

### Employee Rights to Representation at Investigatory Interviews

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For twenty-five years *union* employees have had the right, upon request, to be accompanied by their *union representatives* at employer initiated investigatory interviews that the employee reasonably believed would result in discipline. Named for the landmark United States Supreme Court decision, NLRB v. Weingarten, Inc., 420 U.S. 251 (1975) ("Weingarten"), the Supreme Court announced that Weingarten rights are inherent in the rights of employees to act in concert for their mutual aid and protection as set forth in Section 7 of the National Labor Relations Act ("Act") and to ensure evenhanded treatment of employees. The National Labor Relations Board ("NLRB") has limited the application of *Weingarten* rights to union employees. However, on July 10, 2000, the NLRB abandoned its long-standing limitation on Weingarten rights and extended such rights to non-union employees, in Epilepsy Foundation of Northeast Ohio, 331 NLRB No. 92(7/10/00) ("Epilepsy Foundation").

#### A. The Facts.

In Epilepsy Foundation, two employees, who were not represented by a union, sent a memo to the Director of their project stating that they did not require his supervision. After receiving the memo, the Executive Director instructed both employees to meet with her and the Director, on an individual basis. One employee requested that the other be allowed to accompany him at the meeting. The request was denied, and the employee, expressing his opposition to meeting without his co-worker, refused to attend the meeting. The Executive Director sent the employee home, and the next day terminated him on the ground that his refusal to meet constituted gross insubordination. The General Counsel of the NLRB issued a charge against the employer alleging that its termination of the employee constituted a violation of Section 8(a)(1) of the Act. The case was tried before an Administrative Law Judge, who found no violation because the non-union employee did not have a right to representation at the meeting based on established law. The matter was appealed to the NLRB which overruled its prior decisions and extended the rule enunciated in Weingarten to *union* and *non-union* employees, alike.

#### B. The Rule.

All employers should be aware of the rule set forth in this decision and should consider its effects when interviewing employees. Simply put - employees, even in non-union jobs, have the right to request the presence of a *co-worker* at an investigatory interview that the employee reasonably believes may result in disciplinary action. An employer that refuses to grant such a request and goes forward with the investigatory interview violates Section 8(a)(1) of the Act. An employer that discharges, demotes, or threatens an employee who seeks representation at such an interview, also violates Section 8(a)(1) of the Act and will be subject to "make-whole" remedies such as back pay and reinstatement. Such make-whole remedies, however, are only applied if the discipline was a direct result of exercising *Weingarten* rights. If the employer can demonstrate that the discipline was a result of other misconduct, unrelated to an employee's request for representation, then a make-whole

remedy will not be imposed.

## C. Limits To The Rule.

In establishing the rights of union employees to representation at investigatory interviews, the Court in Weingarten also established limits to those rights. Because the NLRB in Epilepsy Foundation, specifically held that Weingarten rights apply to non-union employees, the accompanying limitations, which are set forth below, also apply.

1. The employee subject to the interview must request the presence of a co-worker representative; the employer does not have an obligation to provide a representative if one has not been requested.
2. The employee subject to the interview must reasonably believe that the investigatory interview will result in disciplinary action. A meeting called by the employer for the purpose of informing the employee of the imposition of discipline already decided, is not an interview subject to Weingarten rights. Moreover, the employee's reasonable belief must be based on "objective standards" upon a reasonable evaluation of "all the circumstances," not the subjective evaluation of the employee. While training meetings and on-the-spot counseling by low level managers do not constitute investigatory interviews subject to Weingarten rights, the NLRB and the courts in this Circuit have held that counseling sessions that constitute a "preliminary step to the imposition of discipline" do trigger the application of Weingarten rights.<sup>1/</sup>
3. If the employee requests a representative, the employer may decline the request, and go forward with the investigation without interviewing the employee.
4. The employer has no duty to bargain with the employee's representative.

## D. The Employer's Options.

An employer faced with a request for co-worker representation has three options: (1) grant the request; (2) forgo the interview; or (3) give the employee the choice of having the interview without representation or not having the interview. All three options have certain risks.

The first option increases the number of people with knowledge of the investigation, and may create problems in particularly sensitive investigations. The second option may expose an employer to a greater risk of liability for wrongful discharge for failing to conduct thorough workplace investigations under California state law as set forth in Cotran v. Rollins-Hudig Hall International, Inc., 17 Cal. 4th 93 (1998). The third option involves a waiver of rights and will only be permissible if the employee knowingly and voluntarily agrees to continue with the interview without representation.

## E. Guidelines For Granting Requests.

### 1. The representative.

The NLRB in Epilepsy Foundation specifically limited the representation of non-union employees to co-workers. Thus, non-union employees do not have the right to legal counsel, union representatives, or other individuals who are not co-workers, to be present at the interview. In addition, as long as another representative is available at the time of the interview, the employer need not postpone an interview because the particular representative requested by the employee is not available. And, the employer need not provide alternate representation for the

employee. However, if the representative selected by the employee is available, then the employer must allow that representative to attend.

## 2. Consultation time.

If the employer has scheduled the interview providing enough time for the employee to meet with his/her representative, then the employer need not allow the employee and representative to consult on company time. However, if the employer insists that the interview be conducted immediately, then the employer must afford the employee and representative the opportunity to meet in private before the interview.

## 3. The role of the representative.

The employer cannot limit the role of the representative to an observer or witness; however, the representative cannot interfere with the employer's ability to conduct the interview. The employer may eject a disruptive representative from the meeting.

This decision constitutes a substantial change in the law and imposes additional duties on non-union employers. Employers would be well served to become familiar with the mandates of the case and train their managers accordingly. The case is currently on further appeal, and it should also be noted that the decision was a split 3-2 vote, with the dissenting members voicing strong objection to the majority's rejection of prior precedent. We will continue to keep you updated on the status of the law. In the meantime, please call us for additional information, or to discuss any specific issues relating to the case.

## Endnotes

1/The courts and the NLRB have also applied *Weingarten* rights to pre-polygraph interviews, administration of polygraph tests and post-polygraph interviews, as well as drug testing, particularly in connection with a broader investigation of misconduct.

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