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The Right to Effective Union Representation at Disciplinary Interviews

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THE RIGHT TO EFFECTIVE UNION
REPRESENTATION AT DISCIPLINARY
INTERVIEWS

I. INTRODUCTION

A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview.¹

In NLRB v. J. Weingarten, Inc.² and International Ladies Garment Workers Union, Upper South Department v. Quality Manufacturing Co.³ the United States Supreme Court upheld the National Labor Relations Board’s (NLRB or Board) determination that section 7⁴ of the National Labor Relations Act⁵ (NLRA or Act) gives an employee the right to have a union representative present at an investigatory interview which the employee reasonably believes might result in disciplinary action. The Court found that “the Board’s holding was a permissible construction of ‘concerted activities for . . . mutual aid or protection’”⁶ under section 7 because the employee had engaged in concerted activity by seeking the assistance of another member of the bargaining unit to aid in

¹ 1982 by Steven J. Barth.
4. Employees shall have the right to self-organization, to form, join or assist 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 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.
6. 420 U.S. at 260 (elision in original).
the protection of her employment interest. Accordingly, an employer commits an unfair labor practice in violation of section 8(a)(1) of the Act when it denies an employee's request for union representation at such an interview.

Subsequent decisions by the NLRB have expanded the scope of Weingarten protections. For example, the Board held that an employee has a right to consult with his representative prior to a disciplinary interview, that he is entitled to representation at meetings where the employer merely imposes discipline, and that the proper remedy for violations of his rights is reinstatement with back pay (a make-whole remedy). One commentator claims that some decisions have even "extended the Weingarten doctrine to situations arguably not within the contemplation of the Supreme Court." Former Board Member Peter Walther criticized those decisions as establishing "a trend which goes beyond the teachings of the Supreme Court, ignores the realities [of] private industry, and . . . undermines the concept of industrial harmony which is at the heart of the National Labor Relations Act."

Various United States courts of appeals have disagreed with the Board's interpretation of Weingarten and have denied enforcement of Board orders. It is the Board's policy to adhere to established Board precedent which the Supreme Court has not reversed, regardless of contrary decisions by the


13. Under NLRA §10(e) (codified at 29 U.S.C. § 160(e) (1976)) the Board has the power to petition the court of appeals for the circuit wherein the unfair labor practice occurred or wherein the employer resides or transacts business for the enforcement of its order.
circuit. Consequently, the Board has instituted proceedings charging an employer with a violation of an employee's Weingarten rights, tried the case, found the employer in violation of the NLRA and ordered appropriate relief, only to have a court of appeals refuse to enforce the Board's order. This conflict between the Board and the courts will probably continue until the Supreme Court further defines the nature and extent of an employee's rights.

There is evidence that the Board is willing to modify its position. With regard to two of the more controversial issues, the appropriate remedy for violations and the nature of the interview which will give rise to Weingarten rights, the Board has reevaluated its position and adopted a less expansive interpretation of Weingarten. On other disputed issues, such as the right to pre-interview consultation, the Board has reaffirmed its position, thereby perpetuating its disagreement with the courts.

This Comment explores what the Board has called the "complex scheme of Weingarten" with particular emphasis on the issues which are unresolved by the Board and the courts. The Comment examines the development of the representation doctrine and discusses the scope of the Supreme Court's opinions in Weingarten and Quality Manufacturing. Finally, although it has not been articulated by either the Board or the courts, the Comment concludes that a right to effective representation at disciplinary interviews exists. In reaching this conclusion the Comment identifies and analyzes six elements of the right to effective representation: (1) the right to pre-interview consultation, (2) the requirement that an employee request representation, (3) waiver of the right, (4) selection of the representative, (5) the proper role of the

14. Los Angeles New Hospital, 244 N.L.R.B. 960, 966 n.4 (1979) (citing Iowa Beef Packers, Inc., 144 N.L.R.B. 615, 616 (1965)).
15. See, e.g., notes 8 & 9 supra.
18. Pac. Gas & Elec. Co., 253 N.L.R.B. 1143, 1144 (1981). As one commentator stated: "It is unfortunately not easy to introduce the unfamiliar reader to the complexities of Weingarten, for it is but the last act in a drama which has been running for years, with the Board, the courts of appeals, and many unions and employers in the cast." Brousseau, Toward a Theory of Rights for the Employment Relation, 56 Wash. L. Rev. 1, 3-4 (1980).
representative, and (6) the remedy for a violation of the right.

II. DEVELOPMENT OF THE DOCTRINE

A. Early Decisions

The early treatment of the issue of whether the NLRA provided employees with a right to representation during an investigation was inconsistent and equivocal. The issue was first addressed in 1945 in Ross Gear & Tool Co. There the Board held that the employer committed an unfair labor practice by denying an employee's request for a union representative. The Board's reasoning, however, was unsatisfactory because it relied primarily on the fact that the employee was being disciplined for her union activities (she was called to the meeting partly in her capacity as a member of the union bargaining committee) rather than relying on a section 7 right to representation. The Seventh Circuit denied enforcement of the decision on the grounds that insubordination would be encouraged if employees could refuse to attend meetings unless their union representative was present.

The Board did not address the issue again for almost twenty years. The General Counsel for the NLRB even refused to issue complaints on the matter between 1955 and 1962. In 1964 the Board rejected the doctrine of a right to union representation at disciplinary meetings, only to reverse itself three years later in Texaco, Inc., Houston Producing Division. In Texaco the Board based its decision on a violation of section 8(a)(5) which makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the pro-

19. 63 N.L.R.B. 1012 (1945).
20. Id. at 1033-34.
23. Dobbs Houses, Inc., 145 N.L.R.B. 1565, 1571 (1964). The Board affirmed without comment a Trial Examiner's (now Administrative Law Judge) decision dismissing the complaint. The Trial Examiner distinguished Ross Gear on the grounds that the subject of the investigation in Ross Gear was protected union activity. Id. See also Comment, Union Presence in Disciplinary Meetings, 41 U. Chi. L. Rev. 329, 329 n.2 (1974) [hereinafter cited as Union Presence].
24. 168 N.L.R.B. 361 (1967), enforcement denied, 408 F.2d 142 (5th Cir. 1969).
visions of section 9(a)." The Board drew a distinction between "investigatory" interviews (meetings where the employer is merely gathering facts) and "disciplinary" hearings (meetings where the employer imposes discipline). The right to representation did not apply in the former situation, but did in the latter. The Board reasoned that a disciplinary action involves a change in the terms or conditions of employment and therefore the employer must consult with the employee's collective bargaining representative. Subsequent Board decisions attempting to distinguish between investigatory and disciplinary interviews failed to provide an adequate standard; the result was uncertainty and confusion.

B. Section 7 as the Basis for the Right to Representation

In three cases decided in 1972 and 1973 the Board abandoned the Texaco analysis and adopted section 7 as the statutory foundation for the right to union presence at disciplinary meetings. In rejecting the breach of the duty to bargain under section 9(a) as the basis for the right, the Board relied on section 7's guarantee of the right of employees to act in concert

25. 29 U.S.C. § 158(a)(5) (1976). Section 9(a) provides in relevant part: Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

26. In Baton Rouge Water Works, 246 N.L.R.B. 995 (1979), the Board took the opposite view, holding that investigatory interviews are subject to Weingarten rights, but meetings where an employer merely announces a predetermined decision to impose discipline are not.

27. This rationale has been criticized by the Supreme Court and by commentators. See NLRB v. J. Weingarten, Inc., 420 U.S. at 271 n.3 (Powell, J., dissenting); Union Presence, supra note 23, at 330-32.


For a discussion of the inadequacy of the standard, see Union Presence, supra note 23, at 330-32.

for mutual aid and protection. In each of the three cases the Board found that the employer committed an unfair labor practice in violation of section 8(a)(1) by interfering with, restraining, or coercing employees in the exercise of their section 7 rights by denying them union representation at disciplinary interviews. The rationale for the Board's conclusion was that the employee had engaged in concerted activity by seeking the assistance of another member of the bargaining unit to aid in the protection of the employee's employment interest.

The Board's decisions were not warmly received by the courts of appeals. Three different courts of appeals reviewed the Board's orders; all three denied enforcement. The Fourth Circuit based its opinion on the fact that the Board had established a new right without clearly presenting the statutory grounds for that right. The Fifth Circuit held that the Board had misinterpreted the NLRA by adopting an overbroad interpretation of section 7. Both the Fourth and Fifth Circuits held that the meetings involved therein were investigatory, not disciplinary, and were therefore not subject to protection under the Board's previous standard.

The Seventh Circuit was more direct in its criticism, stating that the right to representation was not a concerted activity under a "fair interpretation" of either the broad purpose or the language of section 7. The court declared that the basic purpose of section 7 was to protect union activity for the purpose of applying "economic pressure against their employers in appropriate situations." It found that concerted economic pressure was inappropriate as an element of an investigatory process, because such concerted activity went beyond the scope of mere employee self-organization. Similarly, the

30. See note 4 supra.
31. Mobil Oil, 196 N.L.R.B. at 1052.
32. NLRB v. Quality Mfg. Co., 481 F.2d 1018 (4th Cir. 1973), denying enforcement in pertinent part; NLRB v. J. Weingarten, Inc., 485 F.2d 1135 (5th Cir. 1973); Mobil Oil Corp. v. NLRB, 482 F.2d 842 (7th Cir. 1973).
34. NLRB v. J. Weingarten, Inc., 485 F.2d at 1138. The court also found that the Board's construction of § 7 was contrary to its prior construction and was an impermissible change.
36. Mobil Oil Corp. v. NLRB, 482 F.2d at 847.
37. Id. at 846-47.
38. "In our opinion, economic pressure may properly be applied to compel em-
court found nothing in the text of section 7 indicating that a right to representation should exist. The NLRB petitioned the United States Supreme Court following this unanimous rejection by the courts of appeals.

III. THE SUPREME COURT'S WEINGARTEN AND QUALITY MANUFACTURING CO. OPINIONS

The United States Supreme Court granted certiorari in NLRB v. J. Weingarten, Inc. and International Ladies Garment Workers Union v. Quality Manufacturing Co. and reversed the circuit courts' decisions. The factual situations in those cases are illustrative of cases concerning employee requests for representation at disciplinary interviews. From that standpoint it is useful to examine those facts in order to better comprehend and evaluate the significance of the rights conferred by the Supreme Court.

A. The Facts

Leura Collins was employed at J. Weingarten, Inc., a Texas retail store chain. She had previously worked at the lunch counter in Store No. 2 of the chain for nine years before transferring in 1970 to the "lobby food operation" at Store No. 98. In June of 1972 the company sent a "loss prevention specialist" to investigate surreptitiously a complaint that Collins was taking money from her cash register. After two days of covert surveillance the specialist disclosed his presence to the store manager and reported that he had observed no dishonest activity. The manager then told the specialist that he had received a complaint from another employee that Collins had purchased a box of chicken that sold for $2.98 and had placed only $1.00 in the cash register. The manager and the security specialist then interrogated Collins regarding the incident. Several times during the interview Collins asked that some union representative be present, but her requests were refused. Collins admitted that she had purchased some chick-

en and other food which she donated to her church for a church dinner. She explained that she had taken only $1.00 worth of chicken but had to put the chicken in the larger $2.98-size box because the store was out of the smaller dollar-size boxes. An immediate investigation by the security specialist confirmed her statement. When the specialist apologized for inconveniencing her, Collins burst into tears and claimed that the only thing she had ever received from the store without paying for it was her "free lunch."

This remark caused the manager and the specialist to continue the interview, because they believed that although there was a free lunch policy at stores with lunch counters, there was no such policy at Store No. 98 because it was a "lobby operation." Collins again requested union representation. Again her request was denied and the interview continued. No disciplinary action was taken, however, when it was discovered that most employees at Store No. 98, including the department manager, took free lunches.

Contrary to the store manager's request Collins reported the incident to her union shop steward. The union filed unfair labor practice charges with the NLRB, which led to the Board's finding of a violation of section 8(a)(1) and the subsequent decision by the Fifth Circuit denying enforcement of the Board's order.

The companion case, Quality Manufacturing Co., involved a similar denial of union representation by the employer. There, however, the employer discharged the employee requesting representation, her shop chairwoman, and the shop steward. Catherine King, the employee being interviewed, was discharged for refusing to attend the interview unaccompanied by a representative; Delia Mulford, the shop chairwoman, was discharged for her persistence in seeking to represent King at the interview; Martha Cochran, the shop steward, was discharged for filing grievances on behalf of the other two.42 The employer was therefore charged with and found in violation of sections 8(a)(1) and 8(a)(3).43 The Fourth Circuit refused to enforce the Board's order.44

42. 420 U.S. at 277-78.
43. Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment, or to encourage or discourage membership in a labor organization.
44. 481 F.2d 1018.
B. The Rationale for the Court's Opinions

The Court gave three reasons for reversing the Fourth and Fifth Circuits and holding that employees have a right to union representation at disciplinary interviews. First, the right was warranted by a proper interpretation of the NLRA. Contrary to the courts of appeals, the Supreme Court declared that the Board's holding that "employees shall have the right . . . to engage in . . . concerted activities for mutual aid or protection" was a permissible construction of the wording of section 7. The Court found that the action of seeking assistance at an employer confrontation falls within the literal wording of that section despite the fact that only an individual employee would have an immediate stake in the outcome of the meeting. In the Court's opinion, the presence of the union representative would serve to assure other members of the bargaining unit that they could also have union representation if they were called into a similar interview.

Second, the right to representation effectuates the purposes of the NLRA. The Court found that a primary goal of the Act is to protect self-organization for mutual aid or protection; to achieve that goal the NLRA "is designed to eliminate the 'inequality of bargaining power between employees . . . and employers.'" Such inequality would be perpetuated if employees were required to attend investigatory interviews alone.

Third, there are practical reasons for upholding such a requirement. The union representative could help clarify the issues, elicit facts and assist employees who, because of the circumstances, may be too fearful or inarticulate to represent themselves accurately.

45. 420 U.S. at 260-61.
46. Id. at 260 (elision in original).
47. Id.
48. The Court also noted that the union representative would be protecting the interests of the entire bargaining unit by making certain that the employer did not impose punishment unjustly. Id. at 260-61 (citing Union Presence, supra note 23).
49. 420 U.S. at 262 (quoting § 1 of the NLRA, 29 U.S.C. § 151 (1935)) (elision in original).
50. 420 U.S. at 262.
51. Id. at 262-63 (citing Independent Lock Co., 30 Lab. Arb. 744, 746 (1958), and Caterpillar Tractor Co., 44 Lab. Arb. 647, 651 (1965)). See also Union Presence, supra note 23, at 344 which states:
   Notwithstanding the apprehensions of employers, union representa-
C. Limits on the Right to Union Representation

The Board and the Supreme Court realized that an employer may have legitimate concerns regarding union representation at investigatory interviews. Primarily, employers fear that requiring representation would disrupt work and obstruct the fact-finding process of the interviews. Accordingly, the Court emphasized four standards that the Board had formulated in its Mobil Oil Corp. and Quality Manufacturing Co. opinions limiting the right to representation.

First, the employee must request representation. If the employee prefers, he may attend the interview unaccompanied by a representative.

Second, the right to representation attaches only when the employee reasonably believes discipline may result from the interview. The Court quoted from the Board’s decision in Quality Manufacturing Co. that the reasonableness of the

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...union representation could guarantee a better understanding of the infraction charged, and early, informal consideration of the merits of possible grievances might reduce the costs that the employer must bear in formalized grievance procedures. (Footnotes omitted.)


Employers insist that union presence at investigatory interviews results in disruption of operations and challenges their authority. Indeed, employers have a significant interest in preserving their power to investigate working conditions or job performance absent union interference. An employer would not desire a union representative who perceived his role as counsel in a criminal case. Employers fear situations in which the union representative instructs the employee how to respond. These fears may be compounded by the employer’s interest in avoiding unnecessary conferences resulting in disciplinary delays.

Id. at 659. See also Union Presence, supra note 23, at 344.

53. 196 N.L.R.B. at 1054.
54. 420 U.S. at 256-60.
55. Id. at 257.
56. The Court uses both “may,” 420 U.S. at 257, and “will,” id. at 258, in speaking of the reasonable belief of discipline being imposed. The logic of the Court’s opinion and subsequent decisions by the NLRB indicate that “may” is the proper construction.
employee's belief is to be measured objectively in light of all the circumstances of the case.\textsuperscript{57} The purpose of this limitation, as stated by the Board, was to exclude ordinary shop-floor conversations concerning such matters as training or correction of work techniques.\textsuperscript{58}

Third, the exercise of the right may not interfere with legitimate employer prerogatives. Although the employee may desire a representative, the employer may refuse to allow representation and is not obligated to justify the refusal. The employer may merely announce that the interview will not proceed unless the employee is willing to attend without a representative. The employee may then refrain from participating, but in doing so he relinquishes any benefit that could be derived from the interview. For example, by deciding not to participate the employee may lose his opportunity to state his version of the events. The employer is then free to act on information obtained from other sources.\textsuperscript{59}

Fourth, the employer has no duty to bargain with any union representative who may attend the interview. Although the representative is there to assist the employee and may attempt to clarify the issues, the employer may insist on hearing only the employee's account of the matter under investigation.\textsuperscript{60}

There is an inherent incompatibility between the reasons for the Court's opinion and the four limitations imposed by the Court. That incompatibility has resulted in disagreements about the proper interpretation of the Supreme Court's

\textsuperscript{57} 420 U.S. at 257-58 n.5. The Court also cites NLRB v. Gissel Packing Co., 395 U.S. 575, 608 (1969) for the proposition that it rejects any probe of an employee's subjective motivations. \textit{But see} Decker, \textit{supra} note 52, at 667-69 (the test is actually subjective since it relies on the employee's beliefs).

\textsuperscript{58} 420 U.S. 257-58 (quoting Quality Mfg. Co. 195 N.L.R.B. at 199).

\textsuperscript{59} 420 U.S. at 258-59 (quoting the Board's opinions in \textit{Mobil Oil} and \textit{Quality Mfg}). In subsequent decisions the Board enumerated the employer's options. Once a valid request for representation has been made, the burden is on the employer to: (1) grant the request; (2) discontinue the interview (Amoco Oil Co., 238 N.L.R.B. 551 (1978)); or (3) offer the employee the choice of either continuing the interview unaccompanied by a union representative or having no interview at all (Mehary Medical College, 236 N.L.R.B. 1396 (1978)). The employer may not continue an interview without granting the employee representation unless the employee voluntarily agrees to remain unrepresented after having been informed of the choices stated in option (3), "or if the employee is otherwise aware of those choices." United States Postal Serv., 241 N.L.R.B. 141 (1979) (citing Super Valu Stores, Inc., 236 N.L.R.B. 1581 (1979)).

\textsuperscript{60} 420 U.S. at 259-60 (quoting Brief for the NLRB).
D. Criticisms of the Court’s Opinion

Commentators have suggested that the Supreme Court’s opinion creates a paradox.61 The Court points out the need to provide the lone, fearful and inarticulate or ignorant employees with a representative.62 At the same time the Court considers the employee sufficiently aware of the attendant circumstances that he will have the presence of mind to make an intelligent decision whether to waive representation.63 This is particularly contradictory since in order to be entitled to representation at all the employee must “reasonably” believe that the investigatory interview will result in disciplinary action.64 Also, if the Court’s opinion is construed to place the burden for the invocation of Weingarten rights entirely on the employee, the union’s role in that regard is very limited.

The Court’s comments on the nature of the representative’s role are also inconsistent. In dicta the Court states that a “knowledgeable union representative” could help elicit favorable facts, clarify the issues, assist employees who lack the ability to express themselves, and take steps to discourage formal grievances where the employer’s actions appear justified.65 Conversely, the employer “‘is free to insist that he is only interested, at that time, in hearing the employee’s own account of the matter under investigation.’”66 Given these conflicting statements from the Court it is not surprising that

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61. See, e.g., Brousseau, supra note 18, at 4-5 where the author states:

   The Court suggests that the right to representation depends on the reasonableness of the employee’s fear of punishment. Paradoxically, the Court in the same opinion gives us language which is formally reconcilable but in fact completely inconsistent with this notion of reasonable fear. . . . Evidently there is a fastidiously precise threshold [sic] of fear, which, becoming “reasonable,” renders one “too fearful or inarticulate to relate accurately the incident being investigated,” thus triggering a section 7 right in the employee. And yet we are told that this ignorant, fearful and inarticulate employee may intelligently waive this right. This is not merely paradoxical, it is absurd. (Footnotes omitted, emphasis in original).


62. 420 U.S. at 262-63.
63. Id. at 257-58.
64. Id. at 257.
65. Id. at 262-63 n.7.
66. Id. at 260 (quoting Brief for NLRB at 22).
IV. Right to Effective Representation

The limitations that the Supreme Court placed on the employee's protected right to union representation make it clear that the right is not absolute. The NLRB has generally construed those limitations more narrowly than have the courts of appeals. Consequently, the representative has been given a more active role under the Board's decisions.

Although neither the Board nor the courts have ever specifically stated that an employee has a right to effective representation, recent Board decisions suggest that such a right exists. The Board alluded to a right to effective representation in connection with preinterview consultation and subsequent Administrative Law Judge (ALJ) decisions have expanded that concept in cases concerning the proper role of the representative.

There is more to effective representation, however, than merely recognizing a right to preinterview consultation and expanding the role of the representative. A right to effective representation involves several interrelated elements which cover various aspects of the Weingarten rights.

This section of the Comment identifies and analyzes six elements of an integrated right to effective representation. It suggests resolutions to issues that are unresolved by the Board and the courts.

A. The Right to Preinterview Consultation

Preinterview consultation is one of the more controversial aspects of Weingarten. A discussion of the necessity of a request and waiver will indicate that it is the cornerstone of effective representation. The employee is more likely to fully exercise his section 7 rights if the union representative has an adequate opportunity to inform him of those rights. As discussed below, preinterview consultation also has additional

69. See, e.g., Address by Walther supra note 12.
70. See notes 92-125 and accompanying text infra.
advantages.

In Climax Molybdenum Company, a Division of Amax, Inc. 71 (Climax) the Board announced that Weingarten provides an opportunity for preinterview consultation. In that case the Board held that an employer violated section 8(a)(1) of the NLRA by refusing to permit a union representative to consult with two employees on company time prior to an investigatory meeting which could have resulted in disciplinary action. The two employees had been involved in an altercation and their supervisor told them that the matter would be settled the next day. The union grievance representative was notified by the company, as required by the collective-bargaining agreement, that an investigatory meeting would be held, but he was not informed of the names of the employees. Neither of the employees requested representation. The next morning, before the meeting started, the representative asked the employer if he could talk to the two employees alone. This request by the union official for a preinterview consultation on company time was denied.

The Board relied on two sentences from Weingarten in reaching its conclusion:

A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. 72

The Board 73 took the position that a union representative must have the opportunity to consult with the employee prior to the interview in order to discover his version of the incident. This is necessary, the Board declared, in order for the representative to “represent effectively” a fearful or inarticulate employee and to elicit facts favorable to the employee. 74

72. 420 U.S. at 262-63 (emphasis added).
73. Then-Chairman Murphy and Member Jenkins in a plurality decision.
74. 227 N.L.R.B. at 1190 (emphasis added).

In United States Postal Serv., 241 N.L.R.B. 141 (1979), the ALJ, holding that Weingarten rights are not waived with Miranda rights, examined the rationale for Weingarten rights in the context of a preinterview consultation:
The Board intimated that this would also benefit the employer since the fearful or inarticulate employee would be more inclined to reveal his version of the facts to his union representative outside the employer’s presence and the representative could then help explain those facts to the employer.\textsuperscript{75}

The Board found that this holding was consistent with the Supreme Court’s opinion in \textit{Weingarten}. There the Court said that employees were entitled to “a knowledgeable union representative” who could aid the employer in eliciting facts.\textsuperscript{76} The Board concluded that knowledge implies that the representative have a chance to learn the facts before the interview. Additionally, the representative’s assistance in eliciting facts “can be performed better, and perhaps only, if he can consult with the employee beforehand.”\textsuperscript{77}

While concurring, Member Fanning nevertheless disagreed with the majority’s characterization of the decision as an “extension” of \textit{Weingarten} rights.\textsuperscript{78} According to Fanning, prior consultation “is not something different than, nor superior to, the act of representation itself; it is simply an aspect of that function which enables the representative to fulfill his role.”\textsuperscript{79} He also pointed out that prior consultation is a common component of representation of another person’s interests, which is necessary for intelligent and effective representation.\textsuperscript{80}

Members Penello and Walther dissented. They argued that the Supreme Court did not envision prior consultation as part of the \textit{Weingarten} rights, and that in using the term “knowledgeable union representative” the Court meant only a

\begin{itemize}
\item It is true that \textit{Miranda} and \textit{Weingarten} share one very similar ethical foundation—namely, the belief that a lone individual is subjected to unfair pressures when he is compelled, without being given the right to informed assistance, to submit to an interview about his alleged shortcomings with trained interrogators empowered to cause him to suffer adverse consequences therefor. Perhaps because of this common ethical foundation, both \textit{Miranda} and \textit{Weingarten} rights include the right to preinterview consultation with the representative.
\item \textit{Id.} at 151.
\item 75. 227 N.L.R.B. at 1190.
\item 76. 420 U.S. at 263.
\item 77. 227 N.L.R.B. at 1190.
\item 78. \textit{Id.} at 1191.
\item 79. \textit{Id.}
\item 80. \textit{Id.}
\end{itemize}
person who is generally knowledgeable about grievance resolution, not one who is familiar with the employee’s particular version of the events.

The Tenth Circuit refused to enforce the Board’s order in Climax. The court focused on two of the five “contours and limits” of the Supreme Court’s decision in Weingarten: the right to union representation arises only where an employee has requested it and the exercise of the right may not interfere with legitimate employer prerogatives. Based on these limitations the court held there was no right to a preinterview conference on company time. The court went on, however, to state that Weingarten requires the employer to set interviews at a future time so that the employee can consult with his representative prior to the interview on his own time.82

One commentator suggests that the Board’s decision in Roadway Express, Inc. is more significant to the continued vitality of the right to preinterview consultation than is the Tenth Circuit’s denial of enforcement in Climax.4 In Roadway Express the Board stated that an employee’s right to representation “matures at the commencement of the interview.”83 The commentator claims that by that statement the Board indicated that it has reconsidered its position on the right to preinterview consultation.84 Roadway Express involved an employee’s refusal to leave the production area and go to his supervisor’s office unless he was accompanied by his union representative. Contrary to the view expressed by the commentator, preinterview consultation was not an issue in Roadway Express; neither the Board nor the ALJ who heard the case considered it an issue. The employee did not request a preinterview consultation and the Board merely held that

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82. The employer is under no obligation to accord the employee subject to an investigatory interview with consultation with his union representatives on company time if the interview date otherwise provides the employee adequate opportunity to consult with union representatives on his own time prior to the interview. Thus we do believe 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.

Id. at 365.
85. 246 N.L.R.B. at 1128.
the employee was not privileged to ignore the employer's request to leave the production area.87

The Tenth Circuit's holding in Climax is a reasonable approach to preinterview consultation. Although Weingarten did not specifically grant representatives the opportunity to consult with employees prior to interviews, it did attempt to strike a balance between employees' rights and management's prerogatives. That balance is struck by the Tenth Circuit's reasonable requirement that the employer postpone the interview until the employee can consult with his union representative on his own time.88 Preinterview consultation not only promotes effective representation by allowing the representative to advise the employee of his Weingarten rights, but also enables the representative to participate in the interview on an informed basis. A major criticism of Weingarten is that union representatives may tend to disrupt the interview;89 they are less likely to be disruptive if they do not have to wait until they walk into the interview to learn the facts. Unlike the situation in Climax, the representative probably will not instruct the employee to remain silent because the hearing is primarily in the employee's interest since the employer could discipline the employee based on information obtained from other sources.

A point the Board has not yet considered is whether the union must be notified of the disciplinary interview before the interview is held. Nothing in Weingarten suggests that such a requirement exists. Arguably that requirement would be a logical extension of the Board's Climax decision, but the trend of recent Board decisions on Weingarten rights intimates that the Board probably will not pronounce such a requirement. Clearly, the union can obtain a notification provision through collective bargaining, as the union did in Climax,90 but neither

87. 246 N.L.R.B. at 1129.
88. Cf. Annual Survey of Labor Law, 21 B.C. L. Rev. 85, 151 (1979) (authors express support for that part of the court's opinion in Climax that held there is no right to preinterview consultation during company time, as a proper balance of Weingarten rights).
89. See, Decker, supra note 52. See generally B. Crane & R. Hoffmann, SUCCESSFUL HANDLING OF LABOR GRIEVANCES 14 (1956).
90. See also Volkswagen of America, Inc., (JD-667-80) issued Nov. 17, 1980 (employer found in violation of § 8(a)(1) for denying a request for preinterview consultation notwithstanding employer's established practice of permitting such consultation, which stemmed from provision of collective-bargaining agreement).
the Board nor the courts have indicated that notification is required independently of a collective-bargaining agreement.\textsuperscript{91}

B. Necessity of a Request

There is no right to representation unless it has been requested.\textsuperscript{92} The Supreme Court's specific language was "the right arises only in situations where the employee requests representation."\textsuperscript{93} Although this could be interpreted to mean that it is merely the employee's decision whether he wishes to be represented, the courts have construed that language literally to mean that the actual request for representation must come from the employee.\textsuperscript{94}

Several commentators have criticized the logic of requiring employees faced with the obviously disconcerting prospect of being disciplined to maintain the presence of mind to ask for representation.\textsuperscript{95} In Climax the Board specifically stated that \textit{Weingarten} rights could be invoked by a request from the union.\textsuperscript{96} The Board, in a plurality opinion,\textsuperscript{97} held that the union had a right to a preinterview consultation with employees and, in order to effectuate that right, it also had the right to request consultation.\textsuperscript{98} In his concurring opinion Fanning declared that it makes no difference whether the request is

\textsuperscript{91} Arguably, a notification requirement is necessary to fully effectuate the right to preinterview consultation. If the union is unaware of a disciplinary interview due to either geographic or temporal restrictions, it is unable to exercise its ability under Climax to request representation at the interview.

\textsuperscript{92} The test for determining whether a request is effective is: Was the employee's request for union representation sufficient, measured by objective standards, to put the employer on notice of the employee's desire for representation? Southwest-ern Bell Tel., 227 N.L.R.B. 1223 (1977).

\textsuperscript{93} The Court went on to explain: "In other words, the employee may forgo his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative." 420 U.S. at 257.

\textsuperscript{94} Climax Molybdenum Co. v. NLRB, 584 F.2d at 363 ("\textit{Weingarten} holds that the employee must request representation." (Emphasis in original)). \textit{See also} Appalachian Power Co., 253 N.L.R.B. 931, 932 (1980); Pacific Tel. and Tel. Co., (JD-(SF)-38-81) issued February 13, 1981.

\textsuperscript{95} \textit{See} notes 61-66 and accompanying text \textit{supra}.

\textsuperscript{96} The plurality of then-Chairman Murphy and Member Jenkins held that although the union's request would be effective because the collective-bargaining agreement involved therein provided for union representation at disciplinary interviews, even if it did not, "the denial of this right upon the Union's request is a denial of representation." 227 N.L.R.B. at 1190.

\textsuperscript{97} Member Fanning concurring.

\textsuperscript{98} 227 N.L.R.B. at 1190.
from the employee or the union.\textsuperscript{99} Fanning based his opinion on the Supreme Court's \textit{Quality Manufacturing}\textsuperscript{100} decision which, in his view, held that the union officers who insisted on being present at the disciplinary hearing "were themselves engaging in a protected concerted activity."\textsuperscript{101}

The Board appears to have retreated from the \textit{Climax} decision. In its recent \textit{Appalachian Power}\textsuperscript{102} opinion the Board affirmed without comment the ALJ's decision that the employer had not denied two employees their \textit{Weingarten} rights during an investigative interview when the employer denied their union steward's request to attend the interview. The ALJ also found that the employees' requests were insufficient because they never communicated the request directly to the employer.\textsuperscript{103} Neither the ALJ nor the Board mentioned \textit{Climax} in their opinions so the precise effect of \textit{Appalachian Power} is uncertain.\textsuperscript{104}

The argument could be made that under \textit{Climax} the union's right to request representation is limited to representation at a preinterview conference. No such preinterview conference was involved in \textit{Appalachian Power}. An interpretation which would resolve the apparent conflict between \textit{Climax} and \textit{Appalachian Power}, and which would also take cognizance of the Supreme Court's limitations in \textit{Weingarten}, is that the union has the right to request a preinterview conference to inform an employee of his right to representation and the options available to him and the employer under \textit{Weingarten},\textsuperscript{105} but the employee must specifically request representation at the actual interview. The union cannot demand to be present at the interview contrary to the employee's wishes. Since the individual employee must bear the

\begin{itemize}
  \item \textsuperscript{99} \textit{Id.} at 1191-92.
  \item \textsuperscript{101} 227 N.L.R.B. at 1192.
  \item \textsuperscript{102} 253 N.L.R.B. 931 (1980).
  \item \textsuperscript{103} \textit{Id.} at 931-32. In \textit{Lennox Indus., Inc.}, 244 N.L.R.B. 607 (1979) the Board found that an employee's request made to one company official was insufficient to invoke \textit{Weingarten} protections where the request was not made known to the official who conducted the interview.
  \item \textsuperscript{104} \textit{But cf.} \textit{Pacific Tel. and Tel. Co.}, (JD (SF)-38-81) \textit{issued} Feb. 13, 1981, slip op. at JD 6 n.7 (The ALJ stated that in \textit{Appalachian Power} the Board reversed the aspect of \textit{Climax} concerning the union's right to invoke representation.); \textit{Colgate-Palmolive Co.}, 257 N.L.R.B. No. 28 (1981) (The ALJ relied on \textit{Climax} in finding that the union's request for representation was sufficient.).
  \item \textsuperscript{105} \textit{See note 59 supra.}
\end{itemize}
consequences of the disciplinary process he should determine whether representation at the interview is in his best interest. The union should have the opportunity to request preinterview consultation with the employee to inform him of his options so that his decision whether to invoke his right to representation is made on an informed basis. The union should have that right not only to safeguard the employee’s employment interests, but also as an “assurance to other employees in the bargaining unit that they, too, can obtain [protection at a similar interview].” This resolution would encourage effective representation by assuring that employees act in their own best interests based on a full understanding of their rights.

Notification of the union prior to the interview may well be in the employer’s best interest. First, this pro forma notification would avoid delaying the disciplinary process since the employer would not have to interrupt a discussion with the employee if the employee requests a representative during the interview. Second, notification of the union would discourage a discharged employee who did not request a representative from later filing a charge with the NLRB, claiming he was denied representation and, therefore, should be reinstated and entitled to back pay. This may occur where the employee did not realize during the interview that he might be disciplined or where he did not know of his right to representation until afterwards. In a subsequent unfair labor practice hearing where the employee claims he requested representation and the employer claims he did not, the result will involve a credibility resolution for the ALJ and circumstantial evidence may point to the probability that the employee made such a request. Thus, attorneys should advise their employer-clients that notification of the union prior to any disciplinary hearing may expedite the disciplinary process and avoid subsequent litigation.

C. Waiver of the Right to Representation

The corollary of the right to obtain union representation at disciplinary interviews is the ability to waive that right. Waiver occurs in three contexts: express waiver by the em-

106. 420 U.S. at 261.
ployee, implied waiver by the employee, and waiver by the union through collective bargaining.

1. *Express waiver*

Since the right to representation arises only where the employee requests it, the employee "may forgo his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative." If an employee determines that it is in his best interest to proceed with the interview without a representative he should be allowed to do so.

2. *Implied waiver.*

A totally different situation occurs when the employer claims that the employee waived his rights by implication. Generally, the criterion for ascertaining whether a statutory right has been waived is the "clear and unmistakable" standard. The Board has declared that waiver of the right to representation will not be inferred unless the Board is convinced that the right was waived knowingly and voluntarily. Consequently, the Board has held that the right to representation is not waived where circumstances indicate coercion, or where the employee waives his *Miranda* rights in an investigation of possible criminal acts, or merely by beginning the interview.

3. *Waiver through collective bargaining*

The Board has not addressed the issue of whether Wein-

107. Id. at 257.


109. Southwestern Bell Tel., 227 N.L.R.B. 1223, (quoting Union Presence, supra note 23, at 350). See also Super Valu Stores, 236 NLRB 1581 (an investigatory interview is inherently coercive and the employee should be given the benefit of any doubt regarding waiver), enforcement denied, Super Valu Xenia, a Div. of Super Valu Stores v. NLRB, 627 F.2d 13 (1980). Accord, "Specifically, the Board's policy is to find no waiver where an employee has not been expressly advised of her option to remain silent, absent evidence that the employee was otherwise aware of that right." Brief for NLRB at 13, NLRB v. Illinois Bell Tel. Co., No. 80-2629.

110. Southwestern Bell Tel., 227 N.L.R.B. at 1223 (employer unlawfully interfered with its employees' rights by threatening them with more severe discipline if they exercised their right to representation).


113. Texaco, Inc., 247 N.L.R.B. No. 56 (1980) (the mere fact that the employee did not request a representative at the beginning of the interview does not constitute a waiver because he may not perceive the need for representation until the interview has begun); Greyhound Lines, Inc., 239 N.L.R.B. 849 (1978); Texarkana Memorial Hosp., 238 N.L.R.B. 829 (1978).
garten rights can be waived or restricted by contract. The Supreme Court's opinion in Weingarten "provides no indication whether such waivers in the collective bargaining process are permissible." A union probably can bargain away its own right to be present at disciplinary interviews. The greater question is whether it also has the power to relinquish the employee's right under section 7.

It is well established that unions can surrender contractually the section 7 right to strike, and they may waive their right to select persons to negotiate grievances with the employer. Thus, by analogy, Weingarten rights are probably waivable by the union through the collective bargaining process.

In Western Electric Co. then-Chairman Miller, in a concurring opinion, asserted that there was no violation of the right to union representation at an investigatory interview because the union had effectively waived the employees' right through collective bargaining. He analogized the right to waive union representation at disciplinary interviews to the union's ability to waive other section 7 rights. Western Electric, however, was decided prior to Weingarten and the plurality opinion therein relied on dissents in cases which were subsequently affirmed in Weingarten. Thus the Board still considers it an open issue.

Because the right to representation at a disciplinary interview is so important to the individual employee, waiver of that right through collective bargaining should not be readily inferred. In reviewing instances of waiver through collective bargaining:

115. 420 U.S. at 275 n.8.
116. See Craver, The Inquisitorial Process in Private Employment, 63 CORNELL L. REV. 1, 23 (1977); Union Presence, supra note 23, at 349-50. The Board construes the union's ability to waive employee rights very narrowly. The union may wish to take the position to waive rights at certain hearings over minor violations provided no notice or warning is placed in the employee's file.
120. Id. at 625-26.
121. Members Kennedy and Penello relied on Member Kennedy's dissents in Quality Mfg. and Mobil Oil.
122. See Brief for NLRB at 14, supra note 114.
bargaining, the Board or the court should determine whether the waiver was clear and unmistakable. Then it should determine, after examining the nature of the right, whether waiver violates the underlying policies of the NLRA. The union's waiver of employees' rights should require a showing that the bargaining unit's interests take precedence over the individual's rights.

Obviously, employees would be represented more effectively if their rights were not waived either by themselves or the union. If, however, the employee considers it in his best interest to proceed unrepresented he should have that right even though the disciplinary decision may have a precedential effect, either substantively or procedurally, on the remainder of the bargaining unit. By providing a preinterview consultation the union can aid the lone employee facing a disciplinary hearing in making an informed decision whether to waive his Weingarten rights.

D. Selection of a Representative

Although an employee has a right upon request to representation at a disciplinary interview, he does not have the right to a particular representative. In Coca-Cola Bottling Co. of Los Angeles (Coca Cola) the Board held that an employer need not postpone an interview with an employee because a particular representative is unavailable, where another representative is available and whose presence could have been requested. In Coca-Cola an employee requested the presence of a representative whom he knew was on vacation. The interview was to be held on a Friday and the steward he requested would not return from vacation until the following Monday. The Board found that the employee was merely attempting to delay the interview and concluded that such action interfered with the employer's legitimate prerogative to conduct the investigation without delay.

123. See cases cited at note 108 supra.
It was unclear after Coca-Cola whether an employee had the right to a representative of his choice where providing him with such a representative would not significantly delay the interview. The Board addressed that issue in Pacific Gas & Electric Co. and found that there was no right to a particular representative even where the delay would be only fifteen to forty minutes.

The Board's position that an employee does not have a right to a representative of his choice is a reasonable interpretation of Weingarten because it acknowledges both the rights of the employee and the employer's prerogatives. If a representative selected by the union is readily available to assist an employee then the employee's rights are protected. Under Weingarten the rights of the employee must be balanced with the employer's right to operate his business. Allowing an employee to select a particular representative could be too disruptive of an employer's operations. It could also allow the employee to circumvent a collective-bargaining agreement if the employer and the union have agreed upon a certain procedure.

On the other hand, the employer should not be allowed to control who will represent the employee. If more than one an employer must respect the employee's request for assistance even if it means delaying the interview.).

Members Fanning and Jenkins, dissenting in Coca-Cola, claimed that the employee had done all that was required by Weingarten by asking for his steward. The burden shifted to the employer, they asserted, to stop the interview or offer the employee the choice of either participating in the interview without his steward or not participating in an interview at all. To put the burden of requesting an alternate representative on the employee would negate the purpose of Weingarten since "it is because employees are not skilled in the niceties of procedure that they need help." 227 N.L.R.B. at 1277.

In Roadway Express the Board responded to the contention of the Coca-Cola dissenters. The Board stated that while it is true that the employer must offer the employee those options, the employer does not have to do so unless and until the employee makes a valid request for union representation. The employee in Coca-Cola did not make a valid request when he asked for a representative whom he knew was unavailable. 246 N.L.R.B. at 1129.

129. Member Jenkins, dissenting, claimed the delay would be 15 to 20 minutes; the majority said the delay could be as long as 40 minutes.
130. See generally Emporium Capwell Co. v. W. Addition Community Organization, 420 U.S. 50 (1975) (employees cannot circumvent their elected representative to bargain separately with the employer).
representative is available or is provided for in the collective-bargaining agreement then the employee should be able to select the representative he feels will best represent him. An employee should also be allowed to select someone else when the person provided to represent the employee has an interest in the outcome of the disciplinary process that conflicts with the employee's interest in being adequately represented. Effective representation is promoted by providing the employee with a representative in whom he has confidence.

E. Proper Role of the Representative

Although in Weingarten the Supreme Court went into great detail about the benefits a knowledgeable union representative could bring to disciplinary interviews, it also indicated that the role of the representative is limited. The employer is under no duty to bargain with the representative at the meeting. The representative is there to assist the employee in bringing out favorable facts and to present extenuating circumstances. He is not there to serve as the employee's attorney or to transform the interview into an adversary proceeding. The employer is free to insist on hearing only the employee's statement of the facts.

Despite the limitation imposed on the representative, his role is more than the "mute and inactive presence of . . . a witness to the interview," as the dissent in Weingarten claimed. In Southwestern Bell Telephone Co., (C.W.A. Local
the Board unanimously held that the employer violated its employee's section 7 rights by requiring the union steward to remain silent during the interview. Noting the Supreme Court's detailed explanation of the role of the representative, the Board reasoned that Weingarten entitled the employee to the assistance of a representative, not the mere presence of that representative. The Board rejected the employer's contention that it was free to insist on only hearing the employee's statement of the facts. The Board found, viewing the Supreme Court's opinion as a whole, that the Court did not intend to limit the representative's role so severely; the employer's ability to limit the role of the representative was restricted to reasonably preventing a collective-bargaining or adversary confrontation with the representative.

The Board's Southwestern Bell decision was recently cited with approval by the Ninth Circuit in NLRB v. Texaco, Inc. In that case, the court upheld the Board's determination that the employer violated the employee's right to representation by refusing to permit the representative to speak and, thereby, "relegating him to the role of a passive observer." In reaching its decision, the court employed the same analysis that the Board had used in Southwestern Bell.

The Board's Southwestern Bell decision and the Ninth Circuit's Texaco opinion are reasonable interpretations of Weingarten. The right to representation should include the right to benefit from that representative. The employee is entitled to the aid, assistance, and protection of his representative. Weingarten creates more than a right to silent representation, it creates a statutory right of assistance. The employer is still free to exercise his option to refuse representation and conduct the inquiry without interviewing the em-

139. Chairman Fanning and Members Jenkins, Penello and Truesdale.
140. 251 N.L.R.B. at 613.
141. Id. at 613.
142. Id.
143. 659 F.2d 124 (9th Cir. 1981).
144. Id. at 126-27.
145. 420 U.S. at 262-63.
146. 251 N.L.R.B. at 613.
ployee. The Southwestern Bell decision encourages effective representation. To have found otherwise would have severely decimated the right to representation and would have, in effect, rescinded the section 7 right "to engage in . . . concerted activities for . . . mutual aid or protection."148

F. The Remedy

1. Evolution of the make-whole remedy

In early Weingarten cases the common remedy was an order requiring the employer to cease and desist from requiring employees to take part in interviews without representation and to post a notice to its employees that it would refrain from such activity in the future.149 In Southwestern Bell Telephone Co.150 the Board, without comment, ordered a make-whole remedy which required reinstatement with backpay for four employees who were either discharged or suspended for falsely claiming that a fellow employee’s injury was work-related. The Board consistently afforded a make-whole remedy after that decision, even in cases where the adverse personnel action was based on the employee’s misconduct.151 It did not limit that remedy to situations, as in Quality Manufacturing, where employees were disciplined specifically for invoking their Weingarten rights.

The rationale for applying a make-whole remedy in all cases has never been clearly stated. Apparently, the Board had two reasons for imposing that remedy. First, if the em-

147. Mehary Medical College, 236 N.L.R.B. 1396.
149. See, e.g., Mobil Oil Corp., 196 N.L.R.B. 1052 (employees suspended and later discharged for theft of company property); Detroit Edison Co., 217 N.L.R.B. 622 (1975) (employee suspended for filing altered meal receipt in support of reimbursement claim); Keystone Steel and Wire, 217 N.L.R.B. 995 (1975) (written notice given for unsatisfactory work).
151. See, e.g., Certified Grocers of Cal., Ltd., 227 N.L.R.B. 1211 (1977), enforcement denied, 587 F.2d 449 (9th Cir. 1978) (backpay and removal of layoff notice from personnel files for employee who had been laid off for two weeks because of low production); Glomac Plastics, 234 N.L.R.B. 1309, 1323 (1978), enforced in pertinent part, 592 F.2d 94 (2d Cir. 1979) (backpay and personnel records expunged for employee who was disciplined for errors in her production cards); Niagara Falls Memorial Medical Center, Inc., 236 N.L.R.B. 342, 352 (1978) (backpay and removal from personnel files of reprimand to an employee who had misinformed her employer of her whereabouts). The typical make-whole remedy provides for reinstatement, backpay, and expungement of personnel records.
ployer had permitted the representative to participate, the representative might have been able to raise extenuating or mitigating circumstances and the employer might not have imposed discipline, or the action he took might have been less severe. Second, it is "virtually impossible" in mixed-motive cases to determine whether the employer disciplined the employee for exercising his \textit{Weingarten} rights or for the action which was the basis for the disciplinary interview.

2. \textit{Criticisms of the make-whole remedy.}

The practical criticism of the application of a make-whole remedy in all \textit{Weingarten} cases is that employees who are disciplined for lawful reasons are reinstated because the employer violated their right to representation. Reinstating individuals who were disciplined for legitimate reasons and awarding them backpay will not promote industrial harmony.

The legal issue concerning the application of the make-whole remedy is whether the Board can order reinstatement of an employee whose \textit{Weingarten} rights were violated, where there is evidence that he was disciplined for cause, "despite the fact that section 10(c) of the Act prohibits the reinstatement of an employee who was fired for cause." In \textit{NLRB v. Potter Electric Signal Co.} the Eighth Circuit answered that question in the negative. That court held that section 10(c) prohibited the Board from granting a make-whole remedy where the employees were not discharged for requesting union assistance but were instead discharged for a fight that resulted in shutting down the production line. The court relied on the Supreme Court's opinion in \textit{Fibreboard Paper Prod-}

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153. The term "mixed motive" refers to cases where the employer has more than one reason for disciplining an employee. Discipline could be imposed for cause which would be lawful, or to discourage employees' concerted activity which would be in violation of the NLRA.


155. Anchortank, Inc. v. NLRB, 618 F.2d 1153, 1169 n.31 (5th Cir. 1980).

156. 600 F.2d 120 (8th Cir. 1979).

157. No 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 discharged for cause . . . .

products Corp. v. NLRB which found that section 10(c) precludes the Board from re-instatement of an employee who was discharged for misconduct.

3. The Board's current remedy

In Kraft Foods, Inc. the Board modified its position and set forth the circumstances in which a make-whole remedy would be ordered. That remedy is warranted if a prima facie showing is made that an investigatory interview was conducted in violation of Weingarten and that the employee whose rights were violated was later disciplined for conduct which was the subject of the interview. The burden then shifts to the employer to negate the prima facie showing by demonstrating that the decision to discipline the employee was not based on information obtained at the unlawful interview. If the employer meets its burden the Board will not order a make-whole remedy but will issue a cease and desist order.

Entry of a make-whole order does not forever foreclose the employer from discharging the employee because of the conduct which was the subject of the interview. The Board merely requires that the employer not discharge the employee on the basis of any information obtained at the interview.

The effect of the Board's new position is unclear. It may be, as Board Member Jenkins claimed in his dissent in Kraft Foods, that the new scheme will be ineffective in differentiating between situations where the employer imposes discipline based on information obtained at an unlawful interview and where he acts on the basis of information obtained independently. The Board is, however, attempting to adopt a more tenable position and provide a make-whole remedy only where employees are not dismissed for cause. Such a stringent remedy is helpful in encouraging the employer to observe an employee's right to effective representation.

159. 251 N.L.R.B.
160. Id.
V. Conclusion

Although the Supreme Court’s opinion in _NLRB v. J. Weingarten, Inc._ is unclear as to the precise nature of the representative’s and the union’s roles, subsequent decisions by the NLRB have established a patchwork of legal rights and responsibilities which to some extent defines those roles. If, however, those decisions are viewed as establishing a right to effective representation at disciplinary interviews, a cohesive pattern emerges which can be tailored to provide employees with adequate protection of their rights.

Under a system of effective representation the union representative can request a preinterview consultation with the employee in order to fully inform him of his right to representation, the employer’s options if he invokes that right, and of his ability to waive representation. The preinterview consultation must be held other than on company time and the employer must postpone the interview in order to allow for such consultation. At the interview the representative must be allowed to participate in order to provide the employee with the aid and protection he is entitled to under section 7 of the NLRA. If an employer does not respect an employee’s right to representation, the Board can issue a cease and desist order. If the employer, however, takes disciplinary action on the basis of information obtained at an unlawful interview, the Board may order a make-whole remedy.

Such a system of effective representation is a reasonable construction of both section 7 of the NLRA and the Supreme Court’s opinion in _Weingarten_. Thus, effective representation affords employees adequate protection of their rights at disciplinary interviews and also takes cognizance of the employer’s legitimate prerogatives as set forth in _Weingarten_. Recent Board decisions that are important to effective representation have not yet come before the courts of appeals for enforcement. The courts should recognize the interrelatedness of the elements of effective representation and defer to the Board’s reasonable interpretation of section 7.

_Steven J. Barth_