

NLRB Says Beer Dealer's Refusal-To-Drug-Test Firing Doesn't Mix With "Weingarten Rights"

Article By:

Roger S. Kaplan

Brewing more trouble for workplace drug testing, the National Labor Relations Board has held a New York beer distributor violated the National Labor Relations Act by denying its driver helper, who reported to work with his clothes "reek[ing] of the smell of marijuana" and with "glassy" and "bloodshot" eyes, and was directed to take a drug test immediately despite requesting representation by his union steward, his right to union representation at an "investigatory interview" (the drug test) about his possible substance abuse. The Board also found the employer had unlawfully discharged the employee for refusing to take the test in the absence of his union steward. [*Manhattan Beer Distributors, LLC*](#), 362 NLRB No. 192 (August 27, 2015).

The employee spoke to his shop steward on the telephone at the time he was told to go for a drug test and the steward replied that he would not accompany the driver helper to the test because it was his day off. However, the Board held the employee was entitled to the "physical presence" of a union representative. Deciding the employee's statutory rights here were infringed, the Board relied heavily on the Supreme Court's decision in *NLRB v. Weingarten*, 420 U.S. 251 (1975), according unionized employees the right to union representation, upon request, during investigative interviews where the employee reasonably apprehends the interview could lead to discipline, and its decision in *Ralph's Grocery Co.*, 361 NLRB No. 9 (2014), [discussed here](#), that a workplace drug test was an investigatory interview into possible misconduct to which *Weingarten* applied. In *Ralph's Grocery*, the Board held that "an employee has the right to the assistance of an authorized union representative even if that might cause some delay in the administration of the drug or alcohol test."

The Board panel majority relied on the comment by one manager to the driver helper that the employee "smelled funny," and his question whether the driver helper had been "doing anything stupid," as well as the remark made by another manager, in sending the employee for a test, that they could finish their conversation at the test site, to bolster its contention that an investigatory interview was in progress when the employee made his request for representation. Thus, it reasoned, the driver helper was entitled to *Weingarten* representation.

The panel majority decided the physical presence of the steward was needed to provide the driver helper with "active assistance" – "at the very least," it said, "to permit the [union] representative to independently observe [the employee's] condition and potentially contest the grounds for [the managers'] suspicions." According to the majority, the steward also could have "advised [the driver

helper] regarding the standard testing protocol and ensured that those protocols were followed.” (At least one of the managers had received “reasonable suspicion” training; the decision is silent as to whether the union steward also had received such training. Furthermore, the driver helper had served previously as union steward while working as a forklift operator for the company.)

The Board allowed it was not requiring the employer to postpone drug testing indefinitely, but did insist that the employer allow the employee an unspecified “reasonable period of time to obtain union representation.” Here, it said, the employer did not accord the employee sufficient time to see whether an assistant shop steward who was at work that day “might become available.”

Member Johnson dissented. He protested, “My colleagues today have painted companies seeking to maintain safe workplaces into a corner by unnecessarily foreclosing their ability to take reasonable steps to confirm whether an employee has reported to work under the influence of drugs or alcohol.” In his view, a drug or alcohol test should not have to be delayed because of the absence of a union representative; “employers,” he said, “have a legitimate and substantial interest in immediately testing employees suspected of using drugs or alcohol, particularly employees who hold safety-sensitive positions.” Member Johnson noted, too, that the Board’s decision may give rise to disputes under workplace substance abuse policies, where testing is thwarted by a union’s delay in providing representation and an employer seeks to rely on reasonable suspicion alone as a basis for taking action against an employee. Whether the employer could win an arbitration on this ground was not free from doubt, Member Johnson observed. Furthermore, he worried that union representatives could be incentivized to make themselves unavailable for “investigatory interviews” to frustrate employer drug and alcohol testing policies and so make termination of an abusing employee more difficult.

Employers of represented employees who maintain drug and alcohol testing programs may have to review their policies and procedures in light of this decision and *Ralph’s Grocery* to promote their effectiveness, while avoiding “*Weingarten* rights” pitfalls.

Jackson Lewis P.C. © 2025

National Law Review, Volume V, Number 246

Source URL: <https://natlawreview.com/article/nlrb-says-beer-dealer-s-refusal-to-drug-test-firing-doesn-t-mix-weingarten-rights>