargaining unit.[27] The Board did not address this issue in its *Anchortank* decision.[28]

What if the union has won a representation election but the employer has challenges to ballots or objections to the election pending? The Board held in *Anchortank* that, *in these circumstances,* after a majority of employees had selected the union, "the status of the requested representative, whether it be that of Union not yet certified or simply that of a fellow employee, does not operate to deprive the employees" of *Weingarten* rights.

Once again, the Fifth Circuit took a different view in *Anchortank.* The court held that, in this situation, the employer acts at its peril. If the employer is successful in its arguments and wins the election or has it set aside, an employer will not have violated the Act by refusing to allow a union representative onto the premises to accompany an employee at a *Weingarten* interview. Conversely, if the employer's position is not upheld and the union is eventually certified, the court will find a violation.

Employee's Refusal to Participate

May an employee whose proper request for representation has been denied refuse to participate in the interview? The Board has said "yes." The courts of appeals have disagreed.

In *Spartan Stores,*[29] an employee stormed out of an interview, stating "I am going to get my shop steward." The employer discharged the employee for his insubordination. The Board held that the discharge was unlawful. The Board stated that, once the employee reasonably believed the interview may result in discipline, and his request for representation was denied, "he had

[26] See e.g., *Scott Hudgens,* 230 NLRB 414 (1977), 1977-78 CCH NLRB ¶ 18,290.

[27] *Anchortank v. NLRB,* 618 F. 2d 1153 (5th Cir. 1980), 89 LC ¶ 12,106.

[28] *Anchortank,* 239 NLRB 430 (1978), 1978-79 CCH NLRB ¶ 15,296.

[29] 235 NLRB 522 (1978), 1978 CCH NLRB ¶ 19,141, enforcement denied 628 F. 2d 953 (6th Cir. 1980), 89 LC ¶ 12,226.

no obligation to remain [in the interview] without union representation."

The court of appeals refused to enforce the Board's order, stating that walking out of the interview is not a proper request for a representative under *Weingarten*. The court observed that the company had a procedure for calling a steward to the office and that the employee's walking out of the interview interfered with the employer's legitimate prerogative to adhere to this procedure.

In *AAA Equipment Service Co. v. NLRB*,[30] the court and Board disagreed on an employee's right to refuse to report when summoned to an interview. There, the employer met the employee in the parking lot and said "I want to talk to you." The employee responded with a request for his shop steward. The employer reiterated his desire to speak to the employee. Again, the employee yelled that he wanted the steward and began walking away. The employer warned the employee that, if he walked off, he would be discharged. He did and he was.

The Board found that the employee had a reasonable basis to expect disciplinary action as a result of the parking lot interview. The employee was discharged unlawfully because of his insistence on his right to representation, the Board held. The employee had no obligation to participate in the interview and could walk away. The court of appeals upheld the employer's actions, stating that the employee had no right to refuse to participate in the interview.

However, in *General Electric Co.*,[31] a supervisor approached an employee and asked him for his "side of the story." The employee walked away, saying that he was going to get his shop steward. The employer told the employee to go back to work and that he (the employer) would get the shop steward. The employee continued to walk away; the supervisor suspended him. The Board upheld the suspension, stating that the employee should not have walked away after the employer offered to get the shop steward.

When must an employee assert his *Weingarten* rights? An employee who requests representation at any time prior to the end of the investigatory aspect of the interview is entitled to representation.

In *Greyhound Lines*,[32] a bus driver was called into an interview with his supervisor to investigate a report that he used a C.B. radio in his bus in violation of company rules. After discussing the allegation with the employee for approximately one hour, the supervisor began writing a warning to the employee. At that point, the employee asked: "Am I here for disciplinary purposes? [If so], I want a union representative." The supervisor acknowledged that the interview was for disciplinary purposes but denied the employee's request. The Board held that the supervisor acted properly since the *investigation* of the facts was complete. Thus, it appears that an employee may ask for representation any time after the interview begins but *must* make his request prior to the completion of the investigatory aspect of the interview.

What Constitutes an Interview?

Is a physical examination a *Weingarten* interview? The "hands on"

[30] 238 NLRB 390 (1978), 1978 CCH NLRB ¶ 15,036, enforcement denied 598 F. 2d 1142 (8th Cir. 1979), 86 LC ¶ 11,325.

[31] 240 NLRB 479 (1979), 1978-79 CCH NLRB ¶ 15,476.

[32] 239 NLRB 849 (1978), 1978-79 CCH NLRB ¶ 15,379. See *General Motors*, 245 NLRB No. 152 (1979), 1979-80 CCH NLRB ¶ 16,499.

examination conducted by a physician is not. In *U. S. Postal Service*,[33] the employer required a "fitness for duty" physical for each employee. The Board upheld the employer's denial of a request for representation during the "hands on" aspect of the examination. The Board noted that no investigatory questions were asked at the interview and there was no "confrontation," as contemplated by *Weingarten*. The Board specifically declined to decide whether it would reach the same result if the employee sought representation during the *interview* portion of the physical exam.

Is an "absence counselling" interview a *Weingarten* interview? It depends. If the "counselling" interviews are an integral part of an employer's *disciplinary* program, the Board has found that an employee has a right to representation during the interview.

In *Good Hope Refineries*,[34] the court of appeals and Board held that an employee could reasonably fear discipline during an absence counselling session. The Board found that the employee's fear was reasonable since: written records of the interviews were sometimes placed in the employee's personnel file; counselling sessions are considered when determining if further discipline is needed; the personnel manager could decide at these interviews whether absences were "excused" or "unexcused"; and the only other time the employee was in the personnel manager's office was when he was hired.

In *Amoco Chemicals Corp.*,[35] the Board upheld the employer's denial of representation at an interview held as part of its "excessive absence counselling" policy. The Board relied heavily on the interviewer's assurances at the beginning of the meeting that the interview was not a disciplinary meeting.

Is a "car search" a *Weingarten* interview? No. In *E. I. DuPont de Nemours*,[36] the NLRB Division of Advice stated that to require an employer to allow an employee to have a representative during a routine car search would "interfere with legitimate employer prerogatives." The Division observed that *Weingarten* affords employers the option of interviewing employees or investigating misconduct by other means. Here, the employer sought to use other means—the car search. To deny the employer its right to use these "other means" would interfere with the employer's options guaranteed by *Weingarten*.

Role of the Representative

What is the role of the representative in the *Weingarten* interview? An employee is entitled to the *assistance* of the representative, not just his presence, during a *Weingarten* interview.

In *Southwestern Bell Telephone*,[37] the employer told the representative that he did not want him to say anything and that he wanted the employee to answer the questions in his own words. The Board held that the employer unlawfully stifled the representative.

In *Texaco*,[38] the employer told the representative that his role was that

[33] 252 NLRB No. 14 (1980), 1980-81 CCH NLRB ¶ 17,395.
[34] 245 NLRB No. 39 (1979), 1979-80 CCH NLRB ¶ 16,406, enforced 620 F. 2d 57 (5th Cir. 1980), 89 LC ¶ 12,150.
[35] 237 NLRB 394 (1978), 1978 CCH NLRB ¶ 19,632.
[36] 4-CA-9762 (General Counsel Advice Mem.)
[37] 251 NLRB No. 61 (1981), 1980 CCH NLRB ¶ 17,372.
[38] 251 NLRB No. 63 (1980), 1980-81 CCH NLRB ¶ 17,392.

of a "silent observer." The Board found that this was an impermissible restraint also.

In *Pacific Telephone & Telegraph*,[39] the employer directed the representatives not to speak or ask questions. The Board held that such directions were lawful since the purpose of the meetings was merely to inform the employees individually of discipline to be imposed. Thus, the meetings were not *Weingarten* interviews.

Is the representative entitled to meet privately with the employee prior to the interview? The Board has held that "the right to representation clearly embraces the right to prior consultation." In *Climax Molybdenum Co.*,[40] the employer advised the union that it had summoned two individuals to the office for an investigatory interview. The union representative asked the employer for time to consult with the employees prior to the interview. The employer denied the request, suggesting that the discussions occur during the interview. The Board held that the employer violated the employees' rights by not allowing them to consult with their representative prior to the interview.

The court of appeals disagreed. *Weingarten* rights do not take effect for any employee until he requests representation, the court stated. Here, neither employee requested representation at the interview or showed any interest in consulting with the union prior to the interview. Additionally, the court explained, the purpose of an investigatory interview is to allow an employer to gather "first-hand information to ascertain what occurred and what discipline, if any, the employee should receive. To allow a union to have a pre-interview meeting with the employee would subvert the employer's legitimate prerogative to obtain this information," the court stated.[41] (The union representative in *Climax* testified that he would have told the employee to remain silent at the interview with the employer.)

Waiver of Rights

Can the union waive the *Weingarten* rights of employees in a collective bargaining agreement? Probably. However, in each case the Board has considered, it has not found the explicit language required to find a waiver of *Weingarten* rights.

In *Prudential Insurance Co.*,[42] the contract provided: "The Union further agrees that neither the Union nor its members shall interfere with the right of the Employer . . . to interview any agent with respect to any phase of his work without the grievance committee being present." The Board held that this clause did not waive an employee's right to representation. "With respect to any phase of his work" refers to the company's business of selling insurance and related matters, the Board said. Nowhere did the union waive its right to conduct *its* business, which is to represent employees.

In *Georgia Power Co.*,[43] the contract gave an employee the right to request union representation where there is more than one supervisor present at an employee interrogation. During an interrogation by one supervisor only, an employee requested

[39] 246 NLRB No. 163 (1979), 1979-80 CCH NLRB ¶ 16,627.

[40] 227 NLRB 1189 (1977), 1976-77 CCH NLRB ¶ 17,792.

[41] *Climax Molybdenum v. NLRB*, 584 F.2d 360 (10th Cir. 1978), 84 LC ¶ 10,829. The Board has recently rejected the 10th Circuit approach and reiterated its *Climax* rule. *Colgate-Palmolive Co.*, 257 NLRB No. 28 (1981), 1980-81 CCH NLRB ¶ 18,247.

[42] 254 NLRB No. 20 (1981), 1980-81 CCH NLRB ¶ 17,801.

[43] 238 NLRB 572 (1978), 1978-79 CCH NLRB ¶ 15,035.

representation. His request was denied. The Board held that, for there to be a waiver of employee rights in a contract, the waiver must be "clear and unmistakable." Since the above clause was in the parties' contract prior to the Supreme Court's decision in *Weingarten* and since there was no "clear and unmistakable" language waiving *Weingarten* rights, the Board held that the employer's denial was unlawful.

Is a waiver signed by an employee at the interview effective? In the one "signed waiver" case the Board has considered, the Board found that the two employees did not waive their *Weingarten* rights.

In *Montgomery Ward*,[44] two employees were brought to the security office for "protection" interviews. The purpose of these interviews was to obtain information concerning the disappearance of inventory and cash. At the outset of the interview, each employee signed the following statement. "I agree that representatives of Montgomery Ward may interview me commencing from the time designated below, on matters relating to Company business. It is fully understood that I am free to leave this interview at any time I so desire."

The company claimed that the employees, by signing this statement, waived their *Weingarten* rights. The Board held that the "waivers" did not waive *Weingarten* rights. The Board noted that the waiver did not state specifically that the employee was waiving his right to representation.

Does a waiver of *Miranda* protectections waive *Weingarten* rights? No. *Miranda* rights do not satisfy or supercede *Weingarten* rights. In *Miranda v. State of Arizona*,[45] the Supreme Court stated that an individual who is in custody by a law enforcement agency and is subject to interrogation must be given the following warnings: he has a right to remain silent; anything he says may be used against him; he has a right to have an attorney present during any interrogation; and he is entitled to an attorney provided by the state if he is unable to provide his own.

In *U. S. Postal Service*,[46] an employee suspected of theft was summoned for questioning by security. The employee was given his *Miranda* rights and waived his right to remain silent. However, the employee did request representation. The employer denied this request. The Board held that the waiver of *Miranda* protections is irrelevant to the issue of whether the employee's right to representation was denied unlawfully.

Employer Violation

Can an employer "cure" its violation of an employee's *Weingarten* rights? Maybe, if it is done very shortly after the unlawful denial. In *Texaco*,[47] an employer called an employee to inform him of a previously made disciplinary decision. Toward the end of the interview, the employee requested representation. The supervisor then ended the meeting by warning the individual not to engage in similar conduct in the future. The employee left and returned with a union representative 15 minutes later. The employer conducted the entire interview a second time, with the representative present. The employee claimed that the employer's denial of his *Weingarten* request in the first interview was unlawful.

[44] 254 NLRB No. 102 (1981), 1980-81 CCH NLRB ¶ 17,820.

[45] (1966), 384 U. S. 436.

[46] 254 NLRB No. 50 (1981), 1980-81 CCH NLRB ¶ 17,819.

[47] 247 NLRB No. 56 (1980), 1980 CCH NLRB ¶ 16,708.

Since the interview was not "investigatory," the Board held that the employer's denial was not unlawful. In separate concurring opinions, in *dicta,* Chairman Fanning and former Member Penello stated: "Whatever rights [the employee] had been deprived of were surely restored when, in 15 minutes, he had an interview with his representative present." Thus, an employer who unlawfully denies an employee his *Weingarten* rights *may* be able to "undo" the wrong if the employer grants the employee a new interview, with representation, as soon as possible after the unlawful interview.

What remedy will be imposed if an employer discharged an employee after unlawfully denying the employee his *Weingarten* rights? It depends. Section 10(c) of the National Labor Relations Act states that: "No order of the Board shall require the reinstatement of any individual who had been suspended, or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." It would appear from this language that the Board lacks authority to order the reinstatement of an individual discharged for just cause, even if his *Weingarten* rights had been violated.

The Board has not adhered to the letter of Section 10(c). The Board has held that, once it is established that the employer unlawfully denied an employee's request for representation in violation of *Weingarten,* the burden of proof shifts to the employer. If the employer can demonstrate that its decision to discipline the employee in question was *not* based on information obtained at the unlawful interview, the employer will *not* be ordered to reinstate the employee and pay him his back wages. If the employer is unable to establish that its decision was based on information not obtained at the interview, the employer will be ordered to reinstate the employee and pay him backpay for the time he was out of work.[48] It is the unlawful denial of representation that is a violation of the Act; the discipline imposed for conduct that was the subject of the *Weingarten* interview where the request was denied is *not* a separate violation of the Act.[49]

In *Kraft Foods,*[50] an employee was involved in a forklift collision and fight which culminated in the employee's suspension and discharge. During the investigatory interview following the collision and fight, the employer unlawfully denied the employee's request for representation. The Board refused to reinstate and make whole the employee since it found that the information on which the decision to discharge the employee was made was obtained from other sources and not from the unlawful interview.

Conclusion

The legislative mandate from the National Labor Relations Act to the Board and courts charged with its enforcement is to *balance* the rights of employers with the rights of employees and "[to prevent] the interference by either with the legitimate rights of the other." The Supreme Court in *Weingarten* did just that. Where the rights of the two conflict, the Court established a series of options to break the logjam. An employee's request for representation at an investigatory interview sets into motion the *Weingarten* options. Depending on the course of the interview, the employer or employee may

[48] *Kraft Foods,* 251 NLRB No. 6 (1980), 1980 CCH NLRB ¶ 17,366.

[49] *Consolidated Food,* 253 NLRB No. 4 (1980), 1980-81 CCH NLRB ¶ 17,485.

[50] Cited at note 48.

be faced with the choice of discontinuing the interview or continuing it with restrictions on their respective rights. The final decision is left to the party confronted with the choice.

By legal standards, the *Weingarten* decision is relatively recent. Decided just six years ago, it can hardly be said that *Weingarten's* contours and limits have been totally and finally defined. These principles will be reviewed constantly to ensure that adherence to them fulfills the congressional mandate to balance employer and employee rights. The *Gideon* decision, also, was not static. Just three years after *Gideon,* in *Miranda,* the Supreme Court said that legal authorities must *advise* an accused of his right to representation.

Will the Board ever require that the employer must *advise* the employee of his *Weingarten* rights? If *Weingarten* has its roots in *Gideon,* can it be long before the Board discovers *Miranda*? **[The End]**

UNCERTIFIABLE UNION CAN INTERVENE IN ELECTION

The NLRA deprives a nonqualified guard union only of the benefits of certification. Thus, it is proper to permit such a union to intervene and participate in an election, a three-member majority of the Board held (*Bally's Park Place, Inc.,* 1981-82 CCH NLRB ¶ 18,314). The decision overruled an earlier Board analysis set forth in *Wackenhut Corporation* (1975-76 CCH NLRB ¶ 16,684).

The intervening guard union was uncertifiable because of its affiliation with an area building and construction trades council. The statutory proscription against certifying affiliated labor organizations to represent guard units does not prohibit putting them on the ballot, the Board said. However, the Board also determined that, "should the nonqualified union be successful in the election, only the arithmetic results will be certified" by the NLRB.

nature. Employer sought and secured admission from employee during interview; no merit is found in contentions that (1) decision to discipline was made before interview and (2) employer was not sufficiently apprised of charge prior to hearing before Board.

2. Interference — Investigatory interview — Right to union representation ▶ 50.728

NLRB held warranted in finding that employer violated Section 8(a)(1) of LMRA when it refused to permit union representative to speak at investigatory interview concerning employee's violation of plant safety rule. By relegating representative to role of passive observer, employer did not afford employee representation to which he was entitled; although employer should be assured opportunity of hearing employee's own account of incident, representative should be able to take active role in assisting employee to present facts.

Application for enforcement of an NLRB order (105 LRRM 1239, 251 NLRB No. 63). Enforcement granted.

Joseph A. Schwachter (Howard E. Perlstein, on brief), for petitioner.

William D. Evans, Los Angeles, Calif., for respondent.

Before SCHROEDER and ALARCON, Circuit Judges, and HATFIELD,* District Judge.

Full Text of Opinion

SCHROEDER, Circuit Judge: — The NLRB found that respondent, Texaco, Inc., violated section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §158(a)(1) when it refused to permit a union representative to participate in an interview with an employee which culminated in discipline of the employee. 251 NLRB No. 63, 105 LRRM 1239 (1980). The Board here seeks enforcement of its order requiring Texaco to expunge its records of the reprimand issued to the employee. Texaco's principal contentions are, first, that the interview was not an "investigatory" interview for which employees have the right to a union representative under NLRB v. Weingarten, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171, 88 LRRM 2689 (1975) and, second, that even if the employee was entitled to have a represen-

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* Honorable Paul G. Hatfield, United States District Judge for the District of Montana, sitting by designation.

NLRB v. TEXACO, INC.

U.S. Court of Appeals, Ninth Circuit (San Francisco)

NATIONAL LABOR RELATIONS BOARD v. TEXACO, INC., No. 80-7692, October 16, 1981

LABOR MANAGEMENT RELATIONS ACT

1. Investigatory interview — Right to union representation ▶ 50.728

NLRB held warranted in finding that employee was entitled to union representation at interview at which he was interrogated about and reprimanded for failure to follow plant safety rule, where interview was investigatory in

tative, Texaco fulfilled all of its obligations by permitting the representative to attend the interview and that the company was not required to permit the representative to speak. We enforce the Board's order.

The episode giving rise to the unfair labor practice charge began when a Texaco foreman, Linnell, discovered that a safety device of one employee, Deutsch, had not been activated. Linnell questioned other employees about the incident and then asked Deutsch to report to the office. Deutsch asked the acting union steward in his department to accompany and represent him at the meeting, but when they arrived, Linnell advised the union steward that he would not be permitted to say anything during the interview. Linnell then asked Deutsch whether he had violated the plant safety regulations. Upon Deutsch's affirmative reply, Linnell issued Deutsch a reprimand for failure to follow the rule and ended the meeting.

One of the goals of national labor policy is to protect workers' free association, self organization and choice of representatives for mutual aid or protection. NLRB v. Weingarten, 420 U.S. 251, 261–62, 95 S.Ct. 959, 965–66, 43 L.Ed.2d 171, 88 LRRM 2689 (1975). For that reason, the Supreme Court has held that employees possess the right to have a union representative present at investigatory interviews with their employer where "the risk of discipline reasonable inheres." Id. at 262, 95 S.Ct. at 966. The right to the presence of a union representative does not, however, extend to a meeting which is held solely for the purpose of informing an employee of a disciplinary decision. NLRB v. Certified Grocers of California, Ltd., 587 F.2d 449, 100 LRRM 3029 (9th Cir. 1978); Alfred M. Lewis, Inc. v. NLRB, 587 F.2d 403, 99 LRRM 2841 (9th Cir. 1978); Mt. Vernon Tanker Co. v. NLRB, 549 F.2d 571, 94 LRRM 3054 (9th Cir. 1977); Baton Rouge Water Works Company, 246 NLRB No. 161, 103 LRRM 1056 (1979).

[1]The Board in this case found that the interview was "clearly of the kind envisioned by the Court in Weingarten as warranting the presence of a union representative." The Board emphasized that the employer sought and secured an admission from Deutsch during the course of the interview. The Board thus found that the employer was "continuing, on a substantive basis, its investigation of the incident." Its findings are amply supported by the evidence and its legal conclusion that union representation was required is fully in accord with the law in this Circuit. NLRB v. Certified Grocers, supra; Alfred M. Lewis, Inc. v. NLRB, supra.

As a corollary Texaco asserts that, even if the interview was investigatory, the reprimand should remain in Deutsch's record because the decision to discipline was made before the interview and did not in fact rest to any degree on the interview itself. Although this position was adopted by one member of the Board, the findings of the Board majority as to a continuing investigation render Texaco's position here untenable. We also reject the contention that Texaco was not sufficiently apprised of the charge prior to the hearing before the Board. The Board correctly concluded that the complaint clearly put the company on notice that the General Counsel was alleging a violation of section 8(a)(1) of the Act under Weingarten.

[2] The more novel and significant contention advanced by Texaco is that the right to a union representative at an investigatory interview does not encompass any right to have the union representative speak. Texaco cites language from Weingarten, in which the Court, after noting that the employer has no duty to bargain with the union representative at an interview, stated:

'The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation.' Brief for Petitioner, at 22.

420 U.S. at 260, 95 S.Ct. at 965. We agree with the Board here that this language, (taken by the Court from the Board's brief in Weingarten) is directed toward avoiding a bargaining session or a purely adversary confrontation with the union representative and to assure the employer the opportunity to hear the employee's own account of the incident under investigation. The passage does not state that the employer may bar the union representative from any participation. Such an inference is wholly contrary to other language in the Weingarten opinion which explains that the representative should be able to take an active role in assisting the employee to present the facts.

A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview.

420 U.S. at 262–63, 95 S.Ct. at 966. See also Alfred M. Lewis, Inc. v. NLRB, 587 F.2d at 409–10, where this Court quoted

the latter passage as central to the holding of Weingarten. Accord, Southwestern Bell Telephone Co., 251 NLRB No. 61, 105 LRRM 1246 (1980) (pet. for review pending, 5th Cir., No. 80-2072).

In refusing to permit the representative to speak, and relegating him to the role of a passive observer, the respondent did not afford the employee the representation to which he was entitled. The Board properly found that Texaco violated section 8(a)(1) of the Act.

Order enforced.