

management matters

Investigatory Interviews with Non-Union Employees

NLRB Says Bring a Friend

By Jonathan A. Wexler, Esq.

Does an employee in a non-union workplace have the right to be accompanied by a co-worker when being interviewed by his or her employer in connection with a disciplinary matter? In a controversial decision issued in July of this year, the National Labor Relations Board (NLRB) said yes. The case, *Epilepsy Foundation of Northeast Ohio*, may alter the way in which employers conduct investigations and administer disciplinary rules.

Background

In the 1975 case of *NLRB v. Weingarten*, the U.S. Supreme Court held that an employer committed an unfair labor practice by denying the request of an employee suspected of workplace theft for union representation during the course of an investigatory interview. The Supreme Court's holding was premised on the language of section 7 of the National Labor Relations Act, which states that "employees shall have the right to ... engage in ... concerted activities for the purpose of ... mutual aid or protection." The Court commented that "a single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or too inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employee by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview." These rights, termed Weingarten rights, attach when an employee requests representation during an interview relating to an incident that the employee reasonably believes could lead to disciplinary action.

Since *Weingarten*, the NLRB has changed its position more than once on whether Weingarten rights apply to non-union settings. In 1982, the board held in *Materials Research Corp.* that employees that were not union members were nevertheless entitled to the assistance of a fellow employee in the course of a disciplinary interview, basing its decision on the "mutual aid or protection" language of section 7. However, in the 1985 case of *Sears, Roebuck & Co.*, the board overruled *Materials Research Corp.* and decided that section 7 does not confer Weingarten rights where there is no bargaining representative.

Epilepsy Foundation

Two employees of the Epilepsy Foundation, Arnis Borgs and Ashraf Hasan, prepared a memorandum to their boss, Rick Berger, with a copy to the foundation's executive director, Christine Loehrke, in which Borgs and Hasan criticized Berger and stated their opinion that Berger's supervision of them was no longer necessary. Displeased with the memo, Loehrke directed Borgs to meet with her and Berger. Borgs requested that Hasan be present at the meeting. Loehrke denied the request and discharged Borgs for "gross insubordination" as a result of his failure to have met with her without Hasan. Borgs filed an unfair labor practice charge accusing the foundation of violating his rights under section 7.

Although finding that Borgs was discharged for refusing to attend the meeting without Hasan, the administrative law judge held that as a non-union employee, Borgs had no right to bring Hasan to the meeting under the board's then-current precedent. Accordingly, the judge ruled that Borgs' discharge did not violate the act.

On appeal, the NLRB reversed the judge's decision as based on board precedent that was "inconsistent with the rationale articulated in the Supreme Court's *Weingarten* decision and with the purposes of the act." The board again relied on the "mutual aid or protection" language of section 7, which the board said "affords employees the opportunity to act together to address the issue of an employer's practice of imposing unjust punishment on employees." The board stated that this rationale was equally applicable to non-union and union settings.

Lessons

In *Epilepsy Foundation*, the NLRB has given employees that are not represented by a labor union the right to have a co-worker representative present at interviews involving incidents that the employee reasonably believes could result in discipline. The holding applies to all employers that meet the act's jurisdiction standards of "affecting interstate commerce," and the board has asserted jurisdiction over accounting firms without setting a minimum jurisdictional amount (such as, for example, the \$250,000 in revenues often applied to law firms). The holding will cover most employees, with the exception of supervisory employees.

Employers should keep the following in mind in the wake of *Epilepsy Foundation*:

- Employers have no affirmative obligation to inform employees of their Weingarten rights;
- Weingarten rights attach only upon an employee's request;
- In the face of an employee's request to be accompanied at an investigatory interview, an employer has the option

of canceling the interview with the employee in question and resolving the issue in other ways without the employee's input, thus giving the employee the option to waive the Weingarten right to present his or her side of the story;

- Weingarten rights do not allow the employee in question to designate anyone other than a co-worker to join the meeting (i.e., the employee is not permitted to insist on the attendance of a friend, relative, or lawyer);
 - Weingarten rights do not apply to meetings at which discipline is being meted out—only to meetings at which the basis for possible discipline is being investigated;
 - In the union setting, the employee's choice of representative must be honored if that person is available, and if not, the employer may go ahead with the interview by giving the employee a chance to designate an alternative individual (that rule may likely obtain in non-union settings as well);
 - The accompanying employee is permitted to participate in the discussion but may not be harassing or abusive or otherwise unduly interfere with the interview (subject to being ejected).
- This ruling will significantly change interaction between employers and employees. Employers will have to become used to dealing with an additional individual in the context of investigations that had previously been kept strictly between employee and employer. ▀

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