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D.C. Circuit Court Quashes the NLRB's Extraordinary Expansion of Weingarten Rights

Article By:

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In Midwest Division-MMC, LLC, d/b/a/ Menorah Medical Center v. NLRB, the D.C. Circuit rejected the Board's unprecedented application of *Weingarten* rights to voluntary meetings, by reversing the Board's Decision that would have extended the right of employees to have union representation at meetings at which the employees' attendance is not compelled.

Kansas state law requires hospitals to establish an internal mechanism to monitor the standard of care provided by nursing professionals. Pursuant to this law, Menorah Medical Center ("Menorah" or "Hospital") established a Nursing Peer Review Committee ("Committee") to investigate alleged violations of the prevailing standard of care. If substantiated, the Committee reports the violation to the state licensing agency, but the Committee itself does not impose discipline. If a violation is reported, the state, not the employer, may suspend or revoke a nurse's license.

In May 2012, two nurses received letters alleging that they had engaged in unprofessional conduct. The letters advised that the nurses could address the Committee at a hearing "**if you choose**," but also gave the nurses the option to submit a written statement in lieu of a personal appearance. Both nurses requested union representation at the Committee hearing, but the Hospital denied their requests. Their union subsequently filed an unfair labor practice charge alleging that the Hospital violated the National Labor Relations Act ("Act") by denying the nurses' requests for union representation at the hearing.

The D.C. Circuit Court Finds There Is No Right to Union Representation at Voluntary Meetings

The Board found that the Hospital's denial violated the Act because employees have a right to union representation under *Weingarten* in "interviews where there is a reasonable belief that the employee will be disciplined," regardless of whether the employees' attendance is compulsory or voluntary. This was an overt expansion of employees' *Weingarten* rights which only apply to a unionized employee's right to representation at a mandatory meeting an employer requires them to answer potentially incriminating questions which may result in disciplinary action by the employer.

The D.C. Circuit Court, however, unanimously reversed the Board's decision. The Circuit Court, quoting the Supreme Court's *Weingarten* decision, held that an employee's *Weingarten* right is

infringed only when an employer ***compels*** an employee's attendance at an interview that might reasonably be expected to lead to discipline and denies his or her request for union representation. Specifically, the Supreme Court in *Weingarten* delineated the limited representation right as:

…the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy.

Here, the Hospital's letters to the nurses clearly conveyed their attendance at the hearing was *voluntary* and even allowed them to submit a written statement as an alternative to attending. Accordingly, the right to union representation under *Weingarten* was not triggered.

The Court also rejected the Board's finding that, after denying a request for union representation in these circumstances, the employer must discontinue the interview unless the employee voluntarily agrees to continue after the employer explains to the employee the he or she has a choice to continue the interview without a representative present or not have the interview at all. The Court explained that the letters sent to the nurses made it clear that their attendance was voluntary, and *Weingarten* "contains no suggestion that the NLRA requires an employer to *renew* advice to an employee that her attendance at a hearing is optional." The Court distinguished the precedent relied upon by the Board on the ground that all the cases involved compulsory attendance at interviews.

The Concurrence Suggests *Weingarten* Rights Do Not Apply Outside Interviews Conducted by Employers

Notably, in a concurring opinion, Circuit Judge Kavanaugh emphasized that the majority's opinion assumes *arguendo* that *Weingarten* rights could apply to peer review committees without deciding this threshold question. Judge Kavanaugh explained that, were the Court to decide this threshold question, he would hold *Weingarten* rights do *not* apply in peer review committee interviews. Rather, *Weingarten* rights exist "to redress the perceived imbalance of economic power between labor and management," and therefore apply primarily in the context of disciplinary investigations conducted by the employer. When the interview is conducted by a state-mandated peer review committee that is not part of the employer's disciplinary process, *Weingarten* rights do not apply.

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