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COMMENT

THE REPERCUSSIONS OF WEINGARTEN: AN EMPLOYEE'S RIGHT TO REPRESENTATION AT INVESTIGATORY INTERVIEWS

The National Labor Relations Act (Act) declares that a goal of national labor policy is that workers be provided with "full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of . . . mutual aid or protection." To this end the Act was structured to eradicate the "inequality of bargaining power between employees . . . and employers."\(^1\)

In \textit{NLRB v. Weingarten},\(^2\) the Supreme Court held that an employee has the right to be represented at an interview with management which he or she reasonably believes may result in the imposition of discipline. The Court found this right necessary to achieve a balance of power between employee and employer at investigatory interviews.\(^3\) There has been extensive post-\textit{Weingarten} litigation regarding the right of representation. The National Labor Relations Board (Board) and the courts of appeals have attempted to follow the guidelines established by the \textit{Weingarten} Court.

Discussion of the representation right in its present form and its future development must consider the interests of the employer, the employee and the union. The Board and courts have been successful in this task in the majority of cases. The principles outlined by \textit{Weingarten} have been followed generally. New guidelines must now be established for issues not addressed in \textit{Weingarten}.

I. PRE-\textit{Weingarten} DEVELOPMENTS

A. Early Developments

The Board, in \textit{Ross Gear and Tool Co.},\(^4\) first acknowledged the right to union representation of an employee at an investi-

\footnotesize
3. Id. at 262.
4. 63 N.L.R.B. 1012, 19 L.R.R.M. 2190 (1945). The \textit{Ross Gear} case did not supply clear precedent in the area of employee representation since the employee involved was also a member of a union committee, and had been called to the meeting as a union representative. Therefore, it is difficult to ascertain if the Board's analysis was
gatory meeting. The Seventh Circuit denied enforcement of the Board's order, finding that such a policy would encourage employee insubordination. In *Dobbs Houses, Inc.*, the Board rejected the existence of a representation right by summarily affirming a trial examiner's decision which found no authority in the Act for an employee's right to union representation at a disciplinary meeting. These early Board decisions did not provide any clear rationale or statutory basis for a representation right.

*Texaco, Inc.*, provided a statutory basis, albeit temporary, for the representation right. The Board found that a denial of representation at a disciplinary interview would violate section 8(a)(5) of the Act, which provides that it is an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees . . . ." The employer was found to be obligated to bargain with the union representative because of the union's status as an exclusive representative. Since the purpose of the meeting was to provide a record for support of disciplinary action, the meeting was deemed to involve the "conditions of employment." To deal directly with an employee regarding "conditions of employment" would violate the union's rights as an exclusive bargaining representative under section 9(a) of the Act. The Fifth Circuit Court of Appeals denied enforcement, finding the meeting to be merely investigatory and not one where an employer sought to deal with its employees regarding conditions of employment.

A line of cases followed *Texaco, Inc.* which stressed the

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5. 158 F.2d 607 (7th Cir. 1947). The Seventh Circuit also pointed out that a grievance was not yet present and, as such, employee representation rights had not yet matured.


9. 29 U.S.C. § 159(a) (1976). This section provides, in part, that union bargaining agents shall be the exclusive representatives of all employees in the unit regarding conditions of employment.

10. 408 F.2d 142 (5th Cir. 1969).

11. Id. at 145. While denying enforcement, the court did not criticize the statutory analysis used by the Board.
distinction between disciplinary meetings and investigatory meetings.\(^{12}\) Representation rights would exist if the meeting were for disciplinary reasons, but no representation would be permitted if the meeting were merely investigatory or fact-finding in nature.\(^{13}\) However, this investigatory/disciplinary dichotomy was not found to be useful in resolving representation conflicts.\(^{14}\) It became increasingly difficult for the Board and courts to clearly distinguish between an investigatory meeting and a disciplinary meeting.

\section*{B. A New Statutory Analysis}

In 1972, a new statutory formulation based on section 7\(^{15}\) of the Act was utilized by the Board in addressing the representation issue.\(^{16}\) Section 7 protects employees' rights to engage in concerted activities for mutual aid and protection. Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."\(^{17}\) The new statutory analysis used by the Board focused on the rights of the individual employee rather than on the bargaining rights of the union as an exclusive representative. When an employee requested representation, the Board viewed the employee as attempting to band together with other employees for mutual protection of their employment status.

The Fourth, Fifth and Seventh Circuits denied enforcement of these decisions, rejecting the section 7 and 8(a)(1) analyses. The courts disagreed with the Board on the existence of a statutory basis for the right to representation at the investigatory stage.\(^{18}\) The employer's prerogative to hold in-

\begin{enumerate}
\item \cite{LafayetteRadioElectronicsCorp.} \cite{IllinoisBellTelephoneCo.} \cite{Jacobe-PearsonFordInc.} \cite{QualityMfgCo.} \cite{WeingartenInc.} \cite{MobilOilCorp.} \cite{NLRBv.Weingarten}
\item \cite{29U.S.C.}\cite{QualityMfgCo.}\cite{WeingartenInc.}\cite{MobilOilCorp.}\cite{NLRBv.Weingarten}
\end{enumerate}
vestigatory interviews without interference was found to be superior to any right the employee might have in representation.\textsuperscript{19}

II. Weingarten

A. Acceptance of the Section 7 Analysis

The Supreme Court resolved the conflict between the Board and the courts in *Weingarten*\textsuperscript{20} and *ILWGU v. Quality Manufacturing Co.*\textsuperscript{21} In six-to-three decisions, the Court upheld the Board's statutory analysis.\textsuperscript{22} The Court adopted the Board's conclusion that denial of a request for union representation at an investigatory interview which the employee reasonably believes may result in disciplinary action constitutes an unfair labor practice in violation of section 8(a)(1) and an interference with section 7 employee rights.\textsuperscript{23}

Justice Brennan, writing for the majority, found the Board's reasoning to be proper. The Court initially noted that the "Board's holding is a permissible construction of 'concerted activities for . . . mutual aid or protection . . . .'"\textsuperscript{24} While it may be the employee alone who may have an immediate interest in the interview's outcome, his request to be represented is action that involves mutual "aid and protection" of other workers. The representative is not only protecting the "particular employee's interest, but also the interests of the entire bargaining unit, by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly."\textsuperscript{25} "The representative's presence is an assurance to other employees in the bargaining unit that they, too, can obtain aid and protection if called upon to attend a like interview."\textsuperscript{26} The Board's analysis was found to clearly further the Act's goal of creating prote-

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\textsuperscript{20} 420 U.S. 251 (1975).
\textsuperscript{21} 420 U.S. 276 (1975).
\textsuperscript{22} 420 U.S. at 260.
\textsuperscript{23} Id. at 256.
\textsuperscript{24} Id. at 260.
\textsuperscript{25} Id. at 260-61.
\textsuperscript{26} Id. at 261.
tions for employees in the exercise of their rights of association and mutual protection. Permitting access to representation at investigatory interviews would be one way in which employees could band together to achieve a balance of power between employees and employer at an investigatory meeting.27

The Court also found the recognition of the right useful to both the employer and employee. Discussing the advantages which representation would provide to the employer, the Court pointed out that the presence of a representative would discourage the filing of grievances where the employer’s action appeared justified. Moreover, the Court noted the assistance that a representative could provide in the clarification of facts and issues.28

Finally, the Court found that the right becomes effective at the appropriate pre-grievance stage because “it becomes increasingly difficult for the employee to vindicate himself . . .”29 at the grievance stage, and the “value of representation is correspondingly diminished . . .”30 at the grievance stage. Once an employer decided to discipline an employee, it would be more difficult to arrive at a compromise. Instead, the employer may develop an interest in vindicating his disciplinary decision. These policy considerations moved the Court to find an adequate basis for a right to representation.

B. Parameter and Limits of the Representation Right

The right to representation is defined by five principles discussed in Weingarten. The principles can be summarized as follows:

1. That the right springs from section 7’s protection of the employee’s conduct in concert for mutual aid and protection.
2. That the “right arises only in situations where the employee requests representation.”
3. That the employee’s right to request representation is only present when the employee reasonably believes that

27. Id. at 262.
28. Id. at 263.
29. Id.
30. Id. at 264.
the investigation will result in disciplinary action.
4. That the exercise of the right may not interfere with legitimate employer prerogatives. The employer is not required to justify his refusal to allow representation and he may proceed with the investigation by gathering information from other sources.
5. That the employer is not required to bargain with the representative who attends the interview.31

In the companion case of Quality Manufacturing Co.,32 the Court reaffirmed its holding in Weingarten and further concluded that the discipline or threat of discipline of an employee because he or she refused to participate in an interview for which representation was requested but not afforded was an unfair labor practice.33

The dissent in Weingarten rejected the statutory analysis of the Board, and concluded that an interview in which an employee reasonably fears a disciplinary result is not within the scope of protected concerted activity.34 Furthermore, the dissent stated that the power to discipline employees was an employer prerogative of such stature that it could be curtailed only by "specific limitation[s] imposed by statute or through . . . collective bargaining."35

III. THE AFTERMATH OF WEINGARTEN

The Board and the courts of appeals have struggled since Weingarten to implement the outline proposed by the Court. Litigation regarding the right to representation of employees in investigatory interviews has been abundant. The following sections trace the roads followed by the Board and the courts of appeals in the representative area.

A. DISCIPLINARY/INVESTIGATORY DICHOTOMY

The Supreme Court in Weingarten dealt directly with the
availability of representation in investigatory interviews.\textsuperscript{36} In
the process, the Court recognized the existence of a right to
representation in disciplinary interviews.\textsuperscript{37} In pre-\textit{Weingarten}
cases, the rule appeared to be that if an investigatory inter-
view were involved, no representation right applied; if a disci-
plinary interview were involved, a representation right did ap-
ply.\textsuperscript{38} After \textit{Weingarten}, it appeared that when an employee
was summoned to an interview which the employee reasona-
ably believed could result in discipline, the right to representa-
tion applied.

The apparent shift from the discipline/investigation di-
chotomy has not been consistently followed by the Board or
courts. A problem arises when the employer calls a meeting
which the employee reasonably believes will result in disci-
pline, but which has as its purpose to merely announce a dis-
ciplinary decision which has been previously made. In \textit{Mt.
Vernon Tanker Co.},\textsuperscript{39} the Board found a section 8(a)(1) viola-
tion in a refusal to provide representation at a meeting called
by a ship's captain to enter a log (a type of maritime disci-
pline) against a crew member. The decision to discipline had
been made prior to the meeting. The court of appeals denied
enforcement,\textsuperscript{40} pointing out that since "logging . . . occurs af-
fter that question has been settled . . ., [t]he result from the
outset is a foregone conclusion."\textsuperscript{41} In as much as no investiga-
tion or questioning of the employees had occurred, no right to
representation was found. In \textit{Certified Grocers of California
Ltd.},\textsuperscript{42} the Board again found that the right of representation
extends to meetings which only involve the announcement of
a predetermined punishment. The Board held that requiring
the sole employee to attend the meeting would "perpetuate

\textsuperscript{36} 420 U.S. 251 (1975).
\textsuperscript{37} \textit{Id.} at 260.
\textsuperscript{38} Note, \textit{Employee Right to Union Representation During Employer Interroga-
\textsuperscript{39} 218 N.L.R.B. 1423, 89 L.R.R.M. 1793 (1975).
\textsuperscript{40} 549 F.2d 571 (9th Cir. 1977).
\textsuperscript{41} \textit{Id.} at 575. This case was also decided on the principle that maritime situa-
tions were not appropriate for representation rights. Rather than seeking to balance
the power between employer and employee, maritime law would maintain and further
the imbalance in labor relations.
the inequality the Act was designed to eliminate." Again the court of appeals denied enforcement. The court emphasized that the purpose of the meeting was not to "elicit damaging facts from [the employee] . . . ." The court found Wein- garten to be the exclusive basis for representation at investigatory interviews.

The Board has apparently decided to follow the position of the courts. In Baton Rouge Water Works, the Board stated that "an employee has no section 7 right to the presence of his representative at a meeting . . . held solely for the purpose of informing the employee of, and acting upon a previously made disciplinary decision." The Board found that not all disciplinary interviews fall under this rule, only those strictly limited in function and action.

Member Murphy, concurring in Baton Rouge, distinguished interviews (which involve the gathering of information) from disciplinary actions. "Disciplinary action" does not involve an interview; it merely consists of an announcement of a previously made disciplinary decision. Under the analysis presented by Member Murphy, the crucial question is not whether the interview is investigatory or disciplinary, but rather, whether there was an interview at all. This approach avoids the difficult exercise of distinguishing between investigatory and disciplinary interviews. The employer would be limited to one function, that being the announcement of a previously made disciplinary decision.

A strong dissent was filed by Member Penello, who, upon tracing pre-Weingarten developments, concluded that a right to representation at disciplinary meetings, where a decision regarding discipline had been previously made, existed before Weingarten. The representation right recognized in Weingarten was seen by Member Penello as a mere extension of a "previously existing right of an employee to request the presence of his union representative at a disciplinary interview."

43. 227 N.L.R.B. at 1213, 94 L.R.R.M. at 1281.
44. 587 F.2d 449 (9th Cir. 1978).
45. Id. at 451.
47. Id. at ----, 103 L.R.R.M. at 1058.
48. Id. at ----, 103 L.R.R.M. at 1061 (dissenting opinion of Member Penello; emphasis in original).
The cases that preceded Weingarten appear to support Member Penello's contention that a right to representation exists in disciplinary interviews. Member Murphy's proposed test avoids the need to confront much of the pre-Weingarten precedent by concluding that, in certain circumstances, no interview has occurred so that representation rights do not exist.

Two recent decisions have expounded upon the investigatory/disciplinary dichotomy. In Pacific Telegraph and Telephone Co., the Board held that a discussion of the employee's record, initiated by the employee, after the employer had fulfilled its purpose of announcing a previously determined disciplinary penalty, did not trigger Weingarten representation rights. In Texaco, Inc., the Board limited Pacific Telegraph and Telephone Co. by finding representation rights in a situation "where an employer engages in conduct that goes beyond that required to inform an employee of a previously made disciplinary decision . . . ." In this case, the employer had initiated the discussion which was over and above the announcement of a prior decision.

The disciplinary/investigatory approach or the interview/disciplinary action approach contains some difficulties. One of these difficulties is that the Board or court will have to reexamine the record of the meeting and determine if the employer had, in fact, previously made the decision to discipline. This determination may be very difficult to make in cases where no specific documentation regarding a prior decision is available. Another problem which results from these theories is that the employee is placed in an untenable position. If an employee is not warned that an interview is not planned, then he may believe that questioning will be part of the meeting and he may then believe it proper to request representation. If the employee makes what seems to be a proper request and is denied representation, he may decide to avoid the meeting. The employee should not have to guess if a meeting to which he is summoned is to be an investigatory interview or a disciplinary interview or, in the alternative, an interview or a disciplinary action.

If no questioning of an employee is performed, it would appear that the presence of a representative at the meeting would not be necessary. The representative will certainly not have the opportunity to help "elicit important facts" during the meeting. Nevertheless, the difficulties presented by the theories forwarded by the Board in its attempt to avoid representation rights in disciplinary interviews or actions seem to underscore the need that such exceptions be applied strictly and that employer-initiated discussion be coupled with a right to be represented. In order to avoid the difficulties arising from the Baton Rouge line of cases, the Board may simply state the issue as the Weingarten Court did: "Is the meeting one that the employee reasonably believes could result in discipline?" If this question is answered affirmatively, then the right to be represented should apply. Granting the right in cases such as this should not disrupt the meetings in question since the employer may limit the representative's role at the meeting.

B. Employee Request of Representation

The Weingarten Court stated that the right of representation "arises only in situations where the employee requests representation."51 The requirement that a request by the employee trigger the right to representation has posed a number of problems. In Climax Molybdenum Co.,52 two employees were asked to appear at an investigatory meeting. Both employees knew of the disciplinary results that reasonably follow, but neither requested union representation. The union requested that it be permitted to have a pre-interview conference with the employees. The employer rejected the union's request. An unfair labor practice was filed by the union. In this case, the Board found the pre-interview consultation to be within the right to representation; but more importantly for our present analysis, the denial of the union's request was found to be a denial of the employee's right to representation.53 The court of appeals denied enforcement, partially on

51. 420 U.S. at 257.
52. 227 N.L.R.B. 1189, 94 L.R.R.M. 1177 (1977). A dissent was filed by members Penello and Walther that disagreed with both the extension of Weingarten to pre-interview consultation and permitting a union to make the representation request.
53. 227 N.L.R.B. at 1190, 94 L.R.R.M. at 1178.
the theory that the right to representation only arises "upon request by the employees."\(^{54}\)

The union has an interest in enhancing its effectiveness in the representation of all employees. This interest is furthered by observing and participating in the investigatory interview.\(^{55}\) The employee's interest is in resolving the matter under investigation in a favorable manner. While these interests were considered by the Court in the formulation of the representation right, it appears that the selection of section 7 as the statutory basis for the right limits use of the right to circumstances where an individual employee seeks to utilize his section 7 rights. Weingarten recognized that an employee "may forego his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative."\(^{56}\) The decision to protect oneself through the concerted action of representation is one that should be made voluntarily. The clear language of Weingarten requires that only an employee request representation.\(^{57}\)

Through collective bargaining, a union may acquire the right to be present at all investigatory interviews. The Board has yet to encounter a case where a union has access to interviews as a representative through a contractual arrangement and where the employee refused to allow the union to be present as his or her representative. A case such as this would necessitate the balancing of the union's interest as the exclusive representative of the bargaining unit and its obligations and rights under the collective bargaining agreement, and the employee's individual rights under Weingarten and his interest in resolving his disciplinary problems in a private manner.

The Board has held that the viability of the representation right does not depend upon the existence of a union as a bargaining representative.\(^{58}\) In Glomac Plastics, Inc.,\(^{59}\) the Board

54. 584 F.2d 380, 363 (10th Cir. 1978).
55. 420 U.S. at 262-63.
56. Id. at 257.
57. See note 31 supra.
held that "[s]ection 7 rights are enjoyed by all employees and are in no wise dependent on union representation for their im-
plementation."60 In Anchortank, Inc.,61 a union election had
been won by the union, but certification had not yet occurred
when a request for representation was made by two employ-
ees. The employer denied the representation request, assert-
ing that no union certification had occurred. The Board stated
that "status of the union as a bargaining representative has no
bearing on the employee's right to have a representative pre-
sent during an investigatory or disciplinary interview."62 The
Board further stated that the Weingarten Court's:

primary concern was with the right of the employees to have
some measure of protection when faced with a confrontation
with the employer which might result in adverse action
against the employee. These employee concerns remain
whether or not the employees are represented by a union
.... The status of the requested representative, whether it
be that of Union not yet certified or simply that of fellow
employee, does not operate to deprive the employees of their
Section 7 rights.63

The section 7 analysis used in the Weingarten opinion
does not lead to the conclusion that a union may unilaterally
request to be present at an investigatory interview.64 In fact,
the existence of a union is wholly irrelevant to the right of
representation. Furthermore, the interests of the union may
be protected by access to the grievance procedure.65 Requiring
an employee's request for representation would insure that an
employee voluntarily chooses to have a representative present
at an investigatory interview.

An employer is under no obligation to inform the employee
of his right to representation.66 This fact places the burden of

60. 234 N.L.R.B. at 1311, 97 L.R.R.M. at 1443.
63. Id.
64. See Comment, Union Presence in Disciplinary Meetings, 41 U. Chi. L. Rev. 331, 348 (1973-74), where by using a combination of section 7 and section 9 in creat-
ing the representation right the commentator concludes that the union may unilater-
ally request to be present. This theory is a pre-Weingarten analysis and may not
survive the purely section 7 analysis by the Court in Weingarten.
65. See text accompanying notes 7-13 supra.
66. Craver, The Inquisitorial Process in Private Employment, 63 CORNELL L.
informing the employee of his representation right on the union. If a union exists, there is a means through which an employee may be informed and educated regarding his right to representation. If an employee fails to request a representative, due to ignorance, his complaint should be directed to his union.67

If a union does not exist, then the employee must be self-educated in regards to the representation right. One of the basic purposes of the representation right is to achieve a balance of power between employees and employers at investigatory interviews. If the employee is not aware of his right to representation, he or she will not be able to enjoy the protection which the representation right was intended to provide. The issue, then, becomes who, if anyone, should have an affirmative duty to inform employees of their rights under Wein-garten. If an obligation is imposed on some party, then it becomes necessary to provide an outline that may be followed in informing the employee of his rights.

The only apparent way in which an employee at a nonunionized business may be made aware of his right to representation is through the employer. This practice could be analogous to the criminal procedure requirements of Miranda v. Arizona,68 or to the employer's requirement to give certain warnings in polling or interrogation cases.69

The countervailing interests of the employer and employee should be considered in determining if a warning requirement should be imposed on the employer. The employee has an interest in protecting his job security; he is protecting his job security by having a fellow worker present to assist in and witness the interview. The employer has an interest in maintaining productivity and efficiency in the work place; he has the prerogative of maintaining work rules. The interests of an employee in having representation, when a union exists, are promoted by the knowledge that the union representative usually has regarded the employer's disciplinary procedures.70 In a nonunion situation, this advantage will probably not be
present. Because of the probable lack of knowledge by a representative regarding disciplinary procedures in a nonunion work place, he will probably act as a witness rather than as an active participant in the interview.

A warning requirement should not be adopted by the Board. Only in a nonunion work place would a warning requirement appear to be necessary; and in such a work place, a representative’s role would be limited. A warning requirement would necessitate specific rules governing when a warning should be made and what the warning would consist of. Furthermore, an additional obligation would be imposed on the employer which would probably lead to complicated rules which an employer would find difficult to apply in an industrial setting. The complications which a warning requirement might bring outweigh the need for a warning in nonunion work places.

C. Effectiveness of the Request

Some difficulties have developed concerning the effectiveness of a request for representation. This section will summarize some of the cases in this area and provide some practical suggestions for dealing with request problems.

In *Lennox Industries, Inc.*, an employee was asked by a supervisor to accompany him to his desk. The employee reasonably feared discipline and, therefore, requested union representation. The supervisor did not attempt to eliminate the reasonable fear of the employee and did not attempt to get a representative. No further representation request was made, and the employee was interviewed in a management office. The Board held that this subsequent interview was in violation of *Weingarten*. An employee “who has made a request for union representation on the plant floor need not repeat the request at the interview.” The Board did not rigidly require a representation request at the location of the interview. The *Lennox* case included an additional claim which developed when an employee, who had earlier appeared before a supervisor and requested representation, was sent back to work; later the same day, the employee was told by a supervi-

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72. Id. at ---, 102 L.R.R.M. at 1300.
sor to return to the supervisor’s office or he would be in “serious trouble.” The administrative judge found that the order to go to the supervisor’s office was a violation of the employee’s Weingarten rights. The Board reversed the administrative judge and found that it was the employee’s duty to request representation before his interviewer and not before any other party. The Board would therefore require a representation request in the presence of the actual interviewer. The dissent by Chairman Fanning and Member Jenkins states that an order, accompanied by a threat to appear for an interview from a supervisor who knows of the employee’s request for representation and does nothing to effectuate that request, is in violation of section 8(a)(1). The dissent further contended that the subsequent interview was “tainted” by the representation violation previously incurred.

Lennox Industries, Inc. demonstrates that an employee should, if he is to protect his Weingarten rights, make it clear to the interviewer that he will not submit to the interview without representation. This explicit request should be made even if a request had been made from the shop floor. A lack of clear communication can result in a loss of the representation right.

D. Request of a Specific Employee as Representative

The Board, in Roadway Express, Inc., addressed the issue of an employee request for a specific representative. In this case, the requested representative was not available at the time of the interview. The Board stated that “nowhere in Weingarten does the Court state or suggest that an employee’s interest can only be safeguarded by the presence of a specific representative . . . .” If the availability of the requested employee is outside of the control of the employer, and the employee requested is not reasonably available, but an alternative representative is, a denial of the requested representative shall not be a violation of section 8(a)(1).

73. Id. at ——, 102 L.R.R.M. at 1301.
74. Id. at ——, 102 L.R.R.M. at 1301.
75. Id. at ——, 102 L.R.R.M. at 1302 (dissenting opinion).
76. Id. at ——, 102 L.R.R.M. at 1302 (dissenting opinion).
78. Id. at ——, 103 L.R.R.M. at 1053.
In *Coca-Cola Bottling Co.*,\(^7^9\) the Board held that to require a three-day postponement of an interview, when an alternative representative is available, would be unreasonable and would interfere with the legitimate employer prerogative of maintaining order and discipline at the work site. The Board also noted that an employer is not required to offer an alternative representative. The burden of informing unit members of the designation of union officials is one more appropriately borne by the bargaining unit.\(^8^0\)

Unions should attempt to instruct their members regarding the representatives that are available to them. If an employee requests a specific union representative who is reasonably available, it would appear that the employer would be required to summon the requested representative. The employer's prerogative to hold an investigatory meeting without interruption of production and within a reasonable period must be weighed against the interest of the employee in having a particular representative. The problems associated with requesting a specific representative should be considered in light of these conflicting interests.

If a request for representation is made which cannot be met because a representative is not available, the interview must be delayed until representation is reasonably available.\(^8^1\) This rule appears to best further the policy of *Weingarten*.

Further problems have developed regarding the representative who is made available to an employee. For example, in the absence of a designated union representative, may another employee be chosen as a representative? In *Crown Zellerbach, Inc.*,\(^8^2\) the Board upheld an administrative judge's ruling which found that the appointment of a fellow union member satisfied the representation right when a union representative was not available. The represented employee did not protest the choosing of another employee (the representative in this case was apparently actively involved in union affairs and had an active role in the interview). The administrative law judge

\(^7^9\) 227 N.L.R.B. 1276, 94 L.R.R.M. 1200 (1977).

\(^8^0\) Id., 94 L.R.R.M. at 1201.


\(^8^2\) 239 N.L.R.B. 1124, 100 L.R.R.M. 1092 (1978).
found that the basic reason for the *Weingarten* rule is to "preclude management from overpowering 'a lone employee in a disciplinary meeting.'"83 Therefore, where a union representative is not available, a request for representation may be fulfilled by the presence of a fellow union member or perhaps a fellow employee.84

A limitation appears to exist upon the designation of a nonunion representative when a union representative is not available. The validity of the designation is conditioned on the competence of the employee representative.85 The representative, if given the opportunity, should be able to reasonably assist the investigated employee. Requiring the representative to be competent would serve to protect the interests of the investigated employee and of all other employees of the workplace.

Another approach would be to require that the designation by the employer be made in good faith. This lesser standard would be less burdensome on the employer, but it would not assure a proper and adequate utilization of the representation right. The Board should clearly establish a standard of competence for representatives who are neither specifically requested by the employee nor designated by the union. Two points can be made concerning this issue. First, the employee involved should immediately make known that he does not accede to the chosen representative. This can be an embarrassing situation for both the potential representative and for the employee; but if no objection is made, the Board may find a waiver to any objection regarding the representative's competence. Second, the employer, in order to avoid dealing with judgments on the competence of the representative, should postpone the meeting until a union representative, or some specifically requested representative is available. This precaution could avoid later claims of unfair labor practices.

83. *Id.* at 1127, 100 L.R.R.M. at 1093.

84. In the *Crown* case, the judge also discussed the fact that he believed that the employee had purposefully requested a representative not present in order to avoid or delay a disciplinary proceeding. While this was a factor in the decision, it seems that his arguments regarding the purpose of *Weingarten* were more at the essence of the decision.

E. Reasonable Belief of Discipline

The Supreme Court in *Weingarten* held that the right to representation exists only "where the employee reasonably believes the investigation will result in disciplinary action."\(^86\) The Court sought to establish an objective standard where the subjective motivations and thoughts of the employee would not be relevant.\(^87\) Investigatory interviews that require representation were distinguished from "run-of-the-mill shop floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques."\(^88\)

In *VanTran Electric Corp.*,\(^89\) the Board summarily affirmed an administrative law judge's decision, after reviewing it in light of *Weingarten*, which appears to give the reasonable basis standard a rather broad meaning. The decision states that the objective standard will be met when the employee has "some reason to be apprehensive about his job situation."\(^90\) Another example of a broad reading of the objective standard may be found in *Exxon Co. USA*,\(^91\) where the Board again summarily affirmed an administrative law judge's decision. The administrative judge's decision, in referring to *Weingarten*, stated that "the standard enunciated by the Board is simply one of whether a reasonable belief exists in the employee's mind based on some objective evidence, rather than a mere figment of the employee's imagination."\(^92\) The approach taken by these decisions indicates that, rather than considering all the circumstances, the courts will engage in a search for any basis to support the employee's contention of reasonable belief.

In contrast to the broader statements regarding the reasonable belief standard, the Ninth Circuit Court of Appeals, in *Alfred M. Lewis, Inc. v. NLRB*,\(^93\) expressed a stricter view of the *Weingarten* standard. The court explained that

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\(^{86}\) 420 U.S. at 257.
\(^{87}\) Id. at 257 n.5.
\(^{88}\) Id. at 257-58 (quoting Quality Mfg. Co., 195 N.L.R.B. at 199, 79 L.R.R.M. at 1271 (1972)).
\(^{89}\) 218 N.L.R.B. 43 (1975).
\(^{90}\) Id. at 45.
\(^{91}\) 223 N.L.R.B. 203 (1976).
\(^{92}\) Id. at 206 (emphasis added).
\(^{93}\) 587 F.2d 403 (9th Cir. 1978).
“whether an investigatory interview may lead to disciplinary action is an objective inquiry based upon a reasonable evaluation of all the circumstances, not upon the subjective reaction of the employee.” 94 The court followed this statement by finding that a “latent threat” permeates all supervisory interviews in which the employee is questioned or instructed about work performance. 95 Finally, the court stated that the validity of a representation request depends on whether “a significant purpose of the interview is to obtain facts to support disciplinary action that is probable or that is being seriously considered.” 96 The difficulty arising from the test proposed by the Ninth Circuit is that a subjective inquiry is necessary in order to determine if a “substantial purpose” of the interview is to gather facts on which to base discipline. Furthermore, in order to establish that discipline is being “seriously considered,” another probe into the subjective motivations of the employer must occur.

In order to remain faithful to the Board’s policy of avoiding incursions into the subjective motives and thoughts of parties, 97 and to fulfill the Weingarten mandate, the courts and the Board should avoid using language which implies a standard virtually lacking in substance or one that requires an analysis of the employer’s intention. All of the circumstances surrounding the meeting should be considered. Past practice in disciplinary procedure, 98 prior history of reprimands of the employee, 99 location of the interview, 100 events just previous to the conversation, 101 and the proposed subject of the interview if known to the employee 102 are all factors of an objective nature and should be considered.

While the above-mentioned factors are helpful to the employer and employee in assessing the validity of a request for representation, it appears that the initial conversation of the

94. Id. at 410.
95. Id.
96. Id. (emphasis added).
99. Id. at 1310, 97 L.R.R.M. at 1443.
parties can be the crucial factor in establishing the reasonableness of the request. An employee is required to listen to the employer’s statements regarding the purpose of the meeting. An employer is wise to instruct his agents to clearly state to an employee that disciplinary action is not contemplated. A statement that “you do not need assistance” is not enough to eliminate an otherwise reasonable apprehension of disciplinary action. But a clear and simple statement that disciplinary reasons are not the purpose of the meeting may be enough to initially eliminate the reasonable basis for the representation request.

The apparent lack of a reason to request a representative at the initial stage of conversation does not prevent the interview from becoming one where a reasonable fear of discipline may develop, and a request may subsequently be appropriate. In Oil Workers Int’l Union v. NLRB, two employees had been in a fight in the work area and had consequently been suspended. The employees were informed that the purpose of the meeting with management would be merely to reinstate them. A representation request was properly denied. The supervisor, after warning that further fighting would not be tolerated, prevented one employee from leaving by stating: “No, no, there’s something else I have to tell you.” This statement was found by the court to create a reasonable fear of discipline. All that would have been necessary to eliminate this reasonable fear would have been a simple statement that no discipline was intended at the meeting. The change from an unprotected employer-employee meeting to a meeting where representation may be required could have been easily avoided.

The use of an objective standard, which considers all the circumstances, appears to be more useful than a subjective

103. AAA Equip. Serv. Co. v. NLRB, 598 F.2d 1142 (8th Cir. 1979).
107. Id.
108. Id. at 591.
standard or a rule that requires representation in all employee-employer contacts. While a case-by-case determination of the circumstances may be necessary to apply the objective standard provided by Weingarten, clear communication between parties may avoid an unnecessary request for representation or an unlawful denial of representation. Furthermore, in light of the cost, confusion and acrimony that litigation of a representation case may bring, it may be advisable for employers to allow representation in questionable cases. Since an employer controls the extent of the representative’s participation in the interview, no extreme hardship would fall upon the employer.

F. The Role of the Representative

1. During the Interview

The Supreme Court in Weingarten was clear in its view that the employer may control the participation of the representative at the investigatory interview. While it was suggested that the representative may be of assistance in clarifying the facts or in suggesting other employees who may know the facts, no mandate was imposed on the employer to bargain with the representative.

In two recent Board decisions, the role of the representative and the employer’s right to regulate the representative’s role have been discussed. In Southwestern Bell Telephone Co. and Texaco, Inc., the Board has concluded that an


111. Note, Employee Right to Union Representation During Employer Interrogation, 7 U. Tol. L. Rev. at 319.

112. Craver, supra note 66, at 19-20 n.82.

113. 420 U.S. at 260.

114. Id.

115. 251 N.L.R.B. No. 61, 105 L.R.R.M. 1246 (Oct. 6, 1980).
employer may not require that a representative remain silent throughout an investigatory interview. In both cases, the representatives were told at the commencement of the meetings that they were to remain silent throughout the interviews. The Board concluded that:

the Supreme Court, in the course of its Weingarten decision, intended to strike a careful balance between the right of an employer to investigate the conduct of its employes at a personal interview, and the role to be played by a statutory representative who is present at such an interview. It is clear from the Supreme Court's decision that the role of the statutory representative at an investigatory interview is to provide "assistance" and "counsel" to the employee being interrogated.117

While "assistance" and "counsel" are to be provided by the representative, the Board also recognized that the employer was under no duty to bargain with the representative and that the interview should not become an "adversary confrontation."118 Therefore, the Board found that an employer may control the role of the representative in a reasonable manner to prevent bargaining or an adversary confrontation with the representative.

The effect of these Board decisions is to eliminate the view of the representative as a "passive observer."119 A representative will now have the right to participate in the interview even where an employer may not desire such participation. The difficulty that now arises is what standard the Board will adopt to determine if a representative is engaging in bargaining or when the representative is changing the nature of the interview to an adversary confrontation.

The courts of appeals have yet to confront the issue presented by these recent Board decisions. The courts have not been receptive to expansions or liberal interpretations of the Weingarten decision as evidenced by the rejection of the right to pre-interview consultation.120 The Weingarten deci-

118. Id.
120. See text accompanying notes 122-24, infra.
sion may be read to preclude an active role for a representative if an employer so wishes. The Board has attempted to balance the interests discussed in *Weingarten* in delineating the role of the representative. It is now necessary to see how the courts of appeals will perform the balancing act.

An employer, if he is truly in search of fairness for his employee, will permit the representative to actively participate in a constructive manner. This may assist the employer because a decision to discipline, made after active participation by the representative, may strengthen the employer's position at the grievance stage and convince the union of the meritless nature of the grievance.

2. Before the Interview

While the representative's role during the interview was clearly delineated in *Weingarten*, pre-interview intervention by a representative was not addressed. The Board and the courts have disagreed on the pre-interview role of a representative. In *Climax Molybdenum Co.*, the Board upheld the decision of an administrative law judge that found an unfair labor practice in a denial by an employer to permit pre-interview consultation between an employee and his representative. The Tenth Circuit Court of Appeals denied enforcement, contending that pre-interview consultation was an unwarranted expansion of *Weingarten*. The court held that a refusal to permit an employee to consult with his representative before an investigative interview was not an unfair practice. While the court of appeals denied the right to pre-interview consultation on company time, it did state that *Weingarten* "requires that the employer set investigatory interviews at such a future time and place that the employee will be provided the opportunity to consult with his representative in advance thereof on his own time." No elaboration was made on this seemingly crucial statement, which actually

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123. 584 F.2d 360 (10th Cir. 1978).
124. *Id.* at 363.
125. *Id.* at 365.
imposes an added obligation on the employer. The employer must provide a reasonable time and place of interview, so that the employee may have representation available, and must consider the availability of a pre-interview consultation.

A representative who is well-prepared before the interview by consulting with his fellow employees would be able to accomplish the tasks of protecting the employee and of presenting the facts as clearly as possible to the employer. Furthermore, a pre-interview consultation followed by an interview with representation may be enough to deter any further action on the part of the employee in a meritless case. This last effect would be advantageous to both unions and employers.\textsuperscript{128}

\textit{Weingarten} does not provide for a pre-interview consultation. The function of an interview consultation would be to familiarize the representative with the facts of the particular case. The representative’s role as contemplated by \textit{Weingarten} could be performed by one who is familiar with the general disciplinary procedures of the employer. \textit{Weingarten} did not require the representative to be familiar with the facts of the particular case.\textsuperscript{197} Nevertheless, a pre-interview consultation may be necessary to permit the representative to effectively “counsel” the employer.

3. Union Right to Bargain Away Representation Rights

Another issue which involves the union’s role in representation is whether the union may waive the individual employee’s right to representation by the terms of a collective bargaining agreement. There have been no post-\textit{Weingarten} cases which have directly addressed this issue.\textsuperscript{128} In \textit{New York Telephone Co.},\textsuperscript{129} the Board reviewed a case where the right to representation was considered dependent upon whether the union had waived the representation right through collective bargaining. While an implication from this case may be drawn that if the union had bargained away the employee’s rights

\begin{footnotes}
\footnote{126. See Brodie, supra note 121, at 13-14.}
\footnote{127. 420 U.S. at 262-63.}
\footnote{128. In a pre-\textit{Weingarten} case, the Board found that a union may negotiate away the right to representation at an investigatory interview. Western Elec. Co., 198 N.L.R.B. 623, 80 L.R.R.M. 1705 (1972). No post-\textit{Weingarten} cases have directly addressed this issue.}
\footnote{129. 219 N.L.R.B. 679, 89 L.R.R.M. 1723 (1975).}
\end{footnotes}
the representation right would effectively be waived, it does not appear that such an implication is proper. Early in its opinion, the Board in *New York Telephone* stated that the administrative law judge's analysis of the case and their own did not pass on the question of whether an employee's right to representation may be waived.\(^{130}\)

A union may bargain away some statutory rights of employees.\(^{131}\) In assessing if a union can waive an employee's statutory right under section 7, the Supreme Court has attempted to weigh the interests of the parties involved and the consistency of the waiver with national labor policy.\(^{132}\) Where a union waives the right to representation, the employee is left without the protection of concerted action at an investigatory interview. The union may feel that it can gain in other areas by negotiating away the right to representation. Unlike the waiver of the right to strike where the interests of the employer, employees, union and the general public are protected, a waiver of the right to representation leaves the employee totally without protection at the investigatory interview. In view of the balance of interests involved and the policy which *Weingarten* articulated, it would appear that the representation right is not waivable by the union. The Board and courts will have to give further guidance on this point.

A waiver of a right protected by section 7 must be clear and unmistakable.\(^{133}\) If the Board and courts ultimately find the right to representation waivable, such waiver should only be allowed in circumstances where the waiver is clear and explicit.

**G. The Employer's Prerogatives and Obligations**

*Weingarten* provided that the representation right should not interfere with certain legitimate employer prerogatives.\(^{134}\) The Court stated that the employer preserved the prerogative to carry out an investigation without an interview with the employee. This, the Court found, would best balance the employer's and the employee's interests. Three choices are avail-

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130. *Id.* at 679 n.7, 89 L.R.R.M. at 1724 n.7.
134. 420 U.S. at 258.
able to an employer upon a valid employee request for representation: "(1) grant the request; (2) discontinue the interview; [or] (3) offer the employee the choice between continuing the interview unaccompanied by a union representative, or have no interview at all."\textsuperscript{135} The employer may not proceed with the interview without fulfilling a valid request "unless the employee voluntarily agrees to remain unrepresented, after having been offered the choices mentioned in option 3 above, or if the employee is otherwise aware of those choices."\textsuperscript{136}

An employer has the prerogative of maintaining order in the line of production. In \textit{Roadway Express, Inc.},\textsuperscript{137} the Board recognized the interest which an employer has in ordering a disruptive employee to leave the production area and report to a supervisor’s office. Once this order is given, an employee must obey. Refusal to appear at the office until representation appears may be grounds for a dismissal for disobedience.\textsuperscript{138} The Board, in analyzing the facts of the case, discussed the concept of a "pre-interview discussion in the office."\textsuperscript{139} The "pre-interview" period consists of an interchange in which the employee is not yet subject to direct questioning nor is asked to speak about the disciplinary situation. During the "pre-interview" period, the employee must comply with the order to appear at the office. The Board attempted to limit the effect of this holding by stating that “an employee’s \textit{Weingarten} rights, with all its attendant safeguards, matures at the commencement of the interview, be it on the production floor or in a supervisor’s office.”\textsuperscript{140} While it appears clear that the employer has an interest in maintaining order at the production line, it is totally unnecessary to add a “pre-interview discussion” to this already confusing area.

Once an order to appear at a supervisor’s office is given (and if the circumstances merit a reasonable belief that discipline may follow), there should be immediate grounds for a

\textsuperscript{135} U.S. Postal Serv., 241 N.L.R.B. No. 18, 100 L.R.R.M. 1520, 1521 (Mar. 19, 1979).
\textsuperscript{136} \textit{Id.} at 1521 (emphasis in original).
\textsuperscript{138} \textit{Id.} at --, 103 L.R.R.M. at 1051.
\textsuperscript{139} \textit{Id.} at --, 103 L.R.R.M. at 1051.
\textsuperscript{140} \textit{Id.} at --, 103 L.R.R.M. at 1052.
valid representation request. The employee should be required to appear at the office, but once at the office the right of representation should immediately be addressed. If the employee is not certain that the interviewer is aware of his or her prior request, another request should be made. The employer should then have the burden of choosing which available option will be exercised. Disobeying an order may interfere with the employee's right to representation. Therefore, employees, in order to protect their rights, should follow the order; but they should make clear that they refuse to participate in any dialogue without representation. This approach balances the employer's interests in maintaining order on his production floor and the employee's interest in representation.

H. Remedies For Violations of Weingarten Rights

Once an employer is found to have violated the Weingarten rights of an employee, it becomes necessary to determine the appropriate remedy for the employer's conduct. The Board seems to agree on a basic analytical outline for determining the appropriate remedy:

Initially we determine whether the General Counsel has made a prima facie showing that a make-whole remedy such as reinstatement, back pay, and, expungement of all disciplinary records is warranted. The General Counsel can make this showing by proving that respondent conducted an investigatory interview in violation of Weingarten and that the employee whose rights were violated was subsequently disciplined for the conduct which was the subject of the unlawful interview.

In the face of such a showing, the burden shifts to the respondent. . . . The respondent must demonstrate that its decision to discipline . . . was not based on information obtained at the unlawful interview. Where the respondent meets its burden, a make-whole remedy will not be ordered.\textsuperscript{141}

While the Board members agree on this general outline, they consistently disagree on the application of the test. In each of three recent cases dealing with the issue of an appropriate remedy, there has been at least a concurring opinion, if

\textsuperscript{141} Kraft Foods, Inc., 251 N.L.R.B. No. 6, 105 L.R.R.M. at 1233.
not a dissent. Member Truesdale has expressed the belief that
the majority of the Board has been applying a per se rule
which permits make-whole remedies, rather than a cease and
desist order, in all cases where an employee's Weingarten
rights have been violated. In turn, Member Truesdale pro-
poses that each case be studied in order to determine if, in
fact, the respondent has relied on the information gathered in
the interview in reaching its decision to discipline.

Member Jenkins has clearly identified himself as one who
believes that "once an employer has disciplined an employee
for conduct which was the subject of an interview conducted
in violation of Weingarten, it becomes virtually impossible to
determine whether the disciplinary decision was based upon
'information' obtained at the unlawful interview." Member
Jenkins continued his analysis by stating that "the only situ-
ation I can conceive where the employer could prove that it did
not rely on 'information' obtained at the unlawful interview in
making the disciplinary decision is when a final . . . decision
to impose discipline was made prior to the interview . . . ."

The debate existing between the members of the Board
may result in a future adoption of a per se rule, the continued
application of a heavy burden on the employer to show an in-
dependent source for its disciplinary decision or the flexible
application of the standard which would allow employers the
opportunity to show an independent source for its disciplinary
decision. The adoption of a per se rule may be precluded, re-
garding employee reinstatement, by section 10(c) of the Act,
since the section provides that "[n]o order of the Board shall
require the reinstatement of any individual as an employee
who has been suspended or discharged, or the payment to him
of any back pay, if such individual was suspended or dis-
charged for cause." Furthermore, the Board majority, in
Kraft Foods, Inc., expressed its unwillingness to adopt a per

142. Texaco, Inc., 251 N.L.R.B. No. 63, 105 L.R.R.M. 1239 (Oct. 6, 1980) (Trues-
dale dissenting).
143. Id. at --, 105 L.R.R.M. at 1235.
144. Kraft Foods, Inc., 251 N.L.R.B. No. 6, 105 L.R.R.M. at 1234 (Jenkins
dissenting).
145. Id. at --, 105 L.R.R.M. at 1235.
Nevertheless, the Board may, in fact, adopt a per se rule by ascribing to the beliefs expressed by Member Jenkins or by making proof of an independent source by an employer an impossible evidentiary task.

IV. Conclusion

The right to representation is now firmly entrenched in labor relations law, but the development of the right and its parameters is still in question. As the Board is able to address the many factual circumstances that may fall within the representation right, further clarity should result. As Professor Brodie noted in a pre-Weingarten article: "[t]hose who rely on the Section 7 analysis are left with the difficult, but not impossible, task of deciding each case of denial on its particular circumstances, gradually establishing landmarks which will guide the employer, the employee, and the union."148

A proper analysis of representation right problems will involve a balancing of interests between the employer, the employee and the union. The necessity of maintaining a smooth continuing relationship between these parties must be recognized. The right should be shaped in a manner which does not overburden the employer with technical difficulties and which, at the same time, does protect the employee in an investigatory interview.

José A. Olivieri

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