

NLRB Tells Non-Union Workers: “Stop Your ‘Weining’- You Have No Weingarten Rights”

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Since the early 1980s, the NLRB has vacillated back and forth on whether non-union employees are entitled to have a co-worker present during an investigatory interview that could result in discipline — a right that has long been afforded union employees pursuant to the United States Supreme Court’s holding in *NLRB v. Weingarten*, 420 U.S. 251 (1975). In the 42 years since the Supreme Court first extended this right to union employees in *Weingarten*, the NLRB has changed its position four times as to whether “*Weingarten* rights” extend to non-union employees. In what can only be viewed as a victory for retail employers with non-unionized workers, the NLRB, on May 3, 2017, rejected a request that it again reverse course and extend *Weingarten* rights to non-union employees. With this Order, the NLRB confirms that retail employers need not acquiesce to a request by a non-union employee to have a co-worker sit in while that non-union employee is questioned in an investigatory interview.

In *Weingarten*, the Supreme Court concluded that an employer violated Section 8(a)(1) of the National Labor Relations Act (“NLRA”) by denying a unionized employee’s request to have a union representative present at an investigatory interview which the employee reasonably believed might result in disciplinary action. The Court held that the presence of a union representative “safeguard[s] not only the particular employee’s interest, but also the interests of the entire bargaining unit. . . .” *Weingarten*, 420 U.S. at 260. Several years later, the NLRB extended *Weingarten* rights to non-union employees. See *Materials Research Corp.*, 262 NLRB 1010 (1982). However, non-union workers did not savor this right for too long. In two successive decisions, *Sears, Roebuck, & Co.*, 274 NLRB 230 (1985) and in *E.I. DuPont & Co.*, 289 NLRB 627 (1988), the NLRB reversed course and ruled that *Weingarten* rights do not extend to non-union employees. But by 2000, union employees regained this right when, in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), the NLRB ruled that *Weingarten* rights do extend to non-union employees. In *Epilepsy Foundation*, the NLRB reasoned that: “Section 7 [of the NLRA] rights are enjoyed by all employees and are in no way dependent on union representation for their supplementation.” *Id.* at 678. Just four years later, in *IBM Corp.*, 341 NLRB 1288 (2004), the NLRB changed direction again, ruling that non-union employees do not have the right to have a co-worker present during an investigatory interview that might lead to discipline. In this opinion, the NLRB noted that changes in employment laws and recent security concerns require that investigations into matters like substance abuse, improper internet use, dishonesty, threats, harassment and discrimination be conducted “in a thorough, sensitive, and confidential manner” and that failure to conduct investigations in this manner could

expose an employer to claims that it did not conduct a fair investigation or that unfair discipline was imposed based on incomplete information. The NLRB reasoned that the presence of a co-worker increases the possibility that information will not be kept confidential, reduces the chance that the employer will get the whole truth, and increases the likelihood that employees with information about sensitive subjects will not come forward. Accordingly, the NLRB concluded that the right of a non-union employee to a coworker's presence is "outweighed by an employer's right to conduct prompt, efficient, thorough, and confidential workplace investigations." *Id.*

By application dated November 15, 2016, petitioner Charles Strickler asked the NLRB to reconsider its position and, again, extend *Weingarten* rights to non-union employees. By Order dated May 3, 2017, the NLRB rejected this application with virtually no explanation. Retail employers remain within their rights to deny a non-union employee's request to have a co-worker present when that employee is being interviewed by the employer, even if the interview may result in discipline.

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