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YOU, YOUR JOB, AND THE LAW



Your right to union representation at employer investigatory interviews

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The United States Supreme Court ruled that an employee is entitled to have a union representative present at an investigatory interview by an employer if the employee "reasonably believes the investigation will result in disciplinary action".

This article will give some examples of cases in which the NLRB has found it reasonable to believe that disciplinary action will result, and examples where an employee does not have a reasonable basis to believe disciplinary action will result from an interview.

I must stress in the beginning of this article that whenever a Local Union 1245 member thinks an interview might be disciplinary, she or he should always contact their shop steward to discuss the matter before going into the interview.

Section 7 of the National Labor Relations Act gives employees the right to engage in "concerted activities for... mutual aid or protection," and requesting union representation at a confrontation with an employer clearly falls within this section.

It is key to recognize that your right to union representation only arises once you request this representation. A worker may forego this right and participate in an interview unaccompanied by a union representative if he or she so desires.

When is it reasonable to believe that disciplinary action will result from an investigatory interview? For example, a general shop-floor conversation in which a supervisor gives instructions, training or needed corrections of work techniques does not normally provide a "reasonable basis" for an employee to believe that adverse impact would result from this conversation.

Thus there would be no right to a union representative at this conversation. The right to representation arises when a *significant purpose* of the interview is to obtain facts to support disciplinary action that is probable or that is being seriously considered.

Another example of where union representation has been denied is at a counseling session of an employee regarding his absenteeism. The employer gave assurance to the employee that the interview was not a

disciplinary meeting and that the interview would not be recorded in his personnel file.

However, when a counseling session is a step to imposition of discipline and employees have reasonable grounds to fear adverse consequences as a result of the interview, the employer violates the National Labor Relations Act by refusing to permit a union representative to be present at these counseling sessions.

The National Labor Relations Board ruled that the right to union representation includes the right to consult a union representative before the interview. However, an employer does have to allow a union representative to consult with the employee on company time before the interview if the interview date provides adequate opportunity for pre-interview consultation with the union representative on the employee's own time.

Further, the employer need not postpone the interview because the union representative is unavailable for reasons for which the employer is not responsible. The employee could have requested the presence of another union representative.

An investigatory interview is to be distinguished from a meeting called by the employer to inform the employee of a predetermined decision regarding disciplinary action. Where a meeting is confined to merely informing an employee of a disciplinary decision, and the employer does not attempt to question the employee or engage in any dialogue to elicit further information, the employee does not have the right to union representation.

It is your right to be represented at investigatory interviews where you reasonably fear disciplinary action will result. You should not attempt to decide alone when it is reasonable to fear disciplinary action. Always request union representation when initially informed of an investigatory interview. Then notify the shop steward or business representative of the proposed interview so that together you can decide if you have a right to union representation given the Supreme Court's criteria cited above.