

Why Giles Should Be Invited to the Party:
“Weingarten Rights” in Non-union Settings
by Terry McCay

Can your client ignore NLRB rules if its workforce is non-union? Not entirely. Many clients (and lawyers) are shocked to learn that some NLRB rules apply to non-union workforces even to office workers. One of these is the rule allowing an employee to be assisted by a co-worker at a disciplinary investigation. If your client ignores this rule, it may find itself faced with an NLRB order to reinstate a discharged employee with back pay. If you have clients with non-union employees, read on!

I. The Non-union Employer Dilemma

You are the shop foreman of the ABC Manufacturing Company, a Louisiana corporation which employs fifty people. Your workforce is not unionized. The factory which you oversee, which manufactures metal garbage cans, has a history of poor housekeeping, which has resulted in three lost time injuries in the past year (two slip and falls resulting in leg injuries, and one back injury, caused by using the wrong tool on an equipment maintenance project because the proper tool was missing). The ABC Manufacturing Company has an employee manual containing a provision about the importance of proper housekeeping and tool maintenance, including a disciplinary provision for violations, and a policy that employees may not use company tools for personal projects.

You assigned two shop employees, Giles and Scott, the task of inventorying the tools in the factory’s tool room to insure that all tools were accounted for and properly

maintained. You have received an anonymous note, allegedly from another shop employee, informing you that Scott may have left work on Friday afternoon with some of the company's impact wrenches. Bobby, another shop employee, was performing an emergency maintenance job on a machine on Saturday, when a wrench slipped resulting in two fractured fingers. In Bobby's accident report, he stated that the accident would not have happened if the necessary impact wrenches had been in the tool room.

First thing Monday morning, you approach Scott and tell him about Bobby's Saturday mishap and the anonymous note you received. Scott informs you that the impact wrenches were missing when he and Giles conducted their Friday tool room inventory. You tell Scott that you want to see him in your office at 10:00 a.m. to discuss this situation in greater detail. Scott agrees to attend, but only if he can bring Giles with him.

Now what? Do you have to allow Giles to attend?

II. Weingarten

a) Genesis of the "Weingarten right"

The search for the answer begins with *N.L.R.B. v. Weingarten*¹, and subsequent decisions of the National Labor Relations Board and federal courts, concerning interpretation of the National Labor Relations Act.² The *Weingarten* case dealt with an employee who allegedly purchased a \$2.98 box of chicken from the store's lunch counter, but only placed \$1.00 in the cash register. Undercover surveillance of the employee for two days by a Weingarten loss prevention "specialist" resulted in no evidence of wrongdoing

by the employee. The employee was subsequently summoned to an interview with the “specialist” and the store manager. Although the employee’s chicken purchase appeared to be consistent with company policy, she had been accepting “free lunches” which appeared to violate the policy of the store where she worked.

Throughout the interview, the employee requested the presence of a union shop steward, which was denied by the store manager. After the interview, the employee reported the details to her shop steward and other union representatives, and the union instituted an unfair labor practice proceeding against Weingarten. The National Labor Relations Board (NLRB) held that Weingarten had committed an unfair labor practice.³ Specifically, the Board interpreted § 7 of the NLRA as providing employees the right to request the presence of a union representative at an investigatory interview that the employee reasonably believed would result in disciplinary action.⁴ The NLRB issued a cease-and-desist order, which Weingarten challenged. The Court of Appeals for the Fifth Circuit rejected the Board’s construction, and denied enforcement of the cease-and-desist order.⁵ The Fifth Circuit recognized that a basic purpose of § 7 is to allow employees to engage in concerted activities for their mutual aid and protection. However, the court found the Board’s interpretation of this section to permit requested representation at an investigatory interview was overbroad.⁶ The U.S. Supreme Court disagreed. Although earlier Board decisions were inconsistent on this issue, the Court reversed the

Fifth Circuit, and held the Board's determination and subsequent cease-and-desist order were enforceable.⁷ Thus, the "Weingarten right" was born.⁸

b) Practical Significance

The *Weingarten* decision is important in signaling the court's deference to the NLRB in its interpretation and enforcement of national labor relations policy through the NLRA. *Weingarten* dealt with unionized employees. A larger question, considering that approximately 90% of private sector employees are not represented by a union,⁹ is whether such non-union workers have "Weingarten rights." The Board itself has not answered this question consistently.

c) *Weingarten's* Progeny

In its initial review of "Weingarten rights" in non-union settings, the Board held that non-union employees have such rights, because the right to a representative comes from Section 7 of the Act, which gives all employees the right to engage in protected concerted activity.¹⁰ Steve Hochman, an employee of Materials Research Corporation's precious metals department, was unhappy with a new work schedule proposed by his employer. Hochman attempted to arrange a group meeting of disgruntled employees with management, which was refused. Hochman's supervisor, Steven Cross, summoned Hochman to a "disciplinary hearing" in his office for Hochman's attempts to organize the group meeting. Although Hochman acquiesced to the meeting, he complained that he had the right to have another employee present. Hochman was given a verbal warning for failing to follow the

company grievance procedure and for organizing the group meeting, a typewritten copy of which was placed in his personnel file. Hochman subsequently filed a complaint with the NLRB, alleging that his employer's failure to allow a co-worker to be present at his meeting with Cross was an unfair labor practice.

The Board agreed, based on its interpretation of Section 7 of the Act, and its finding that unrepresented employees may actually need the protection of the "Weingarten right" more than unionized workers.¹¹ The Board thus concluded that the right enunciated in Weingarten applies equally to represented and unrepresented employees.

Not long thereafter, the Board did an abrupt about-face, and held that non-union employees did not have "Weingarten rights" because these rights flowed, not from Section 7 of the Act, but instead from the union's right to represent employees under Section 9 (29 U.S.C.A. § 159), dealing with representatives and elections.¹² Thus, the Board's decision in *Materials Research Corp.* was explicitly overruled.

Larry Ward was an employee at Sears' non-unionized service center in Oklahoma City, Oklahoma. Ward joined other employees in an attempt to unionize the workforce. He was eventually terminated by Sears, allegedly for his poor work performance, lack of accountability, and unauthorized absences from work. Ward claimed he was terminated because of his union activities, and that he had requested, and been denied that a representative or witness be present at the May 21, 1979 meeting, ending in his discharge.

The Board noted that the Weingarten rule is consistent with established principles of labor management relations in a unionized setting, but, when no union is present, “the imposition of Weingarten rights upon employee interviews wreaks havoc with fundamental provisions of the Act.”¹³ The Board felt it would be illogical to allow employers to act on an individual basis with respect to an employee’s terms and conditions of employment, except for conducting an investigatory interview, in which it would be forced to deal with the employee on a collective basis. The Board could not endorse such a rule, which fundamentally alters the statutory scheme. Thus, non-unionized employees had no Weingarten rights, according to the NLRB in *Sears*.

The Board subsequently eased off its rigid position that non-union workers could not claim the benefits of the “Weingarten right” in *E.I. Dupont & Co.*,¹⁴ in which the Board held that while non-union employees do not have “Weingarten rights,” a finding that they do have such rights would be a permissible construction of the NLRA. Walter Slaughter, an employee with a history of extensive absenteeism, was terminated by Dupont when he refused to meet with his supervisor to discuss Slaughter’s unauthorized posting of an NLRB notice in Dupont’s cafeteria, unless he could have another employee present at the meeting.

The Board agreed with the decision in *Sears*.¹⁵ The “Weingarten right” arises “only when the employee requests the presence of a union representative at the interview and when the employee reasonably believes that the interview may lead to discipline.”¹⁶ While declining to extend “Weingarten rights” to non-union workers, the Board noted that, while

adopting the decision in *Sears*, “the holding in *Materials Research* represented a permissible construction of the Act, but not the only permissible construction.”¹⁷ In so concluding, the Board overruled the finding in *Sears* that the Act compelled a finding that unrepresented employees are not entitled to the presence of a fellow employee during an investigatory interview. The somewhat murky waters of Weingarten thus became murkier.

d) Blast From the Past

Like the “Circle of Life” in Disney’s *The Lion King*, the Board has come full circle¹⁸ in *Epilepsy Foundation of Northeast Ohio*.¹⁹ Two Foundation employees, Arnis Borgs and Ashraful Hasan, prepared a memo to their supervisor, Rick Berger, the Foundation’s director of vocational services, basically informing him that they no longer required Berger’s supervision. A copy of this memo was also sent to the Foundation’s Executive Director, Christine Loehrke. Borgs was an employment specialist and Hasan a transition specialist for a Foundation research project concerning school-to-work transition for teenagers with epilepsy. Borgs and Hasan were critical of Berger’s involvement in this program. Loehrke ordered Borgs to meet with her and Berger, but he refused unless Hasan could be present as well, or he could meet with Loehrke alone. Both requests were denied by Loehrke, and Borgs was terminated the following day for “gross insubordination.” Hasan received a similar directive to meet with Loehrke and Berger and complied. Hasan was reprimanded and eventually terminated for insubordination.

In its analysis, the Board reviewed its inconsistent treatment of “Weingarten rights” for non-union workers. The decision to return to its *Materials Research* holding was necessary because the *Sears* and *Dupont* decisions infringed upon the exercise of Section 7 rights and were inconsistent with Supreme Court precedent and the policies of the NLRA.²⁰ As such, the Board declared “that a return to the rule set forth in *Materials Research*, i.e., that Weingarten rights are applicable in the non-unionized workplace as well as the unionized workplace, is warranted.”²¹ The Board solidified its position by stating: “In sum, we hold today that the rule enunciated in *Weingarten* applies to employees not represented by a union as well as to those that are. We overrule the Board’s decision in *Dupont* and return to the standard set forth in *Materials Research Corp.*”²² The Board then issued a cease and desist order, commanded that Borgs and Hasan be rehired with back pay, and ordered offending material removed from the employees’ personnel files.

In addition to returning to earlier precedent regarding “Weingarten rights” for non-union workers, *Epilepsy Foundation* reinforced that the Board has broad discretionary powers in interpreting the Act, as recognized by the U.S. Supreme Court in the *Weingarten* case. Also, the Board may change precedent when it believes that the precedent is wrong. *Epilepsy Foundation* did not alter the five “contours and limits” of “Weingarten rights,” described by the Supreme Court in the *Weingarten* case:

- 1) the right to representation is grounded in Section 7 of the Act (i.e., the right of employees to act in concert for mutual aid and protection);

- 2) the right arises only if the employee requests representation and the interview is investigatory;
- 3) the employee must reasonably believe that the investigation will result in disciplinary action;
- 4) the employer may refuse the employee's request for representation and forego or halt the investigatory interview, whereby the employee foregoes any benefits that might be derived from the interview; and
- 5) there is no duty of the employer to bargain with the representative.²³

Each of these five "contours and limits" have been the subject of scrutiny and decision by the Board over the years.²⁴ Non-union employers, accounting for approximately 90% of the total employment in the United States, need to recognize that, at least for the present time, *Epilepsy Foundation* is currently the law.²⁵ The remedy for a violation is revocation of the discipline and a back pay order, unless the employer can prove that the information acquired in the interview did not contribute to the decision to discipline.²⁶

III. Applying the Law to the Facts

Returning to our friend Scott and your dilemma as ABC's shop foreman, can you proceed with your planned 10:00 a.m. meeting, or must you allow Giles to attend as well? *Epilepsy Foundation* would appear to tell us that Giles must be permitted to attend, if you plan to proceed with the meeting with Scott. Since *Epilepsy Foundation* returned to the holding of *Materials Research Corp.*, we know that Scott, even as a non-union employee,

has “Weingarten rights.” Since *Weingarten’s* “contours and limits” remain unchanged in the wake of *Epilepsy Foundation*, we must apply these parameters to our situation in an attempt to answer the question:

1. Does Scott have the right?

According to both *Weingarten* and *Epilepsy Foundation*, the answer is yes. Scott is an employee, and since the right is grounded in Section 7 of the Act (i.e., Scott has the right “to act in concert for mutual aid and protection”), his non-union status is (currently) immaterial.

2. Is the meeting “investigatory” and has Scott clearly made a request for representation?

The facts indicate that the answer to both is yes. You clearly intend to “investigate” the missing wrenches, the connection to Bobby’s accident, and Scott’s possible involvement. A Weingarten interview is one in which “the employer engages in any conduct beyond merely informing the employee of a previously made disciplinary decision... thus, were the employer to inform the employee of a disciplinary action and then seek facts or evidence in support of that action, or to attempt to have the employee admit his alleged wrongdoing or to sign a statement to that effect...the employee’s right to...representation would attach.”²⁷ It also appears that Scott has clearly requested Giles’ attendance for the meeting to occur. The request appears unambiguous, i.e., Scott’s statement clearly put you on notice of his desire for representation.

3. Does Scott reasonably believe that the investigation will result in disciplinary action?

Clearly, yes. “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.”²⁸ Our facts indicate that disciplinary action is quite likely: a history of lost time accidents, company policy against “borrowing” tools for personal projects, and possible discipline for violating company policy. It is highly probable that the meeting will end with Scott being disciplined in some way.

4. Must you grant Scott’s request?

It depends. *Weingarten* gives you three options:

- a) Grant the request;
- b) Deny the request and stop the investigatory part of the interview immediately;
or
- c) Give Scott the option of continuing the interview without Giles, or discontinuing the interview altogether and forego whatever benefits would have resulted from the information the employee could have supplied at the interview.

Given our facts, option c) holds little, if any, appeal for Scott. Therefore, if you plan to proceed, you should grant Scott’s request to have Giles present.

5. Must you bargain with Giles?

Clearly, no. *Weingarten* applied to a union setting (“The employer has no duty to bargain with the union representative at an investigatory interview. 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.”²⁹). *Epilepsy Foundation* extends this rationale into non-union settings.

Given the foregoing, if you want to talk to Scott about the situation, given his request and the current state of “Weingarten rights” in non-union environments, better set up another chair for Giles.

¹*N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

²29 U.S.C.A. § 151 *et seq.*

³The NLRB held that Weingarten had violated § 8(a)(1) of the NLRA (29 U.S.C.A. § 158(a)(1)), which states that “[i]t shall be an unfair labor practice for an employer - to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 (Section 7 of the NLRA) of this title.”

⁴Section 7 of the NLRA (29 U.S.C.A. § 157): “Employees shall have the right...to engage in...concerted activities for...mutual aid or protection...”

⁵*NLRB v. J. Weingarten, Inc.*, 485 F.2d 1135 (5th Cir. 1973).

⁶“To extend the scope of the Act’s protection to such preliminary contacts between an employee and his employer would be to apply an overbroad interpretation to Section 7.” *Id.* at 1138.

⁷“The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board... In sum, the Board has reached a fair and reasoned balance upon a question within its special competence, its newly arrived at construction of Section 7 does not exceed the reach of that section, and the Board has adequately explicated the basis of its interpretation.” *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266-267 (1975).

⁸Throughout this paper the phrase “Weingarten right” or “Weingarten rights” will be used to refer to the right of a worker to request a co-worker’s presence during an investigatory interview with their employer, when the requesting employee reasonably believes the investigatory interview may lead to discipline.

⁹Bureau of Labor Statistics, Labor Force Statistics from Current Population Survey: Union Members in 1999 (release date: Jan. 19, 2000).

¹⁰*Materials Research Corp.*, 262 N.L.R.B. 1010 (1982).

¹¹The Board noted that “when confronted with the prospect of an investigatory interview which might result in discipline, the only assistance readily available to an unrepresented employee lies in fellow employees, and an employee attempt to enlist that type of protection is precisely what the Act is designed to safeguard.” *Id.* at 1014.

¹²*Sears, Roebuck & Co.*, 274 N.L.R.B. 230 (1985).

¹³*Id.* at 231.

¹⁴289 N.L.R.B. 627 (1988).

¹⁵“[W]hile recognizing that the statute might be amendable to other interpretations, we decline to return to the rule of *Materials Research*, and we hold that an employee in a non-unionized workplace does not possess a right under Section 7 to insist on the presence of a fellow employee in an investigatory interview by the employer’s representatives, even if the employee reasonably believes that the interview may lead to discipline.” *Id.* at 628.

¹⁶*Id.*

¹⁷*Id.*

¹⁸That is, that all employees, unionized or non-unionized, have “Weingarten rights.” See, *Materials Research Corp.*, 262 N.L.R.B. 1010 (1982).

¹⁹331 N.L.R.B. No. 92 (July 10, 2000); 2000 WL 967066 (N.L.R.B.)

²⁰2000 WL 967066 (N.L.R.B.), p.11 n.8.

²¹*Id.* at p.4.

²²*Id.* at p.6.

²³*N.L.R.B. v. J. Weingarten, Inc.*, 410 U.S. 251, 256-260 (1975).

²⁴For an excellent summary, see Michael J. Soltis and Alexandra M. Gross, *Weingarten Redux: An Employer's Manual*, 51 Lab. L.J. 179 (Winter 2000).

²⁵Epilepsy Foundation of Northeast Ohio filed a petition for review with the U.S. Court of Appeals for the D.C. Circuit on July 27, 2000, and numerous participants have joined as *amicus curiae* between August 25, 2000 and September 22, 2000, several of which have filed briefs as of June 30, 2001.

²⁶*Illinois Bell Tel. Co.*, 251 N.L.R.B. No. 128 (1980).

²⁷*Baton Rouge Water Works*, 246 N.L.R.B. 995, 997 (1979).

²⁸*Brown & Connolly*, 237 N.L.R.B. 271, 286 (1978).

²⁹*Weingarten* at 260.