Getting it "right": The everchanging NLRB precedents on coworkers presence at investigatory interviews

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I. INTRODUCTION

In 1973 the National Labor Relations Board (NLRB) issued its *Weingarten* decision, which held that an employer violates Section 8(a)(1) of the National Labor Relations Act (NLRA) when it denies an employee's request for the presence of a union representative at an investigatory interview which the employee reasonably believes might result in disciplinary action. The Board's decision was upheld by the Supreme Court in *NLRB v. Weingarten, Inc.* in 1975. The *Weingarten* right of an employee to request the presence of a coworker at an investigatory interview was extended to non-union workplaces by the Board's 1982 *Material Research Corp.* decision. Three years later, in 1985, the Board reversed itself in *Sears, Roebuck Co.*, holding that *Weingarten* principles do not apply in nonunion settings. In the Board's
year 2000 Epilepsy Foundation of Northeast Ohio decision, it reimposed its Materials Research holding, concluding that unrepresented employees have a right to have a coworker present during investigatory interviews. With major employer interest groups filing an amici curiae brief in support of the employer Epilepsy Foundation’s challenge of the extension of Weingarten rights to nonunion workplaces, the Court of Appeals for the District of Columbia Circuit upheld the Board’s renewed meaning of the statutory language in question stating in part:

“It is a fact of life in NLRB lore that [the meaning of] certain substantive provisions of the NLRA invariably fluctuate with the changing compositions of the Board. Because the Board’s new interpretation is reasonable under the Act, it is entitled to deference.”

And, three years later, with the changing composition of the Board, on June 9, 2004, in a 3-2 decision, the Board reversed itself again in its IBM Corp. decision and ruled that nonunion employees do not have the right to have a coworker present during an investigatory interview.

This article will present the Supreme Court’s Weingarten precedent, and discuss the extent of the rule approved by the Supreme Court in that case. The Board’s IBM Corp. decision will be presented. The administrative decision making process, and the impact of the changing compositions of the Board will be discussed. Finally, the article will consider whether the “right” decision was made by the Board in the IBM Corp. case.

II. THE WEINGARTEN DECISION

In NLRB v. J. Weingarten, Inc., an employee at a Weingarten store who was being questioned by two company officials about reported thefts at the store, asked for but was denied the presence of her union representative at the interview. As a result the union filed an unfair concerted activity as guaranteeing union members and unorganized employees alike the right to have a representative present at investigatory interviews (at 128). On remand in E.I. Dupont, the Board determined that although the Act did not compel its interpretation, nevertheless it was a permissible interpretation of the Act to conclude that the Act did not confer Weingarten rights on nonunionized employees, 289 N.L.R.B. 627,629-630 (1988). Thus the conclusion set forth in Sears Roebuck that Weingarten rights do not apply in nonunion settings continued as a result of the Dupont decision.


6 Epilepsy Foundation of Northeast Ohio v. NLRB, 269 F.36 1095, 1097 (3rd Cir. 2001).


8 420 U.S. 251 (1975).

9 Id. at 254, 255.
labor practice charge with the National Labor Relations Board.\textsuperscript{10} The Board held that the employer had violated the act. However, the Fifth Circuit Court of Appeals refused to enforce the Board’s order which directed the employer to cease and desist from requiring any employee to take part in an investigatory interview without union representation if the employee requests representation and reasonably fears disciplinary action.\textsuperscript{11} The Supreme Court reversed the Court of Appeals’ decision and remanded the case to that court.\textsuperscript{12}

Section 7 of the NLRA states in part, “[e]mployees shall have the right...to engage in concerted activities for the purposes of...mutual aid or protection.”\textsuperscript{13} The Board’s construction of the language was that it created a statutory right in an employee to refuse to submit to an interview which the employee reasonably feared may result in discipline without union representation.\textsuperscript{14} The Board shaped the contours and limits of this statutory right. Accordingly, the right only arises in situations where the employee requests representation. The right to request representation as a condition of participation in an interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action.\textsuperscript{15} Moreover, the exercise of the right may not interfere with legitimate employer perogatives.\textsuperscript{16} And, the employer has no duty to bargain with any union representatives permitted to attend such an investigatory interview. The representative is present to assist the employee and may attempt to clarify facts or suggest other employees who may have knowledge of the event.\textsuperscript{17}

In a 5 to 3 ruling the Supreme Court majority held that the action of the employee in seeking to have the assistance of a union representative at a confrontation with an employer falls within the literal wording of Section 7.\textsuperscript{18} The Court determined that the Board’s holding is a permissible construction of the language “concerted activities for...mutual aid or protection” by the agency charged by Congress with

\begin{enumerate}
\item[12] Weingarten, 420 U.S. at 268.
\item[13] 20 U.S.C. §157 (2000). It provides: “Employees shall have the right to self-organization to form, join or assist in labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.”
\item[14] Weingarten, 420 U.S. at 256.
\item[15] Id. at 257.
\item[16] Id. at 258.
\item[17] Id. at 260.
\item[18] Id.
\end{enumerate}
enforcement of the Act.\textsuperscript{19} Moreover, the Court stated that it is the responsibility of the Board not the courts to adapt the Act to changing patterns of industrial life; and the Board’s special competence in this field is the justification for the deference accorded its determination.\textsuperscript{20} Thus the employer violated Section 8(a)(1) of the NLRA because it interfered with, restrained and coerced the individual rights of the employee protected by Section 7 “to engage in...concerted activities for the purpose of...mutual aid or protection...” when it denied her request for the presence of her union representative at the investigatory interview that the employee reasonably believed would result in disciplinary action.\textsuperscript{21} In Mr. Justice Powell’s dissent, joined by Mr. Justice Stewart, he concluded:

\begin{quote}
[\textit{U}nion representation at investigatory interviews is a matter that Congress left to the bargaining process. Even after affording appropriate deference to the Board’s meandering interpretation of the Act, I conclude that the right announced today is not among those that Congress intended to protect in §7. The type of personalized interview with which we are here concerned is simply not “concerted activity” within the meaning of the Act.]\textsuperscript{22}
\end{quote}

III. THE IBM CORP. DECISION

In \textit{IBM Corporation} the 3-2 Board majority held that employees who work in a nonunion setting are not entitled under Section 7 of the NLRA to have a coworker present at an investigatory interview with their employers when the affected employees reasonably believe that the interview might result in discipline.\textsuperscript{23} The Board thus overruled the \textit{Epilepsy Foundation of Northeast Ohio} decision which gave employees in nonunion workforces the right to have a co-worker present during an investigatory interview.\textsuperscript{24}

IBM Corporation’s facility at Research Triangle Park, North Carolina is a nonunion facility. In response to allegations of harassment contained in a letter from a former employee, an IBM manager interviewed three employees individually in October of 2001, after denying each employee’s request to have a counselor present during the

\textsuperscript{19} Id.
\textsuperscript{20} Id. at 266.
\textsuperscript{21} Id. at 257.
\textsuperscript{22} Id. at 277.
\textsuperscript{23} 174 L.R.R.M. 1537 (BNA 2004). Chairman Battista and Member Meisburg, wrote the majority opinion with member Schaumber separately concurring. Members Liebman and Walsh wrote a dissenting opinion.
\textsuperscript{24} Id. at 1544.
interview. All three were discharged approximately a month after the interviews. An administrative law judge, applying the Epilepsy Foundation precedent found that IBM violated Section 8(a)(1) of the Act by denying each employee’s request for the presence of a coworker. A Board majority reversed the Epilepsy precedent in IBM.

The majority set forth its position that the reexamination of Epilepsy Foundation is a proper exercise of the Board’s adjudicative authority, as was both anticipated and approved by the Supreme Court in Weingarten. It pointed out that the Weingarten Court observed that it was in the nature of administrative decision-making to do so, quoting the Court as follows:

“Cumulative experience begets understanding and insight by which judgments... are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process.”

Because there is a Board precedent presenting two permissible interpretations of the statute, the decision as to which approach to follow is a matter of policy for the Board to decide in its discretion. The Board majority concluded that policy considerations support the denial of the Weingarten right in the nonunionized workplace. It pointed out that coworkers do not represent the interests of the entire work force as would a union representative; and it pointed out that coworkers cannot redress the imbalance of power between employers and employees. Moreover, the Board majority stated that coworkers do not have the same skills as a union representative. Finally, the Board majority states that the presence of a coworker may compromise the confidentiality of information developed at the interview. The Board majority summarized its position as follows:

Our reexamination of Epilepsy Foundation leads us to conclude that the policy considerations supporting that decision do not warrant, particularly at this time, adherence to the holding in Epilepsy

25 Id. at 1538.
26 Id.
27 Id.
28 Id. at 1539.
29 Id. at 1540, quoting NLRB v. Weingarten, Inc. 420 U.S. 251, at 265-266 (1978).
30 Id. at 1539.
31 Id. at 1543.
32 Id. at 1541.
33 Id.
34 Id. at 1542.
35 Id.
Foundation. In recent years there have been many changes in the workplace environment, including ever-increasing requirements to conduct workplace investigations, as well as new security concerns raised by incidents of national and workplace violence.

Our consideration of these features of the contemporary workplace leads us to conclude that an employer must be allowed to conduct its required investigations in a thorough, sensitive, and confidential manner. This can best be accomplished by permitting an employer in a nonunion setting to investigate an employee without the presence of a coworker.\textsuperscript{36}

Member Schaumber joined the majority opinion’s finding that policy considerations support the denial of the \textit{Weingarten} right to the non-unionized workplace.\textsuperscript{37} He believes that the \textit{Weingarten} right is unique to employees represented by a Section 9(a) bargaining representative.\textsuperscript{38}

In their dissent, Members Liebman and Walsh wrote “Today, American workers without unions, the overwhelming majority of employees, are stripped of a right integral to workplace democracy.”\textsuperscript{39} The dissent refers to the following language of Section 7 of the NLRA, “the right to...engage in...concerted activities for the purpose of...mutual aid or protection” and states that it is hard to imagine an act more basic to “mutual aid or mutual protection” than an employee turning to a coworker for help when faced with an interview that might end up with the firing of the employee.\textsuperscript{40} Citing the District of Columbia Court of Appeals decision approving the Board’s \textit{Epilepsy Foundation} decision, the dissent points out that the presence of a coworker gives an employee a potential witness, advisor, and advocate in an adversarial situation, and ideally militates against imposition of unjust discipline by the employer.”\textsuperscript{41} They conclude:

“\textit{[I]t is our colleagues who are taking steps backwards. They have neither demonstrated that Epilepsy Foundation is contrary to the Act, nor offered compelling policy reasons for failing to follow precedent. They have overruled a sound decision not because they must, and not because they should, but because they can.}”\textsuperscript{42}

\textsuperscript{36} \textit{Id.} at 1540.
\textsuperscript{37} \textit{Id.} at 1545.
\textsuperscript{38} \textit{Id.} at 1554.
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} \textit{Id.} at 1555.
\textsuperscript{41} \textit{Id.} at 1559, quoting \textit{Epilepsy Foundation v. NLRB}, 268 F.3d 1095, 1100 (D.C. Cir. 2001).
\textsuperscript{42} \textit{Id.} at 1560.
IV. THE ADMINISTRATIVE PROCESS, LEGAL PARAMETERS AND THE CHANGING BOARD COMPOSITION

The Board majority in *IBM* asserted that its re-examination of the Board's *Epilepsy Foundation* precedent—as opposed to simply following the precedent—was a proper exercise of the Board's adjudicative process.\(^43\) It relied on the Supreme Court's guidance in the *Weingarten* decision "that the constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process."\(^44\) In Judge Edward's opinion on behalf of the District of Columbia Circuit Court of Appeals upholding the Board's *Epilepsy Foundation* decision, this renowned labor law scholar and jurist stated that "it is a fact of life in NLRB lore that certain substantive provisions of the NLRA invariably fluctuate with the changing compositions of the Board."\(^45\)

The doctrine of *stare decisis*, the doctrine of following precedents in statutory interpretation by the courts, has been the subject of much discussion by preeminent Supreme Court justices. For example Justice Brandeis said in his dissenting opinion in *Burnet v. Coronado Oil & Gas Co.*:

"*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right."\(^46\)

In the ordinary case, considerations of certainty and equal treatment of similarly situated litigants will provide a strong incentive to adhere to precedent.\(^47\) However Justice Frankfurter wrote for the court in *Helvering v. Hallock*:

"*Stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."\(^48\)

As opposed to the judicial process with its general acceptance of the doctrine of *stare decisis* and its narrow exceptions, the administrative...
process relevant to labor relations law has a tradition of some fluctuation in the interpretation of substantive provisions of the NLRA with the changing compositions of the NLRB, as pointed out by Judge Edwards.\footnote{The five members of the NLRB are appointed by the President with the advice of and consent of the Senate, and serve five-year staggered terms. The President designates one member chairperson. 29 U.S.C. §153(a)(2000).} The \textit{Epilepsy Foundation} decision was rendered by a Clinton-era Board on July 10, 2000. The decision was overturned by the \textit{IBM Corp.} decision of the Bush-era Board on June 9, 2004.

The \textit{Epilepsy Foundation} decision which for the first time in 18 years extended the right to have a coworker present during an investigatory interview to all unrepresented employees in the private sector was considered a major adverse decision by American business interest groups.\footnote{Major business groups filed \textit{amicus curiae} briefs in support of the employer’s petition for review of the \textit{Epilepsy Foundation} decision before the U.S. Court of Appeals for the D.C. Circuit in 2001, including the Chamber of Commerce of the United States, the National Association of Manufacturers, the Associated Builders and Contractors, Inc., the International Mass Retail Association and the Florida Hospital Association. The AFL-CIO filed an \textit{amicus curiae} brief in support of the Board’s application for enforcement of the decision against the employer. It is interesting to note that in the \textit{IBM Corp.} case the Board granted the joint request of LPA, Inc., The Equal Employment Advisory Council, Associated Builders and Contractors, the Chamber of Commerce of the United States, the Society for Human Resource Management, the International Mass Retail Association, and the National Association of Manufacturers, to file an \textit{amicus} brief on behalf of the employer. The AFL-CIO did not file a brief in this case. However, Wal-Mart Stores, Inc. filed a response in support of the amici briefs because an Administrative Law Judge, following the Board’s \textit{Epilepsy Foundation} decision had found that Wal-Mart had unlawfully discharged an unrepresented employee because he refused to participate in an investigatory interview, which he reasonably believed might result in discipline against him, unless Wal-Mart granted his request for his own witness. Wal-Mart Stores, Inc. and UFCWIU Local 343, 343 N.L.R.B. No. 127 (Dec. 16, 2004).

As a result of the \textit{IBM Corp.} decision the only way unrepresented employees can obtain the Section 7 right to a coworker witness at an investigatory interview is to vote for a union in a representation election. As set forth previously the AFL-CIO did not submit an \textit{amicus curiae} brief to the \textit{IBM Corp.} Board. It could be argued that more groups of unrepresented employees would join unions under IBM Corp. than Epilepsy Foundation because it would be the only way to obtain full Section 7 rights.} The \textit{IBM Corp.} decision of the Bush-era Board on June 9, 2004.

The \textit{Epilepsy Foundation} decision which for the first time in 18 years extended the right to have a coworker present during an investigatory interview to all unrepresented employees in the private sector was considered a major adverse decision by American business interest groups.\footnote{In 2003 8.2 percent of private-sector employees were unionized. See Bureau of Labor Statistics, “Union Members in 2003” News Release USD L 04-53 (Jan. 21, 2004). The definition of employee under the NLRA is set forth in 29 U.S.C. §152(3)(2000).} That is, while less than 10% of private sector employees are unionized, only these employees had the protection of \textit{Weingarten} rights. Under \textit{Epilepsy} all private sector individuals meeting the broad statutory definition of "employee" were entitled to these rights.\footnote{In 2003 8.2 percent of private-sector employees were unionized. See Bureau of Labor Statistics, “Union Members in 2003” News Release USD L 04-53 (Jan. 21, 2004). The definition of employee under the NLRA is set forth in 29 U.S.C. §152(3)(2000).}
and the constant process of trial and error. Moreover, through the presidential appointment powers there can be an ever-changing composition of the Board. While a Board majority cannot create under the guise of “interpretation” a meaning for the Act that is unsustainable in order to achieve a desired result, the Board has the primary responsibility for applying the provisions of the Act to the complexities of industrial life, and as long as its interpretation is permissible, courts will defer to the expertise of the Board.

The IBM Corp. Board’s interpretation of the Act is permissible, but not “right” according to the dissent. The dissent states that the majority overruled the Epilepsy decision not because they must or should, but simply “because they can”. The IBM Corp. decision is well within the norms of the administrative process. The Board could legally do what it did do.

V. IS THE IBM CORP. DECISION “RIGHT”?

The Board decided that policy considerations support its decision to deny unrepresented employees, who make up over ninety percent of all non-management workers employed by the private sector in the United States, the right to have a coworker present during an investigatory interview that could lead to discipline. The policy considerations were that coworkers do not represent the interest of the entire work force as would a union representative; coworkers cannot redress the imbalance of power between employers and employees; coworkers do

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52 In Third Division Award No. 22431 (Twomey) of the National Railroad Adjustment Board, the Brotherhood of Railway, Airline and Steamship Clerks (BRAC) contended that under the Supreme Court’s Weingarten precedent a represented employee was wrongfully disciplined for refusing to stay at in investigatory interview without the presence of a union representative. The Board ruled since Weingarten was based on construction of Section 7 of the NLRA providing employees the right to engage in “... concerted activities for... mutual aid or protection...” and the Railway Labor Act had no comparable statutory language, then the Board was compelled to deny the claim. That is, the Board had no right to create language that was not present in the statute to provide a result that the Board believed to be just.

53 See Slaughter v. NLRB, 794 F.2d 120, at 124 and 128, (3rd Cir. 1986).

54 IBM Corp., 174 L.R.R.M. at 1560.

55 Id.

56 In a January 10, 2005 interview Chairman Battista expressed the view of wanting labor law “to be stable, predictable and certain,” but that the NLRB is an administrative agency that interprets the law and makes labor policy. He expressed his view that there should be changed circumstances to justify overruling precedent, but that he is more willing to overturn precedent that is short in duration and that itself reversed a longer term precedent that was wrongly decided. S. J. McGoldrick, “Labor Outlook 2005”, 11 DLR S-13 (January 18, 2005).

57 IBM Corp., 174 L.R.R.M. at 1541.

58 Id.
not have the same skills as union representatives; and the presence of a coworker may compromise the confidentiality of information divulged at the interview.

Section 7 of the NLRA provides in part that employees shall have the right “to engage in...concerted activities for the purpose of... mutual aid or protection.” Unionized workers have the right to a representative at an investigatory interview under the literal meaning of the language quoted above. The plain language of Section 7 does not limit coverage to “unionized employees” nor does it turn on the skills or motives of the employee’s representative. Issues of confidentiality are the very same for the coworker representative as a union representative. The Board carefully shaped the contours and limits of the statutory Section 7 rights enunciated in Weingarten. The employer can end the interview at any time at its discretion. It need not bargain with the representative permitted to attend the interview. It ordinarily will refuse disclosure and discussion of medical records, if relevant, in the presence of a representative. The Weingarten representative is present to assist the employee and may attempt to clarify facts or suggest other employees who may have knowledge of the event. The Board’s policy reasons simply do not make out a compelling case for refusing to allow nonunion workers the right to a coworker witness or representative at an investigatory interview.

Ordinarily a coworker witness is just that, a witness. He or she can listen to what is said, and if need be, confirm or deny statements or discussions made at the interview at any subsequent proceeding. The fact that a coworker, in good standing, is present gives the interview process an element of fairness. The employer is nevertheless in charge, with the power to terminate the interview and continue its investigation without the presence of the employee, as it sees fit. The transparency of simply having a coworker witness may result in the avoidance of unjust discipline that may occur when two or more management personnel team up against an individual employee in a private interview unwatched by an observer. Indeed, if justifiable discipline is administered subsequent to an interview where a coworker witness is present, the coworker may well recognize the appropriateness of the discipline and be an internal and credible voice supportive of management. If, on the other hand, management teams conduct investigatory interviews in private and disciplined employees feel unfairly treated, morale is

59 Id. at 1542.
60 Id.
61 Weingarten, 420 U.S. at 257.
62 IBM Corp. 174 L.R.R.M. at 1558.
63 Weingarten, 420 U.S. at 260.
adversely affected and there may be sufficient suspicion and momentum in the workplace to seek union representation in order to attain the "mutual aid or protection" promised in Section 7 of the NLRA.  

VI. CONCLUSION

The IBM Corp. decision will stand until the changing composition of the Board, aligned with an appropriate fact pattern illustrative of the complexities of the application of Section 7 rights to the unrepresented workplace, results in a reexamination of the extension of rights to the nonunion workplace. Congressional action to balance or adjust labor law reform issues has not been a viable option for either management or labor.

64 An instructive, real life fact pattern can be found in the administrative law judge's decision to the Board's Wal-Mart Stores, Inc. and UFCWIU, Local 343 decision, 343 N.L.R.B. No. 127 (Dec. 16, 2004). The administrative law judge found that Wal-Mart had unlawfully discharged an unrepresented employee because he refused to participate in an investigatory interview which he reasonably believed might result in discipline unless Wal-Mart granted his request for his own witness. Because the judge's findings were based on Epilepsy Foundation which was subsequently overruled by IBM, the judge's ruling was overturned and the employer could lawfully deny the employee's request for a witness and could lawfully require that he continue the investigatory interview without the presence of his requested witness. Co-manager Manderson waited for the employee in question to report to work, and accompanied by an assistant manager and with, at Manderson's request, a police officer standing nearby, Manderson asked the employee to follow him to his office. The employee responded that he was not going anywhere to meet with Manderson unless he had a witness present to which the manager directed that he could not have a witness. The refusal to participate in the investigatory interview without the presence of his own witness constituted a factor in Wal-Mart's decision to discharge the employee.