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THE EMPLOYEE’S RIGHT TO REPRESENTATION DURING EMPLOYER INVESTIGATORY INTERVIEWS: A CRITICAL ANALYSIS OF THE EVOLUTION OF WEINGARTEN PRINCIPLES

DAVID L. GREGORY†

I. INTRODUCTION

The investigatory interview poses an obvious threat to an employee, since information garnered during such a session may subsequently be used in disciplinary proceedings. This article will examine the important labor relations issues surrounding the scope of the employee’s right to representation during employer investigatory interviews concerning employee misconduct. In the companion cases of NLRB v. Weingarten, Inc.¹ and International Ladies’ Garment Workers’ Union v. Quality Manufacturing Co.,² the United States Supreme Court held that the union employee has a statutory right to representation by a union official upon request during investigatory interviews which the employee reasonably fears could result in disciplinary action.³ A discussion of these two cases and important predecessor decisions will highlight and frame the initial analysis.

The article will then concentrate on recent decisions by the National Labor Relations Board (Board) and by the courts of appeals which have expanded, in some instances, and limited, in others, the

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¹ 420 U.S. 251 (1975). The Supreme Court validated the National Labor Relations Board’s position that § 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1976), guarantees an employee’s right to union representation during interviews which he reasonably fears may result in disciplinary action. Id. at 256-57, 260.

² 420 U.S. 276 (1975). In Quality, several employees complained about the system for determining wages according to the amount of work. Id. at 278. One of the employees was called to the employer’s office after she turned off her machine. The employee insisted upon having a union representative at the meeting and refused to submit to the interview without representation. After several later encounters in which the employee refused to meet with a supervisor alone, the employee was discharged. Id.

³ See 420 U.S. at 250-51; 420 U.S. at 281. The Supreme Court in Weingarten noted that an employee’s right to request representation in an interview is limited to situations where the employee “reasonably believes” the investigation will result in disciplinary action. 420 U.S. at 251. The Court explained that this reasonable belief will be measured by objective standards under all the circumstances of the case and not by a probe of the employee’s subjective motivations. Id. at 251 n.5.
Weingarten right to union representation. Finally, this article will conclude with an assessment of probable future developments and will offer some suggestions for further refining Weingarten principles.

II. PRE-WEINGARTEN LAW

The first major decision regarding employee rights to representation at an employer interview was Ross Gear & Tool Co. In Ross, an employee, Mae Ford, was discharged because she refused to meet with her company’s labor relations representative without a union representative. The Board concluded that the company’s labor relations representative interfered with Ford’s section 7 rights when he ordered her to appear before him without union representation. It also concluded that the employee’s dismissal constituted a violation of sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (Act).

In reaching this conclusion, the Board suggested that the company’s labor relations representative had ordered Ford to meet with him in an attempt to resolve a dispute out in her department. Moreover, the Board concluded that Ford had properly inferred that her employer’s purpose in calling her to his office was to admonish her. According to the Board, the cause of the general discord was Ford’s attempt, as the union’s recording secretary and committeewoman, to challenge the company’s policy against smoking by female employees in the workplace. The Board therefore concluded that it had been unlawful for the company’s labor relations representative to order

4. 63 N.L.R.B. 1012 (1945), enforcement denied, 158 F.2d 607 (7th Cir. 1947).
5. Id. at 1033.
6. Id. at 1034. The Board concluded that the dismissal of this employee violated § 8(3) of the Act because it “necessarily discouraged membership in the union.” Id.
7. Id. at 1024. Both men and women were employed in the employee’s department, the inspection department. There was also a split in union membership within this department: three women, including the dismissed employee, belonged to the union, while five women were not members of the union. Nonetheless, the union represented all of the employees by virtue of its certification. Id. at 1222. Ford became unpopular with the non-union women employees when she challenged the company’s restriction against smoking by women employees. Id.
8. Id. at 1024.
9. Id. at 1021-23. The Board noted that Ford had previously presented a grievance in a meeting between union committee members and the company’s labor-management representative. During this meeting, she requested that women in the department be allowed to smoke cigarettes in the workplace just as men were then permitted to do. Id. at 1021. After the company representative gave the employee permission to inform the women in her department that they were now allowed to smoke, a few non-union women in the department and the chief inspector of the department became antagonistic and labelled her a “trouble-maker.” Id. at 1022-23.
Ford to meet with him alone upon penalty of discharge. In so concluding, the Board stated, however, that the right to insist upon union representation derived not from the individual's status as an employee but rather from her membership on a union committee.

The Seventh Circuit subsequently reversed the Board's decision, largely because it viewed the facts in a different light. The court emphasized, for instance, the employee's "record for tardiness." It also discussed at length the dissension she had caused among some of the female employees when she fought for their right to smoke on the job. Unlike the Board, the Seventh Circuit viewed the employer's request to meet with the employee alone as motivated not by any predetermined decision to admonish her, but rather by a desire to resolve interpersonal discord about which the employer had received a complaint. Thus, when the employee repeatedly refused to meet with her employer unaccompanied by a union representative, the em-

10. Id. at 1034.

11. Id. In explaining its holding, the Board emphasized that the dismissed employee was a member of a union committee:

Assuming, without deciding, that an individual employee is not entitled to insist upon union representation whenever he or she may be called in by management to be admonished, in the instant case Ford was being called in partly as a member of a union committee about a matter concerning which the respondent had already dealt with that committee as the exclusive bargaining representative. Under these circumstances . . . Ford was within her statutory rights in refusing to handle the matter alone and in insisting that Stecker take it up with the entire union committee, of which she was a member.

Id. at 1032-33.

12. NLRB v. Ross Gear & Tool Co., 158 F.2d 607, 611-13 (7th Cir. 1947). The Seventh Circuit stated that there was no basis for the Board's inference that the employee was discharged because she was a union official or that she was dismissed for the purpose of restraint, intimidation or coercion. Id. at 613. The court found that her discharge was based on insubordination and that she had signed, without protest, a "termination of employment" statement articulating this reason for her discharge. Id. The court concluded that "[i]t is difficult to believe that a woman of Ford's intelligence would sign such a statement if she had any reason to think her discharge was for any cause other than that stated." Id. at 614.

13. Id. at 612. The court noted that "[w]hile she was a skilled worker and a valuable employee in many respects, she had a record for tardiness far exceeding any other employee in the department, and the evidence strongly indicated that she was a general trouble maker and possessed an exaggerated idea of her importance." Id.

14. Id. The Seventh Circuit noted that when Ford posted a notice describing the smoking privilege which she had won from management, "[t]he battle of words and epithets between smokers and non-smokers greatly accelerated." Id. At one point, "Ford and another woman agreed to go outside to settle their differences in a fist fight." Id. The court noted that the situation became so tense that two of the women employees in the department asked to be released after telling the labor-management representative that they had "tolerated Ford as long as they could." Id.

15. Id. The court stated that, after two women employees complained to the labor-management representative, he had promised to speak to Ford. Id. The court suggested that the record showed without question that the company representative's
ployer, according to the court, was justified in firing her for violation of the company's rule that an employee who refused to comply with the direction of a supervisory employee was subject to discharge.\footnote{Id. at 613.}

Although the Seventh Circuit nowhere articulated the difference between its approach and the Board's to the same set of circumstances, it appears to be a difference in the degree of willingness to probe behind certain facts. For instance, only the Board imputed ill motives to the employer by suggesting that the employee had properly inferred that the purpose of the meeting was to admonish her. The court's aversion to look behind facts in \textit{Ross Gear} and the Board's readiness to undertake close factual analysis are characteristic of the different approaches taken by the Board and the courts of appeals in deciding subsequent cases on the employee's right to representation. \footnote{Id. at 1565 (1964).}

\textit{Dobbs Houses, Inc.},\footnote{Id. at 1571.} decided almost twenty years after \textit{Ross Gear}, was the first Board decision squarely to address the employee's right to representation during employer investigatory interviews. Because this decision involved an employee who was not also a union official, as was the case in \textit{Ross Gear}, its holding is not limited to an employee in a special union capacity.\footnote{Id. at 1570.} The Board in \textit{Dobbs Houses} adopted the findings of the trial examiner and upheld the termination of an employee who had repeatedly violated the employer's express rule against union solicitation on company time and concluded the employee was not entitled to representation under the circumstances.\footnote{Id. at 1570-71.}

The trial examiner, in particular, considered the allegation that the employer violated section 8(a)(1) of the Act by refusing to accede to the employee's request for a union representative during the meeting regarding the employee's discharge. He concluded that the employer was not required to allow the presence of a union representative dur-
ing meetings that were called for the purpose of admonishing or disciplining an employee.20 Besides looking to the Act, the trial examiner relied on dictum in Ross Gear which suggested that an individual employee who was not acting in the capacity of a union official might not be entitled to a right to union representation.21

The next Board decision to consider the union employee's right to union representation in certain meetings with his employer was Texaco, Inc., Houston Producing Division.22 This time, however, the Board concluded that the employee was entitled to union representation at a meeting with his employer concerning his suspension.23 Furthermore, the Board traced this right not only to section 8(a)(1) of the Act as it had done in Ross Gear, but also to section 8(a)(5).24 Under section 8(a)(5), it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."25 The Fifth Circuit, however, disagreed with the Board's analysis and reversed its decision.26

The controversy leading to the employer's alleged violations of these statutory rights arose when an employee was observed stealing

20. Id. at 1571. The trial examiner stated:
I fail to perceive anything in the Act which obliges an employer to permit the presence of a representative of the bargaining agent in every situation where an employer is compelled to admonish or to otherwise take disciplinary action against an employee, particularly in those situations where the employee's conduct is unrelated to any legitimate union or concerted activity. An employer undoubtedly has the right to maintain day-to-day discipline in the plant or on the working premises and it seems to me that only exceptional circumstances would warrant any interference with this right. Id.

21. Id. The examiner noted the following language from Ross Gear: "Assuming, without deciding, that an individual employee is not entitled to insist upon union representation whenever he or she may be called in by management to be admonished. . . ." Id. (quoting Ross Gear & Tool Co., 63 N.L.R.B. at 1033).

22. 168 N.L.R.B. 361 (1967), enforcement denied, 408 F.2d 142 (5th Cir. 1969).

23. Id. at 362. The Board stated that the employer's refusal to respect the employee's request that the bargaining representative be permitted to represent him at the meeting interfered with and restrained him in the exercise of rights guaranteed by § 7 of the Act. The Board noted that there was no evidence that the employee or union waived this right to representation or had agreed to channel disputes into the procedures set forth in the contract grievance provisions. Id.

24. Id. The Board stated that the employer's refusal to deal with the union representative "transgressed its statutory obligation to bargain with the union concerning the terms and conditions of employment of the employees it represents," thereby violating § 8(a)(5) as well as § 8(a)(1) of the Act by restraining and coercing an employee in exercise of his § 7 rights. Id.

25. See 29 U.S.C. § 158(a)(5) (1976). In Texaco Inc., Houston Producing Division, the employee was not a union member, but he was part of a collective bargaining unit which had selected the union to represent them. 168 N.L.R.B. at 361-62.

company property and was subsequently suspended without pay. Although the employee was not a member of the union, he was part of a unit of employees represented by that union. After the union's field steward complained that the employee should have had union representation, Texaco began to investigate the matter. It set a meeting date and invited the employee to defend himself. Prior to this meeting, the union requested the right to represent the employee, but this request was denied. At the meeting, the employee also requested union representation, but once again this request was denied. He was questioned and then asked to sign a statement admitting the theft.

Central to the Board's decision was its characterization of the employer's purpose behind the second meeting with the employee. Taking issue with the trial examiner's "too narrow a view," the Board observed that the second meeting was called not merely to investigate the theft and gather additional information, but to complete the company's case against the employee in order to justify disciplinary action. This characterization formed the basis of the Board's

27. Id. at 143. A Texaco employee, Gilberto Alaniz, was suspended by his foreman on November 5, 1965, after the foreman observed Alaniz leaving the plant with a two-gallon can of kerosene which belonged to the company. Id. The foreman's action was in compliance with a company policy which required that an employee suspected of theft be suspended immediately with the understanding that he would suffer no loss of pay if subsequent investigation failed to support the suspicion. Id.

28. Id. at 144 n.3.

29. 168 N.L.R.B. at 361.

30. Id. After denying the employee's request for union representation, one of the company representatives stated that there would be no interview if Alaniz insisted on union representation and that Alaniz would then be free to go. Alaniz, however, remained and was questioned. Id.

31. Id. At the November 17th meeting Alaniz signed a statement prepared by the company in which he conceded that he had taken two gallons of the company kerosene, promised to do his job in a manner which would do credit to him, and asked that consideration be given "on past service to Texaco." Id. Alaniz was suspended without pay for 16½ working days, but he was thereafter allowed to return to work. Id.

32. See notes 33-34 and accompanying text infra.

33. 168 N.L.R.B. at 361-62. The Board noted that the trial examiner found that no grievance had been raised in the November 17th meeting with Alaniz; hence, no violation of § 8(a)(5) of the Act occurred. Id. The trial examiner also concluded that the employer had not violated § 8(a)(1) in denying Alaniz union representation at the meeting because Alaniz could have filed a formal grievance, thereby assuring such representation. Id. at 362. The Board commented that the "Trial Examiner took too narrow a view of the issues before him." Id.

34. Id. The Board noted: [T]he November 17 meeting was not simply a part of an investigation into some alleged theft and Alaniz was not invited solely to provide the company representatives with information. Rather the meeting was concerned essentially with Alaniz and his alleged theft, the facts of which were known to management representatives some two weeks earlier, and more specifi-
section 8(a)(5) analysis:

Thus it is clear that on November 17 [the date of the second meeting] the Company sought to deal directly with Alaniz [the employee] concerning matters affecting his terms and conditions of employment. . . . [I]n view of Alaniz’s request for union representation at the meeting and the Union’s evident willingness to represent him . . . we find that the respondent’s refusal to deal with the Union on that occasion transgressed its statutory obligation to bargain with the union concerning the terms and conditions of employment of the employees it represents. 35

The Fifth Circuit’s subsequent reversal of the Board decision, like the Seventh Circuit’s reversal in Ross Gear, was based, at least in part, on its different view of the facts. 36 It was also based in part on two cases—Chevron Oil Co. 37 and Jacobe-Pearson Ford, Inc. 38—which were decided by the Board subsequent to the Board’s decision in Texaco. The Fifth Circuit, in Texaco, Inc., Houston Producing Division, relied on these two cases for the proposition that “[t]he Board has properly recognized that an employee’s right to union representation does not apply to all dealings with his employer which may eventually or ultimately affect the terms and conditions of his employment.” 39 Implicit in the court’s reliance on these two cases was its view that in the case before it the second employee-employer meeting did not directly affect the terms and conditions of the employee’s employment. The court made this view of the facts explicit when it went on to state that the meeting or interview in question was purely investigatory, and that the employer was not committed to a course of disciplinary action prior to the interview. 40 Thus, the Fifth Circuit, in holding that sections 8(a)(1) and 8(a)(5) of the Act were not violated by the em-

35. Id.
36. For a discussion of the Fifth Circuit’s factual analysis in Texaco, Inc., Houston Producing Div., see note 40 and accompanying text infra.
39. 408 F.2d at 144 (citing Jacobe-Pearson Ford, Inc., 172 N.L.R.B. 594 (1968); Chevron Oil Co., 168 N.L.R.B. 594 (1967)).
40. Id. at 145. As the Fifth Circuit observed, the “[f]oreman’s suspension of Alaniz was conditional pending the outcome of an investigation and by no means committed the company to a course of action.” Id.
ployer, distinguished between meetings called for the purpose of uncovering additional facts about the employee's alleged misconduct and those called with the express purpose of taking disciplinary action.\textsuperscript{41}

This distinction between investigatory and disciplinary interviews which the Fifth Circuit relied upon in \textit{Texaco, Inc., Houston Producing Division}\textsuperscript{42} appeared in its embryonic stages in the two earlier Board decisions. In \textit{Chevron Oil Co.},\textsuperscript{43} the Board held that the statutory right to union representation did not arise until two events occurred: a management decision was made to affect, in some adverse way, an employee's terms of employment, and the decision was on the brink of implementation.\textsuperscript{44} Neither event had occurred in \textit{Chevron Oil Co.}, where management had established a bifurcated system of review. The first part of this system consisted of a fact-finding meeting during which the employee was not permitted to have union representation. The second stage consisted of a disciplinary meeting, which was held after disciplinary measures had been discussed by management. During this second meeting, however, both the employee and his union representative were permitted to make comments or modify earlier statements.\textsuperscript{45} In \textit{Chevron Oil Co.}, several

\textsuperscript{41} \textit{Id.} at 144. The Fifth Circuit stated that the evidence was overwhelming that the interview was investigatory in nature and there was absolutely no evidence that the comptroller sought to deal with Alaniz about the consequences of his alleged misconduct. \textit{Id.}

\textsuperscript{42} \textit{Id.} at 145.

\textsuperscript{43} 168 N.L.R.B. 574 (1967).

\textsuperscript{44} \textit{Id.} at 578. The Board adopted the trial examiner's statement that the right to union representation does not arise under the Act unless a "grievance" exists from management's formulation of a decision which will adversely affect an employee's wages, hours, or other conditions or terms of employment and that decision is on the brink of implementation. \textit{Id.}

\textsuperscript{45} \textit{Id.} at 577. The employees in \textit{Chevron Oil} were charged with insubordination after they disregarded a foreman's order to stay at their work stations at the Perth Amboy Refinery until 7:30 a.m., the normal quitting time, rather than leaving earlier at 7:15 a.m. \textit{Id.} The trial examiner related the testimony of a labor management representative describing the bifurcated interview process for disciplinary infractions:

[A] factfinding session is held at which the employee will be invited to present his side of the story so that management representatives may make a fair appraisal of all the evidence. . . . The employee is told that, because the purpose of the meeting is essentially to gather basic information and because management representatives at a factfinding session are not authorized to dole out punishment, the presence of a union representative is unnecessary . . . .

When a decision to discipline has been reached, Respondent schedules a disciplinary meeting at which the affected employee and his union representative are invited to appear. . . . At the disciplinary meeting the facts again are presented to the group present. Once more everyone present has the opportunity to comment, to amend, alter, modify or whatever, including of course the union steward.

\textit{Id.}
employees who were suspended after the second meeting with the employer and their bargaining agent alleged that their section 8(a)(5) rights were violated when they were not permitted to have their bargaining agent present with them during the initial fact-finding meetings. The Board, however, concluded that the employees' statutory rights had not even arisen because not only had no disciplinary action been decided on prior to the initial fact-finding meetings, but the person conducting them was without authority to take disciplinary action at these meetings.

In Jacobe-Pearson Ford, Inc., the Board concluded that an employee's section 8(a)(1) and 8(a)(5) rights were not violated by denying union representation at a meeting scheduled with the employer which ultimately never took place. The controversy in this case arose when an employee turned aside an automotive repair job, estimated to require 45 to 60 minutes of work, and left work five minutes.

46. Id. at 578. The employees argued that "an employer violates section 8(a)(5) of the Act when he fails to consult with the duly designated bargaining agent of his employees during the course of a preliminary investigation to ascertain whether an employee has engaged in conduct in contravention of plant rules which justifies the invocation of disciplinary measures affecting job tenure." Id. The employees also argued that it was a violation of § 8(a)(1) "to deprive employees of the advice and counsel of a union representative whenever the possibility of disciplinary action may be visited upon them." Id.

47. Id. at 578. The Board adopted the examiner's position that although §§ 9(a) and 8(a)(5) of the Act obligate an employer to deal with a duly designated labor organization concerning all matters which affect the employment tenure of represented employees, "this is not to say that a bargaining agent must be privy to management councils, or that represented employees must be shielded by that agent from company inquiries, on each and every occasion when management embarks upon an investigation to ascertain whether plant discipline has been breached." Id.

48. Id. at 577. Although the trial examiner noted that before the initial fact-finding interview, the superintendent and manager of the department had "reached a tentative decision . . . to mete out some form of punishment to the nine employees for insubordination" and that after the fact-finding interview, the manager's staff decided to suspend the employees for 3 days without pay, the Board stressed that this initial interview was merely for the purpose of "fact-finding" and such punishment could not be implemented at the interview. Id.

49. Id. at 578. The examiner noted that the company superintendent lacked the authority to discipline the employees at the fact-finding interviews. Id.


51. Id. at 594. The Board concluded that when the employee was invited to meet with management alone, the company representative had not reached any decision to discipline him but rather was only investigating the events of the preceding day. Id. at 594-95. The Board therefore concluded that the potential for disciplinary action was remote and the purpose for the meeting was essentially information gathering. Id. But, as the trial examiner pointed out, the meeting with the employer never took place and thus the question of whether the proposed interview "was in effect to deal with him concerning the terms and conditions of employment can never be established with any certainty." Id. at 599.
before closing time. The next day the employee found that his time card had been pulled, a practice which generally signaled discharge to most employees. The employer requested a meeting with the employee alone later that day, and denied the subsequent request by both the employee and the union for union representation at that meeting. Invoking the distinction later elaborated upon by the Fifth Circuit in *Texaco Inc., Houston Producing Division*, the Board observed that the meeting was scheduled only for the purpose of investigating the employee’s version of the previous day’s events, and not for the purpose of deciding on discipline. In drawing this distinction, the Board thus ignored the subjective fears which the employee experienced when he saw that his time card had been pulled. Instead, the Board based its holding on the employer’s stated purpose for scheduling the meeting.

After the Fifth Circuit’s decision in *Texaco, Inc., Houston Producing Division* and the Board’s decisions in *Chevron Oil Co.* and *Jacobe-Pearson*, the employee’s right to representation during employer interviews appeared seriously threatened by the distinction between investigatory and disciplinary interviews. As one commentator ob-

52. *Id.* at 594. The employee turned back a light repair job received at about 5:35 p.m. which he estimated would require about 45-60 minutes of working time to complete. *Id.* Company rules specified employee quitting time at 5:30 p.m. “unless there is a job to be done and completed by 6 p.m.” *Id.*

53. *Id.* The Board observed that although, in the minds of the employees, a pulled time card “generally signaled discharge,” there were only two specific instances of discharge following a pulled time card and even the employee admitted that no one in management had told him of such a practice. *Id.* The service manager testified that a pulled time card signifies only that management wants to talk to the employee. *Id.*

54. *Id.* at 597-98. The trial examiner observed that the union representative initially requested permission to represent the employee at the interview because it might affect the employee’s terms and conditions of employment. *Id.* at 597. When this request was denied, the union representative asked for permission to be present at the interview but remain silent in order to serve as a union witness to protect against false accusations. This request was similarly denied. *Id.*

55. *Id.* at 594. The Board noted that the company’s service manager and attorney had assured the union that there was no pre-interview decision to discharge the employee. The Board also observed that the union had been similarly assured by the company manager that it would be informed of any disciplinary decision reached and could protest the decision at the bargaining table if it so decided. *Id.*

56. *Id.* at 599-600. It is notable that the Board ignored the trial examiner’s observations that “the events which occurred after the employee found his time card missing could only enhance rather than reduce his fear that his job was in jeopardy.” *Id.* at 599.

57. See Note, *Union Presence in Disciplinary Meetings*, 41 U. CHI. L. REV. 329, 332 (1973) [hereinafter cited as Note, *Union Presence*]. This commentator noted that the Board’s subsequent attempts after *Chevron Oil* and *Jacobe-Pearson* to distinguish between investigatory and disciplinary proceedings did not produce “a clear standard.” He suggested that the Board’s attempt to restrict the right of union representation to
served, however, neither the Board nor the courts of appeals were able to appreciate that this distinction which they had created between investigatory and disciplinary interviews was illusory. The so-called investigatory interview often served as an indispensable information-gathering tool to corroborate management's version of the incident under review. Moreover, even when the investigatory phase of the interview was intended to serve as a neutral, objective fact-finding process, these meetings nevertheless ultimately assumed a disciplinary tenor.

Recognizing the artificial nature of the distinction between investigatory and disciplinary interviews, the trial examiner in Texaco, Inc., Los Angeles Sales Terminal formulated a new test for determining when the employee's right of union representation arose. This test, which was adopted by the Board, shifted the focus from the employer's professed purpose for the interview to the objective manifestations of this purpose. The controversy leading to the Board's new test arose when an employee of Texaco refused to drive a truck which required repair work on certain safety features. Upon his refusal,disciplinary meetings reflected a concern that a broad recognition of this right would "unduly disrupt employer operations" in the most routine employer-employee meetings because "[e]mployers would be unable to keep informed on plant operations if unions were always present to shield their members from criticism." Moreover, he noted that "[a]n excessively broad right might also interfere with the parties' § 9(a) rights to contract regarding disciplinary procedures." The commentator suggested that the Board overlooked the fact that in many cases the employer already had all the information needed for a disciplinary decision and that the employer held the "fact-finding" interview mainly to confirm these facts. The author also noted that in a bifurcated procedure (fact-finding session followed by disciplinary interview), the Board was often insensitive to the hardships which the employee encountered because the second disciplinary interview did not have all the advantages of a de novo meeting: the employee might have either signed a statement admitting guilt or provided a damaging record by his own admissions in the "fact-finding" interview. A final flaw of this dichotomy between "investigatory" and "disciplinary" interviews is that the Board so expansively defined "investigatory" interview that it was difficult to find an interview that would not fall into that category.

58. See Note, Employee Right to Union Representation, supra note 57, at 306-07. This commentator suggested that the Board overlooked the fact that in many cases the employer already had all the information needed for a disciplinary decision and that the employer held the "fact-finding" interview mainly to confirm these facts. Id. at 306. The author also noted that in a bifurcated procedure (fact-finding session followed by disciplinary interview), the Board was often insensitive to the hardships which the employee encountered because the second disciplinary interview did not have all the advantages of a de novo meeting: the employee might have either signed a statement admitting guilt or provided a damaging record by his own admissions in the "fact-finding" interview. Id. at 307. A final flaw of this dichotomy between "investigatory" and "disciplinary" interviews is that the Board so expansively defined "investigatory" interview that it was difficult to find an interview that would not fall into that category. Id.

59. See id. at 306.

60. Id.


62. Id.

63. Id. at 983.

64. Id. at 978.
the employee was told "to consider himself suspended," pending a talk with a supervisor. Both the employee and the union requested the presence of a union official at this talk, but both were refused. Shortly after this meeting, the employers decided that the employee should be discharged, a decision which was implemented two days later.

In concluding that the employee's section 8(a)(1) and section 8(a)(5) rights were violated, the trial examiner surveyed recent precedent on the issue and noted, in particular, Texaco, Inc., Houston Producing Division and Jacobe-Pearson Ford, Inc. The trial examiner observed that the central premise of these cases—that meetings between employees and employers may be characterized as either fact-finding conferences or as record-building conferences designed to justify disciplinary action—created a "false dichotomy." Finding that there were too many situations which did not fall into either of the two categories, the trial examiner proposed that the conference should be viewed from the employee's perspective. The trial examiner acknowledged, however, that it was as much a mistake to consider the employee's subjective feelings as it was, under the old test, to consider the employer's professed intentions in calling the meeting. Accordingly, the trial examiner set forth an objective test which purportedly was based on "recent cases" and stated that the "claimed statutory rights . . . vest . . . when management's course of conduct with respect to some job or plant situation provides objective manifestations sufficient reasonably to justify the conclusion that a disciplinary reaction, regarding the concerned worker or workers, will be forthcoming."

Three years later, the Board made an oblique reference to the

65. Id.
66. Id. at 979. The employee was assured that the only purpose of the meeting was to get the employee's version of what had taken place and that there was thus no reason for anyone else to be present. Id.
67. Id. at 979-80.
68. Id. at 981-82.
69. Id. at 982 (citing Texaco, Inc., Houston Producing Division, 168 N.L.R.B. 361 (1967)). For a discussion of Texaco, Inc., Houston Producing Division, see notes 22-41 and accompanying text supra.
71. 179 N.L.R.B. at 982.
72. Id. at 982-83.
73. Id. at 983.
74. Id. Applying this test, the trial examiner concluded that the employee's rights were not violated. Id. at 986.
investigatory/disciplinary distinction 75 in Mobil Oil Corp. 76 although it shifted its previous emphasis on section 8(a)(5) 77 to sections 7 and 8(a)(1) of the Act in its analysis of the employee's right to representation. The controversy in Mobil Oil Corp. arose when five employees were charged with theft of company property. 78 During interviews by the employer's security agents, employee requests for union representation were denied. 79 As a result of the information obtained during the security interrogation, the employees were subsequently discharged. 80

In holding that the employees' statutory rights had not been violated, the trial examiner purported to rely on both sections 8(a)(1) and 8(a)(5) of the Act. 81 The trial examiner's observation, however, that the interviews were not designed to obtain support for predetermined disciplinary action 82 suggests that he primarily relied on the "terms and conditions of employment," language of section 8(a)(5), under which the distinction between an investigatory and disciplinary interview is crucial. 83

The Board rejected the trial examiner's opinion and held that the employer in Mobil Oil Corp. did violate the Act, but that the employer violated sections 7 and 8(a)(1) rather than section 8(a)(5). 84 In its analysis, the Board nonetheless made reference to the investigatory/disciplinary distinction when it referred to the Board's decision in Quality Manufacturing Co. 85 and, more specifically, to its statement of an objective standard for an employee's fears that an interview will affect his employment status. 86 This standard was almost identical to the one set by the Board in Texaco, Inc., Los Angeles Sales Terminal. 87

75. For a discussion of this reference, see note 85 and accompanying text infra.
76. 196 N.L.R.B. 1052 (1972), enforcement denied, 482 F.2d 842 (7th Cir. 1973).
77. See note 24 and accompanying text supra.
78. 196 N.L.R.B. at 1059.
79. Id. at 1058.
80. Id. at 1059.
81. Id. at 1056-60.
82. Id. at 1060.
83. Id. at 1056-60. The Seventh Circuit, on appeal, observed that the decision of the trial examiner rested primarily on § 8(a)(5) of the Act. Mobil Oil Corp. v. NLRB, 482 F.2d 842, 844 (7th Cir. 1973).
84. 196 N.L.R.B. at 1052.
85. See id. at 1052 n.3 (citing Quality Mfg. Co., 195 N.L.R.B. 197 (1972)). The majority in Mobil contended that, contrary to the views of the dissent, they were "not giving the Union any particular rights with respect to predisciplinary discussions which it was not otherwise able to secure during collective bargaining negotiations."
86. Id. at 1052.
87. For a discussion of the standard used by the Board in Texaco, Inc., Los Angeles Sales Terminal, see notes 61-74 and accompanying text supra.
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In Mobil Oil Corp., the Board arrived at its conclusion that the employer violated section 7 and 8(a)(1) of the Act through close scrutiny of the language of section 7 regarding an employee's right to engage in "concerted activities for mutual aid and protection." It reasoned that the employer's denial of the employee's request for union representation resulted in a violation of this right because it forced the employee to face his employer alone:

Thus, it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denied the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy. Such a dilution of the employee's right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action.

By disregarding the alleged section 8(a)(5) basis for the cause of action, the Board was able to avoid the difficulties inherent in distinguishing between investigatory and disciplinary interviews.

Rejecting once again the Board's view of the facts, the Seventh Circuit reversed. Considering the spirit of section 7 rather than its letter, the court denied enforcement of the Board's order. It reasoned that section 7 was primarily concerned with the employees' ability to bring concerted economic pressure to bear on the employer in furtherance of legitimate objectives. Applying this purpose to the facts of Mobil Oil Corp., the court concluded that "the requested union representation at an investigatory interview is clearly not the kind of 'concerted activity' with which § 7 is primarily concerned."

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88. 196 N.L.R.B. at 1052. The Mobil majority concluded that the two employees involved "had reasonable grounds to fear that they were suspected of theft" and thus, that their requests for union representation at the interview with their employer were consistent with the § 7 guarantee to employees of a right to engage in mutual aid and protection. Id.
89. Id.
90. Mobil Oil Corp. v. NLRB, 482 F.2d 842 (7th Cir. 1973).
91. Id. at 848.
92. Id. at 846-47.
III. THE QUALITY AND WEINGARTEN DECISIONS

Against this background of Board and appellate decisions that circumscribed, for the most part, the employee's right to union representation during investigatory interviews with the employer, the Supreme Court finally addressed this issue and held for the employee in two companion cases, *International Ladies' Garment Workers' Union v. Quality Manufacturing Co.* and *NLRB v. Weingarten, Inc.* In both cases, the Court applied the threshold test focusing an employee's objective fears about possible discipline that was first enunciated by the trial examiner in *Texaco, Inc., Los Angeles Sales Terminal* to determine whether the employee's rights were even involved. However, the Court linked this test to section 8(a)(1) of the Act, not section 8(a)(5) as the Board had done in *Texaco, Inc., Los Angeles Sales Terminal*. The reasons for the Court's focus on section 8(a)(1) become apparent from an examination of both Board and appellate decisions in these two cases.

A. International Ladies' Garment Workers' Union v. Quality Manufacturing Company

The Board in *Quality Manufacturing Co.* began its analysis of the representation issue by distinguishing several earlier Board decisions, notably *Chevron Oil Co.*, *Jacobe-Pearson Ford, Inc.*, and *Texaco, Inc., Los Angeles Sales Terminal*. It first observed that the Board in these three cases had taken the position of refusing to find a violation of § 8(a)(1) of the Act. *Id.* at 277. The Board also expressly stated that the issue presented by the discharge in the case before it was not decided by either the Board or the appellate court in *Texaco, Inc., Houston Producing Division*, *168 N.L.R.B. 361 (1967)*, *enforcement dep'd*.

95. 420 U.S. 251 (1975).
96. See 420 U.S. at 280-81. The *Quality Manufacturing* Court noted that both the Fourth Circuit in *Quality Manufacturing* and the Fifth Circuit in *Weingarten* had rejected the Board's contention that a denial of a request for union representation at an investigatory interview, which the employee reasonably believed might result in disciplinary action, constituted a violation of § 8(a)(1) of the Act. *Id.* at 277.
97. See text accompanying note 68 supra.
99. 195 N.L.R.B. at 198. The focus of the Board's inquiry was upon §§ 8(a)(1) and 8(a)(3) of the Act and not upon § 8(a)(5) which had been the focus of the cases it distinguished. *Id.* The Board also expressly stated that the issue presented by the discharge in the case before it was not decided by either the Board or the appellate court in *Texaco, Inc., Houston Producing Division*, *168 N.L.R.B. 361 (1967)*, *enforcement dep'd*.
100. For a discussion of *Chevron*, see notes 43-49 and accompanying text supra.
101. For a discussion of *Jacobe-Pearson Ford, Inc.*, see notes 50-56 and accompanying text supra.
102. For a discussion of *Texaco, Inc., Los Angeles Sales Terminal*, see notes 61-74 and accompanying text supra.
8(a)(5) violations in purely investigatory interviews. The Board concluded, however, that these cases were not controlling because they did not involve the factual situation present in Quality, where both the employee and his representative were fired merely for requesting representation. Another distinguishing characteristic, according to the Board, was that the "section 7 right of individual employees to act in concert 'for mutual aid and protection' was not considered in those cases." The Board concluded that it was a clear violation of an employee's right to be represented by a union if he was able to exercise his right to representation during an investigatory or disciplinary hearing only upon penalty of discharge.

While the Board appeared to have abandoned the section 8(a)(5) investigatory/disciplinary approach, or at least to have found it inapplicable in this case, it employed a modified version of it to determine whether the employee's section 7 rights even arose. The threshold test it proposed was much like the one proposed by the Board in Texaco, Inc., Los Angeles Sales Terminal: the employee's rights arise where he "has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action." According to the Board, where such reasonable grounds exist, participation in the interview is voluntary, unless the employer permits the employee to have a union official attend with him. The employer would therefore violate the Act if he required the employee to come to the interview unaccompanied by the union official or if he disciplined him for refusing to attend. The scales, however, were not tipped completely in the employee's favor. The Board pointed out that while the employee might be free to forego an interview if the employer refused to allow representation, the employer would still be free to take action based on information already uncovered. The Board concluded that the employees discharged in Quality had reason to believe that disciplinary action would be taken at the interview, and accordingly, it held that the employer had violated sections 7 and 8(a)(1) of the Act when he discharged these employees upon their

103. 195 N.L.R.B. at 198.
104. Id. While the Board was correct in paraphrasing the focus of the earlier cases which it proceeded to distinguish, it failed to distinguish or even mention Ross Gear, which involved the same factual circumstances found in Quality. For a discussion of Ross Gear, see notes 4-16 and accompanying text supra.
105. 195 N.L.R.B. at 198.
106. Id. at 198-99.
107. Id.
108. For a discussion of this test, see note 74 supra.
110. Id. at 198-99.
request for union representation.  

The Fourth Circuit found the Board's argument without merit, and therefore denied enforcement of its order.  

In particular, the court observed that the Board had improperly distinguished precedent.  

Focusing first on the Board's attempt to distinguish prior cases factually, the Fourth Circuit noted that an implicit, if not explicit, threat of discipline is present in all cases where management directs an employee to cooperate in an investigatory interview.  

With respect to the Board's attempt to distinguish precedent by legal argument, the court found the Board's observation that section 7 rights were not considered in previous cases inaccurate.  

It noted that section 7 rights were discussed, and found inadequate to support a right of union representation in the following cases:  

Ross Gear & Tool Co., 116 Dobbs Houses, 117 and Texaco, Inc., Los Angeles Sales Terminal. 118 In a footnote, the court acknowledged that the Board had sustained the right to union representation under sections 7 and 8(a)(1) in Mobil Oil Corp., 120 but then, without distinguishing it, implied that it too had been wrongly decided.  

The Fourth Circuit's final basis for its denial of enforcement of the Board's order in Quality was the Board's failure to cite any supporting legislative history.  

According to the court, the Board's bald assertion of an employee's right to representation was meritless, because it contained no statutory analysis.  

111. Id.
113. Id. at 1021.
114. Id. at 1024.
115. Id.
116. Id. (citing NLRB v. Ross Gear & Tool Co., 158 F.2d 607 (7th Cir. 1947)). For a discussion of Ross Gear, see notes 4-16 and accompanying text supra.
117. 481 F.2d at 1021 (citing Dobbs Houses, Inc., 145 N.L.R.B. 1565, 1571 (1964)). For a discussion of Dobbs Houses, see notes 17-21 and accompanying text supra.
118. 481 F.2d at 1023 (citing Texaco, Inc., Los Angeles Sales Terminal, 179 N.L.R.B. 976, 982 (1969)). For a discussion of Texaco, Inc., Los Angeles Sales Terminal, see notes 61-74 and accompanying text supra.
119. 481 F.2d at 1023 n.1.
120. 196 N.L.R.B. 1052 (1972). For further discussion of Mobil Oil Corp., see notes 76-93 and accompanying text supra.
121. 481 F.2d at 1023 n.1.
122. Id. at 1025.
123. Id.
B. NLRB v. Weingarten

While the Fourth Circuit was deciding Quality, the Board was deciding Weingarten, Inc., a case in which section 8(a)(1) was also cited as the statutory basis for the right of union representation. Factually, Weingarten differed from Quality since the employee was not discharged merely for requesting representation. In Weingarten, a store employee was questioned by her supervisor and a security guard concerning the theft of company property. During the course of the inquiry, the employee requested several times that her union representative be present, but each request was refused. The employee's responses to questions at the interview were investigated, and the charges thereafter dropped. The employee then brought a suit claiming that her section 8(a)(1) rights were violated when her requests for union representation were denied.

The Board adopted the Trial Examiner's findings that the employer violated section 8(a)(1), identifying section 7 as the source of an employee's right to representation. In reaching this conclusion, the trial examiner had relied on the Board's Mobil Oil Corp. decision. The Trial Examiner also had relied on the Board's decision in Quality and its objective standard for determining whether such rights arose. Nowhere, however, did the Trial Examiner make his own independent analysis of Section 7 or apply it to the facts.

125. Id. at 449.
127. 202 N.L.R.B. at 448.
128. Id. The employer's representatives claimed that the employee never directly asked for union representation. However, the administrative law judge was satisfied that the employee's question to the employer asking "shouldn't someone from the Union be there," was a request for representation. Id.
129. Id.
130. Id. at 446.
131. Id. at 449. The administrative law judge focused upon the language in Mobil which established the denial of union representation as a serious violation of the right to engage in "concerted activities" within the meaning of section 7. Id. (quoting Mobil Oil Corp., 196 N.L.R.B. 1052 (1972), enforcement denied, 482 F.2d 842 (7th Cir. 1973).
132. For a discussion of Mobil Oil Corp., see notes 76-93 and accompanying text supra.
133. 202 N.L.R.B. at 449. Even though neither of the employer's representatives had the authority to discipline employees, the administrative law judge, relying upon Quality, measured the employee's fear of discipline by objective standards. Viewed in light of this standard, the administrative law judge concluded that the questioning concerning possible dishonesty was enough for the employee to reasonably believe that her job security was jeopardized. Id.
Weingarten for a number of reasons. First, it noted that its reliance on the Mobil Oil Corp. and Quality Board decisions was groundless in view of the recent decisions by the Seventh and Fourth Circuits, respectively, denying their enforcement. Secondly, the court reverted to the investigatory/disciplinary distinction characteristic of earlier decisions involving section 8(a)(5) of the Act and found that the interview was purely investigatory. Finally, while the Fifth Circuit acknowledged the Board’s contention that the earlier decisions involving this distinction were distinguishable because none of them relied on section 7, it observed that the Fourth Circuit in Quality had both considered and rejected this contention.

C. The Supreme Court Decisions: Quality and Weingarten

The Supreme Court granted certiorari in both Quality and Weingarten and, considering them together, reversed the courts of appeals in two 6-3 decisions. Because the Court in Quality referred to Weingarten for its analysis, this discussion will focus only on Weingarten.

The Weingarten Court began its analysis of the representation issue by sketching the parameters of the Board’s decisions in Quality and Mobil. The majority initially noted that the right to representation in investigatory interviews was anchored in the language of section 7 guaranteeing employees the right to act in concert for their mutual aid and protection. The denial of the right to act in concert for mutual aid and protection.

134. NLRB v. Weingarten, Inc., 485 F.2d 1135 (5th Cir. 1973).
135. Id. at 1137.
136. Id. at 1137. The Fifth Circuit turned its attention to “the nature of the confrontation” between the employer’s representatives and the employee. The court concluded that there was “no suggestion that the meeting was anything other than a preliminary fact-finding interview.” Id. Accordingly, the Fifth Circuit labelled the interview “investigatory.” Id.
137. Id. Once the interview was labelled investigatory, the Board was faced with “a long line of Board decisions each of which indicates—either directly or indirectly—that no union representative need be present.” Id. Although the Board attempted to distinguish its previous decisions by examining the nature of the investigative interview, the Fifth Circuit stood by the Quality decision and refused to accept the proposition that § 8(a)(1) had never been confronted in the context of a denial of representation at employer interviews. Therefore, the Fifth Circuit followed previous precedent and declined to afford the right to union representation. Id. In a closing paragraph, the Fifth Circuit stated that the employee must demonstrate that an employer’s purpose was intended to go beyond fact-finding with the specific intent to “impose disciplinary measures upon the employee so that grievance hearings later on would merely put the seal on the employer’s judgment.” Id. at 1138.
138. 420 U.S. at 251; 420 U.S. at 276.
139. 420 U.S. at 281. The Quality Court held that its decision in Weingarten “clearly requires reversal” of the court of appeals decisions denying enforcement of a § 8(a)(1) violation and remedial order. Id.
140. 420 U.S. at 256. The denial of the right to act in concert for mutual aid and protection.

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tions which the Board imposed for the exercise of the right to representation and it concluded that an employee must request the representation and also reasonably believe that the investigation will result in disciplinary action.141 Finally, the majority examined the Board-defined limitations on the right to union representation. The employer need not justify a refusal to permit representation and may take action based upon information from other sources if the employee declines to be interviewed without representation.142 Additionally, the employer has no duty to bargain with any union representative present at an investigatory interview.143

After reviewing the Quality and Mobil Board decisions, the Supreme Court declared the Board's holding "a permissible construction of [section 7] by the Agency charged with enforcement of the Act" which should have been sustained.144 Although the language of section 7 covers "concerted activities," Justice Brennan did not interpret it as creating an impediment to the single employee who wished to avail himself of its protection. Instead, Justice Brennan offered a dynamic interpretation of section 7 in which the rights of the individual employee are intimately linked to the rights of the union as a whole. Thus, when a single employee seeks union representation, "[t]he union representative whose participation he seeks is . . . safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of

141. Id. at 257. The employee may choose to attend the interview without union representation thereby waiving his or her § 7 right. Id. Furthermore, the Board did not want the right to inure to "run of the mill shop-floor conversations," and therefore imposed an objective standard for measuring an employee's fear of disciplinary action. Id. See Quality Mfg. Co., 195 N.L.R.B. 197, 198 n.3 (1972) ("reasonable ground" measured by objective standards); NLRB v. Gissel Packing Co., 395 U.S. 575, 608 (1969) (an inquiry into an employee's subjective motivations involves "an endless and unreliable inquiry").

142. 420 U.S. at 258.

143. Id. at 259-60. In drawing a distinction between investigatory and disciplinary interviews, the Board was no longer concerned with the right to the presence of a union representative at either hearing but only with the degree of union involvement in the proceeding. Id. In investigative interviews where an employee reasonably fears discipline, the employer need not meet or negotiate with the representative. Id. at 260. The union representative is only present to assist the employee and clarify facts. Id. In disciplinary interviews, however, the employer has a "mandatory affirmative obligation" to meet with union representatives. Id. (citing Jacobe-Pearson Ford, Inc., 172 N.L.R.B. 594 (1968); Chevron Oil Co., 168 N.L.R.B. 574 (1967); Texaco, Inc., Houston Producing Div., 168 N.L.R.B. 361 (1967)).

144. Id. at 260.
imposing punishment." Moreover, this construction of section 7 was consistent with the Act's purpose of eliminating the inequality in bargaining power between the employee and employer.

Finally, acknowledging that the Board's decision in *Weingarten* was contrary to some of the Board's own precedents, the Court remarked that it was proper for administrative agencies to take an "evolutionary approach," rather than to follow, unquestioningly, prior decisions. It was inappropriate, the Court emphasized, for the court of appeals to interfere with the Board's role by making its own determination of an employee's "need" for union assistance at an investigatory interview: "It is the province of the Board, not the courts, to determine whether or not the "need" exists in light of changing industrial practices and the Board's cumulative experience in dealing with labor-management relations."

The dissenting Justices were primarily concerned with what they perceived as the abrupt shift in Board policy without an adequate explanation of its interpretation of section 7. Chief Justice Burger was not so much troubled with the Board's new rule as with the ab-

145. *Id.* at 260-61.

146. *Id.* at 261-62. Within an investigatory interview, the Court was concerned that "[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." *Id.* at 262-63. The majority also suggested that the presence of a union representative could aid the employer "by eliciting favorable facts and . . . getting to the bottom of the incident occasioning the interview." *Id.* at 263. The Court rejected the employer's contention that representation is unnecessary at the investigatory stage due to the later chance to correct any errors in a disciplinary proceeding. *Id.* Justice Brennan declared "[a]t that point, however, it becomes increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished." *Id.* at 263-64.


148. 420 U.S. at 265. In supporting the Board's "evolutionary approach," the majority recognized that representation problems are not susceptible to "a quick definitive formula as a comprehensive answer;" instead, these problems required the Board to "more or less [feel] its way." *Id.* at 265 (quoting *Electrical Workers v. NLRB*, 366 U.S. 667, 674 (1961)).

149. *Id.* at 266. Fundamentally, the Court believed that the Board, not the courts, should perform the "special function of applying the general provisions of the Act to the complexities of life" due to the Board's special competence in the field of labor relations. *Id.* (quoting NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963)). Even though an interpretation "may not be required by the Act," the majority concluded that so long as the interpretation is permissible and the Board is balancing the conflicting interests of management and labor, the Board's decision is subject only to limited judicial review. *Id.* at 266-67.
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sence of a cogent Board rationale. As he explained in dissent, "[t]he tortured history and inconsistency of the Board's efforts in this difficult area suggest the need for an explanation by the Board of why the new rule was adopted." 150

Justice Powell's dissent expressed concern that the Board's interpretation of section 7 was not altogether supported by its interpretation of previous opinions. 151 More importantly, Justice Powell maintained that the Board impermissibly intruded into the elementary prerogatives of management to discharge and discipline employees. 152

Examining the scope of section 7 of the Act, Justice Powell concluded that "concerted activity" was intended by Congress to reach only the rights of employees as a group to organize, exact concessions, and have a voice in management decisions affecting employees. 153 Representation of the individual employee was a subject for collective bargaining, Justice Powell maintained, not a right which Congress intended to come within the purview of section 7. 154

150. Id. at 268-69 (Burger, C.J., dissenting). Justice Burger emphasized that "'[w]hen the Board so exercises the discretion given to it by Congress, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.'" Id. at 269 (Burger, C.J., dissenting) (citation omitted). The Chief Justice wanted to remand the case to the Board so it could justify its change in policy, "rather than leave with this Court the burden of justifying the change for reasons which we arrive at by inference and surmise." Id.

151. Id. at 271-72 (Powell, J., dissenting). Justice Powell traced the Board's decisions from Dobb's Houses to Quality, concluding that the change in direction did not result from an "evolutional" approach based upon "significant developments of industrial life." Id. Rather, Justice Powell viewed the Board decisions as inconsistent, and as changing the basis of decision from one distinction to another. Id. at 272 (Powell, J., dissenting).

152. Id. at 273 (Powell, J., dissenting). Justice Powell stated:
An employer's need to consider and undertake disciplinary action will arise in a wide variety of unpredictable situations. The appropriate disciplinary response also will vary significantly, depending on the nature and severity of the employee's conduct. Likewise, the nature and amount of information required for determining the appropriateness of disciplinary action may vary with the severity of the possible sanction and the complexity of the problem. And in some instances, the employer's legitimate need to maintain discipline and security may require an immediate response. Id. at 274 (Powell, J., dissenting).

153. Id. at 273 (Powell, J., dissenting).

154. Id. at 272-73 (Powell, J., dissenting). Justice Powell offered a different perspective of the goal of the National Labor Relations Act. Id. In his opinion, the Act "only creates the structure for the parties' exercise of their respective economic strengths; it leaves definition of the precise contours of the employment relationship to the collective-bargaining process." Id. at 273 (citing Porter Co. v. NLRB, 397 U.S. 99, 108 (1970) (results of collective bargaining are best left to the bargaining strengths of the parties); NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 402 (1952) (the Act imposes only the obligation to bargain collectively and does not require any agreement between employer and employee)). Therefore, Justice Powell read section
Weingarten was a watershed decision, perhaps creating as many ancillary problems as it resolved. Exceptions to application of the rule quickly arose.\textsuperscript{155} Because of the Supreme Court's failure to define adequately the contours of its original decision, it becomes important to appreciate how the newly developed representation rule has been recently applied in subsequent lower court decisions.

IV. THE POST-WEINGARTEN EXPERIENCE: AN APPLIED ANALYSIS

A. Employer Notification of Pre-Determined Discipline or Warning

Although many of the post-Weingarten cases have upheld an employee's right to representation, and even expanded the right,\textsuperscript{156} in several particular areas the courts have limited or denied the right. Most of these cases have dealt with a unique set of facts which have enabled courts to circumvent the dictates of Weingarten.

One such case was \textit{Mount Vernon Tanker Co. v. NLRB,}\textsuperscript{157} where the Ninth Circuit confronted the issue of the employee's right to representation in a maritime context. In \textit{Mount Vernon}, a ship captain determined that a ship employee had refused a direct order to leave the engine room after he was discovered "loafing."\textsuperscript{158} Under the prescribed disciplinary procedures, the employee's act was to be "logged" into the captain's record.\textsuperscript{159} The seaman refused to attend the logging procedure without his union representative, despite the captain's insistence that logging was not a union matter.\textsuperscript{160} When the seaman remained steadfast in his refusal to submit to the logging procedure without representation, he was taken below, confined to the ship's hospital, and placed on a diet of bread and water "until his disobedience ceased."\textsuperscript{161} In addition, the employee was fined twenty days'

\textsuperscript{7} as protecting "those rights that are essential to employee self-organization and to the exercise of economic weapons to exact concessions from management . . . . It does not define those terms itself." \textit{Id.} at 273 (Powell, J., dissenting). The existence of union representation clauses in collective bargaining agreements led Justice Powell to conclude that Congress meant to leave the right to union representation to the collective bargaining process. \textit{Id.} at 275 (Powell, J., dissenting).

\textsuperscript{155} For a discussion of some exceptions, see notes 157-96 and accompanying text infra.

\textsuperscript{156} See notes 266-85 and accompanying text infra.

\textsuperscript{157} 549 F.2d 571 (9th Cir. 1977).

\textsuperscript{158} \textit{Id.} at 572.

\textsuperscript{159} \textit{Id.} See 46 U.S.C. § 702 (1976).

\textsuperscript{160} 549 F.2d at 572.

\textsuperscript{161} \textit{Id.} at 573.
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wages, and subsequently placed on probation for eighteen months. 162

The Board in Mount Vernon applied Weingarten and concluded that the logging proceeding was one which an employee might reasonably fear would result in discipline; it therefore held that the employer had violated the employee's section 8(a)(1) rights. 163 The Ninth Circuit, finding Weingarten inapposite, denied enforcement of the Board's order. 164 The court circumvented the Weingarten mandates with two different arguments. First, although it acknowledged that under Weingarten employees are entitled to union representation during investigatory interviews, the Ninth Circuit distinguished Mount Vernon by noting that the logging proceeding was qualitatively different from an investigatory interview. 165 A logging proceeding, according to the court, is not conducted to ascertain guilt or innocence of the seamen charged with the offense. Rather, the logging procedure serves only to notify the seaman of the charges brought against him, and commences only after the ship's captain has determined the guilt of the crew member. 166 This distinction represents a return to a pre-Weingarten analysis. Just as the distinction between investigatory and disciplinary interviews was determinative of the existence of a right to representation in the pre-Weingarten cases, so, too, here is the distinction between investigatory and noninvestigatory interviews determinative of the same right.

The Ninth Circuit also distinguished Weingarten by emphasizing the maritime context in which Mount Vernon arose. 167 In particular, the court suggested that the imbalance of power in favor of a ship captain was necessary as a matter of disciplinary control in this special environment:

162. Id.
164. 549 F.2d 571 (9th Cir. 1977).
165. Id. at 574.
166. Id. at 571. The Fifth Circuit stated:
The result at the outset is a foregone conclusion; from the outset, all that remains to be accomplished is the formality or ceremony itself and the notice to the seaman that results. The proceeding is mandated by law and the captain, as master of the ship, cannot exercise the employer's usual prerogative to dispense with [sic] interview.
167. Id. at 575-76. The Fifth Circuit distinguished Weingarten on the basis of the statutory authorization for the logging procedure. Id. at 575. "Concerted activities," according to the Fifth Circuit, were not meant to hinder the ability of a ship captain to maintain strict discipline while at sea. Furthermore, the court suggested that the Board did not have the ability to correct the imbalance of power in favor of the ship captain during the voyage, noting that other labor activities permissible in the industrial setting, such as a strike, can even constitute a crime aboard ship. Id.
Labor practices appropriate in the normal industrial context can be wholly inappropriate at sea, and it may be doubted that concerted activities of seamen for mutual aid or protection, when in opposition to the directions of a ship's master, are to be tolerated at all during the course of a voyage.  

Read broadly, Mount Vernon could stand for the proposition that the Weingarten right to representation does not attach when the employer conducts a proceeding simply to notify an employee of disciplinary action. However, since the Ninth Circuit also based its decision on the unique nature of the maritime context, it is possible to read Mount Vernon much more narrowly.

A year and a half after Mount Vernon was decided, however, the Ninth Circuit chose to construe Mount Vernon broadly when it confronted similar facts in Alfred M. Lewis v. NLRB. Although the court upheld the Board's decision that Weingarten rights did obtain during employee counseling sessions at which the employer questioned employees on their failure to meet certain quotas, it denied enforcement of the Board's decision that these rights obtained (and were violated) during sessions called for the purpose of explaining pending disciplinary action. Central to the court's decision regarding the second type of meeting was its view that the employee's Weingarten rights were triggered only by interrogation, which warranted a union official's protective role. The Ninth Circuit based its view on

168. Id.
169. 587 F.2d 403 (9th Cir. 1978). In Lewis, the employees were “order runners” who drove lift trucks in a warehouse. Id. at 405-06. The employer recognized that for several years, the performance of the employees at one warehouse was consistently worse than that of order runners at other company warehouses. Id. at 406. For several months, the employer attempted to counsel employees concerning their poor work habits, and quantitatively measured the output of these workers. When this program failed to provide satisfactory results, the employer imposed disciplinary procedures. When several employees were discharged pursuant to the new procedures, the union opted for arbitration. During the pendency of arbitration, the company adopted a policy forbidding union representation at counseling and disciplinary sessions. Id.
170. Id. at 410. Relying upon the Board's decision, the Ninth Circuit viewed the presence of a union representative at counseling sessions “of obvious benefit to the employee,” especially where collective bargaining had been improperly denied and “the atmosphere of intimidation and uncertainty was heightened and the justification for the fear that the interview would be used in significant part for disciplinary purposes was increased.” Id. Summarizing the holding in Weingarten, the Ninth Circuit stated: “The right of representation arises when a significant purpose of the interview is to obtain facts to support disciplinary action that is probable or that is being seriously considered.” Id.
171. Id. at 410-11.
172. Id. at 411. The court noted that “[a]t the disciplinary sessions involved in
the "investigatory interview" language used in *Weingarten*.\(^{173}\)

The Ninth Circuit had the opportunity to reevaluate its decision in *Lewis* dealing with the "investigatory" language of *Weingarten* in *NLRB v. Certified Grocers of California*.\(^{174}\) The controversy in *Certified Grocers* arose when an employee received a written warning regarding his low productivity, followed by an oral warning that he would be laid off if his production did not increase appreciably.\(^{175}\) In a subsequent meeting, the employee requested and was denied union representation and received a two week disciplinary suspension.\(^{176}\) In response to both the employer's and the dissent's contention that the mandates of *Weingarten* were inapplicable to a meeting like that in *Certified Grocers* where there was no questioning of the employee, the Board held that *Weingarten* drew its bounds only at "run-of-the-mill shop floor conversations involving instructions, corrections, or training," and nowhere excluded noninvestigatory interviews.\(^{177}\)

this case, the employees were simply informed of the disciplinary action to be taken. At such a meeting, absent any interrogation, the protective role of union representation envisioned by *Weingarten* is not applicable." \(\text{id.}\)

173. Id. The Ninth Circuit also noted that "[c]ompelled participation by the employee[e] is thus necessary before the right to representation is implicated under *Weingarten*." \(\text{id.}\)

174. 587 F.2d 449 (9th Cir. 1978).

175. Certified Grocers of Cal., 227 N.L.R.B. 1211, 1211-12 (1977), enforcement denied, 587 F.2d 449 (9th Cir. 1978). The employee worked at a warehouse which distributed food and related products. \(\text{id.}\) at 1211.

176. \(\text{id.}\) The Board found that "[t]he purpose of the meeting . . . was to deliver the written warning notice to [the employee]." \(\text{id.}\) at 1212. The supervisor conducting the hearing "had no authority to modify or withhold the issuance of the warning notice." \(\text{id.}\)

177. \(\text{id.}\) at 1214-15. The majority initially concluded that the employee reasonably feared discipline because of the circumstances leading to the issuance of the disciplinary layoff notice. \(\text{id.}\) at 1213. After this finding, the Board majority addressed the dissent's contention that *Weingarten* applied only to "investigatory" interviews where a union representative plays a useful role in the proceedings. \(\text{id.}\) at 1216-17 (Walther, Member, dissenting). The majority first pointed out language in *Weingarten* referring to both "interviews" and "investigatory interviews." \(\text{id.}\) at 1214. Secondly, the majority noted that the dissent relied not upon *Weingarten*, but upon a Second Circuit decision for the proposition that only investigatory interviews confer the right to union representation. \(\text{id.}\) See *NLRB v. Columbia Univ.*, 541 F.2d 922 (2d Cir. 1976). Finally, the majority did not accept the argument that the presence of a union representative at a purely disciplinary meeting was useless. 227 N.L.R.B. at 1219. According to the majority, "the role of the union representative is to assist the employee and to observe what, if any, bearing any such meeting might have on the interests of the other employees in the unit." \(\text{id.}\)

It should be noted that the Board itself overturned *Certified Grocers* in Baton Rouge Water Works Co., 246 N.L.R.B. 995 (1979). In *Baton Rouge*, the Board reasoned that *Certified Grocers* was "wrongly decided on the facts" and therefore held that "an employee has no section 7 right to the presence of his union representative at a meeting with his employer held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision." \(\text{id.}\) at 997. The Board was careful to point out, however, that its holding did not cover every disciplinary
Relying on *Mount Vernon* and *Albert M. Lewis*, and their "interrogation" rationales, the Ninth Circuit in *NLRB v. Certified Grocers* denied enforcement of the Board's decision.\(^{178}\) The court observed that the purpose of the meeting was only to deliver a warning, not to investigate facts; it thus concluded that *Weingarten* did not apply.\(^{179}\) In doing so, however, the court shifted the focus from the employee's fears back to the employer's professed purpose for the meeting.

**B. The Employer's *Weingarten* Choice: Allowing Representation or Ending the Interview**

In addition to the controversy surrounding *Weingarten*’s reference to "investigatory interviews," another issue that has arisen is the Supreme Court's limitation in *Weingarten* on the scope of the employee's right to representation. In *Weingarten*, the Court stated that when an employee requests representation, the employer is obligated to either permit representation, or to put an end to the interview.\(^{180}\) If the employer chooses to end the interview the employer may still bring disciplinary action without the benefit of the interview, as long as it is fully supported by the facts.\(^{181}\) Invoking this limitation, the NLRB General Counsel in *New England Telephone and Telegraph Co.*\(^{182}\) dismissed the employee's charge that the employer had violated section 7 of the Act.\(^{183}\)

The controversy arose in *New England Telephone* after an employee reported late to his job site. When the employee was questioned by his supervisor about the reason for his tardiness, the employee asked for representation.\(^{184}\) At that point, the supervisor ceased his questioning and arranged for him to be driven back to the principal work site, whereupon the employee was suspended for the interview. *Id.* According to the majority, if the employer "engages in any conduct beyond merely informing the employee of a previously made disciplinary decision, the full panoply of protections accorded the employee under *Weingarten* may be applicable." *Id.*

\(^{178}\) 587 F.2d at 450.

\(^{179}\) *Id.* at 451 (citing *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403 (9th Cir. 1978); *Mount Vernon Tanker Co. v. NLRB*, 549 F.2d 571 (9th Cir. 1977); *NLRB v. Columbia Univ.*, 541 F.2d 922 (2d Cir. 1976)).

\(^{180}\) 420 U.S. at 258.

\(^{181}\) *Id.* at 258-59.


\(^{183}\) *Id.* This case was dismissed on the basis of an advice memoranda; consequently the Board never considered the merits of the case.

\(^{184}\) *Id.* at 1531. There had been a history of poor relations between the employee and the supervisor, which led the employee to anticipate potential disciplinary action and thus immediately request union representation. *Id.*
rest of the day. The General Counsel acknowledged that the employee’s right to representation arose at his initial confrontation with his employer, but impliedly suggested that the employer’s obligation to permit representation was thereafter immediately discharged by suspending his questioning and plans for any future interviews.

Although this limitation on an employee’s right to representation is consistent with Weingarten’s express language, New England Telegraph demonstrates the harsh effect of this limitation on the employee. The employee is left with the choice of either waiving his right to representation during the interview or relying solely on the employer’s benevolence without an interview. If the rest of Weingarten’s mandates are to be carried out in any meaningful way, the employer should be obligated to continue the interview and to honor the employee’s request for representation.

C. Employer Pre-Interview Assurance of No Disciplinary Action

Employers have also sought to circumvent Weingarten by providing employees with assurances prior to or during interviews that no disciplinary action will follow. This was the tactic successfully used by the employer in Amoco Chemicals Corp. In that case, the employer decided to institute a counseling program for employees who had high absentee records. In preparation for the program, the employer circulated a communication explaining that a counseling session was not a disciplinary session, and that consequently no union representatives were permitted. Oral assurances that discipline would not occur were also given at the beginning of each counseling session. Two employees challenged the rule set down by the communication after they were denied union representation when they were

185. Id.
186. The General Counsel found that the employee clearly had reasonable grounds to fear that the meeting would entail disciplinary action. Id. at 1531. Weingarten guarantees the right to representation at the outset of such a confrontation. See 420 U.S. at 260.
187. 95 L.R.R.M. (BNA) at 1531 (citing NLRB v. Weingarten, 420 U.S. 251 (1974); Certified Grocers of Cal., 227 N.L.R.B. 1211 (1977)).
188. See 420 U.S. at 258. The Weingarten Court preserved the employer’s prerogative to dispense with the interview and use alternate means to resolve the disciplinary problem. See id. at 258-59. For further discussion of this limitation, see note 142 and accompanying text supra.
190. Id.
191. Id. at 395. The communication also directed the supervisors to inform employees at the start of the interview that the session was not disciplinary in nature. Reports of the session were not filed in employee’s personnel records, but were kept in a separate file. Id.
called in individually to attend counseling sessions for their excessive absenteeism.\textsuperscript{192} Neither at the sessions themselves, nor subsequently, was either employee disciplined.\textsuperscript{193}

The Board adopted the trial examiner’s decision, and thus dismissed the employees’ complaint alleging that the employer had violated section 8(a)(1).\textsuperscript{194} The Trial Examiner based his decision on the premise that the advance notice by the employer that the counseling sessions were not disciplinary in nature removed any reasonable grounds for believing that disciplinary action would follow.\textsuperscript{195}

While \textit{Amoco} may be consistent with \textit{Weingarten’s} principles, it is arguably inconsistent with the collective bargaining agreement that was in force between the union and the employer. The agreement contained a provision under which the union agreed to use best efforts to reduce absenteeism.\textsuperscript{196} It would seem only logical, then, that the employer would have welcomed, rather than resisted, total involvement by the union in the counseling program.

**D. The Employee’s Right to Choose a Specific Union Official as Representative**

One aspect of the employee’s right to union representation about which \textit{Weingarten} was silent was the employee’s right to choose a specific union official to accompany him to an employer interview. The Board confronted this issue in \textit{Coca-Cola Bottling Co.},\textsuperscript{197} and decided that \textit{Weingarten} did accord the right to insist on a specific representative.\textsuperscript{198} The issue arose when the employer requested to speak to an employee, who then requested representation by his shop steward.\textsuperscript{199} After the employer explained to the employee that the steward was on vacation and that it was unnecessary to wait for his return,\textsuperscript{200} the employer began questioning the employee on his alleged misconduct.

\begin{flushleft}
\textsuperscript{192} \textit{Id.} at 396.
\textsuperscript{193} \textit{Id.} at 395. The employer’s policy was to permit union representation at any subsequent interviews in which employees were given warnings about their absenteeism. Records of the initial interviews were not referred to in action taken as a result of continued absences after the counseling interview. \textit{Id.}
\textsuperscript{194} \textit{Id.} at 394.
\textsuperscript{195} \textit{Id.} at 397.
\textsuperscript{196} \textit{Id.} at 394.
\textsuperscript{197} 227 N.L.R.B. 1276 (1977).
\textsuperscript{198} \textit{Id.} The Board found nothing in \textit{Weingarten} to suggest that an employer must postpone an interview because a specific union official requested by the employee is unavailable or that it is the employer’s obligation to suggest or provide an alternate representative. \textit{Id.}
\textsuperscript{199} \textit{Id.}
\textsuperscript{200} \textit{Id.} at 1276. It is undisputed that the employee knew that the union official was away on vacation at the time he requested the steward’s presence. \textit{Id.} The ad-
Thereafter, the employer handed the employee a disciplinary action notice to sign. The employee refused to sign it. Alleging that he was effectively denied the right to union representation, the employee brought this action based on sections 8(a)(1) and 8(a)(5). The Board, however, took a different view of the facts. It observed that the employer never denied the employee’s request for representation, but rather “was simply unable to comply with it.” In observing further that Weingarten does not oblige an employer to postpone an interview until the requested union representative is available, the Board relied upon that portion of Weingarten which stated that an employee, through the exercise of his rights, could not “interfere with legitimate employer prerogatives.” Nevertheless, while denying that the employer had any obligation to secure an alternative representative, the Board implied in dictum that the employee’s rights would have been violated had he subsequently requested an alternative representative and been denied representation. Furthermore, in response to a dissenting Board member’s view that the employer’s refusal to postpone the meeting amounted to compulsion to attend it without any representation, the Board stated that the employee could have requested representation by another union official. Yet, no-administrative law judge found no evidence that the supervisor timed the interview in order to avoid the steward’s presence.  

201. Id. at 1278. The disciplinary action notice listed instances of employee misconduct and warned that failure to improve would result in further disciplinary action. The plaintiff employee was specifically reprimanded for wasting time during his shift, for insubordinate conduct, and for failing to make necessary repairs. Id.  

202. Id. at 1276.  

203. Id. There was evidence that the employer had complied with this employee’s request for representation at a similar prior interview. However, the two dissenting members of the Board argued that regardless of the employer’s willingness to comply with the request, the employer simply could not, without violating the principles announced in Weingarten, compel an unassisted, unrepresented employer to participate in an interview after a request for representation had been made. Id. at 1277 (Fanning & Jenkins, Members, dissenting).  

204. Id. at 1276 (citing NLRB v. Weingarten, Inc., 420 U.S. at 258). The Board then characterized the right to hold investigatory interviews without delay as a legitimate employer prerogative. Id.  

It is not clear, however, that this is a correct inference based on the quoted language from Weingarten. Following its statement that legitimate employer prerogatives should not be infringed upon, the Court referred only to the employer’s prerogative to forego the interview entirely and act on the basis of information from other sources. 420 U.S. at 258-59. There is no indication in the Court’s discussion that one such prerogative is to proceed without delay with the very interview at issue.  


206. 227 N.L.R.B. at 1276.  

207. Id. at 1276 n.6. The trial examiner pointed out that the union could have safeguarded the employee’s interests simply by designating an alternate steward to substitute for the steward on vacation, or that the employee could have requested the
where did the Board or trial examiner state whether the employee had an opportunity to do so.\textsuperscript{208} The administrative law judge (ALJ) stated only that under \textit{Weingarten} it was up to the employee to request alternative representation.\textsuperscript{209}

### E. The Dubious Validity of Union Waiver of the Employee's Right to Representation

Perhaps one of the most troubling post-\textit{Weingarten} issues that has arisen is the possibility of a union's contractual waiver, through its collective bargaining agreement, of an employee's right to representation. This issue confronted the Board in \textit{New York Telephone Co.}\textsuperscript{210} In this case, a union originally proposed to add to its contract a written provision extending an employee's right to representation to any occasion where an employee requested it,\textsuperscript{211} but ultimately, in settlement of a strike, the union agreed to a contract containing a provision allowing representation only at meetings where final disciplinary action was to be taken.\textsuperscript{212} The Board expressly declined to state whether an employee's right to representation may ever be waived,\textsuperscript{213} but it held that under the facts of this case the union's execution of the agreement in settlement of a strike did not constitute a waiver of the employees' rights to representation.\textsuperscript{214} The Board offered little explanation for its holding. It did observe, however, perhaps by way of presence of the union business agent, who, according to the record, was close by and presumably available. The employee testified that he did not do so because it was customary for the shop steward rather than the business agent to represent employees in these interviews. \textit{Id.} at 1280.

\textsuperscript{208} The trial examiner refused to credit the employer's testimony that he specifically told the employee that he could have any other available union representative attend the meeting. \textit{Id.} at 1279 n.4. The examiner found, based on the employee's testimony, that no such offer was made. \textit{Id.}

\textsuperscript{209} \textit{Id.} at 1280 n.6. The trial examiner and the Board reasoned that it was the employee's request which initially triggered the right to representation under \textit{Weingarten}, and in a situation where an alternate representative had to be found, it remained the employee's burden to ask for the alternate's presence. \textit{Id.} From the dissent's perspective, however, \textit{Weingarten} only requires that the employee ask for representation, and to place any additional burden on the employee is to negate the purpose of \textit{Weingarten}—to aid the employee, unskilled in the "niceties of procedure." \textit{Id.} at 1277 (Fanning & Jenkins, Members, dissenting).

\textsuperscript{210} 219 N.L.R.B. 679 (1975).

\textsuperscript{211} \textit{Id.} at 679. At the time this request was made, the employer had a practice of granting representation rights to employees in only the following circumstances: 1) when the matter could result in criminal prosecution; 2) when the employer intended to discipline the employee at the specific meeting; and 3) when the employee was currently under discipline. \textit{Id.}

\textsuperscript{212} \textit{Id.} at 680.

\textsuperscript{213} \textit{Id.} at 679 n.7.

\textsuperscript{214} \textit{Id.} at 680.
of justification, that the union had repeated its demands regarding the employee representation and at no time retreated from its position.\textsuperscript{215}

The ALJ, whose conclusion the Board adopted, was less cursory in his analysis. He stated that while the union remained silent about the provision regarding employee rights to representation when it accepted the contract, its silence could not be viewed as consent, because the union had no affirmative duty to speak.\textsuperscript{216} Interpreting the union’s silence as a decision to “rely on Board law to take care of those situations to which the contract provision did not apply,”\textsuperscript{217} the ALJ concluded that the case was clearly distinguishable from one where a conscious waiver takes place during bargaining.\textsuperscript{218}

The Board’s \textit{New York Telephone Co.} decision apparently posed no obstacle to the General Counsel in \textit{United States Postal Service},\textsuperscript{219} where, in an advice memorandum, it dismissed section 8(a)(1) charges for violation of an employee’s right to representation after finding that this right had been waived by the union in its collective bargaining agreement with the employer.\textsuperscript{220} The General Counsel nowhere alluded to \textit{New York Telephone Co.} or to its reasoning.

As an advice memorandum rather than a Board decision, \textit{United States Postal Service} has considerably less precedential value than \textit{New York Telephone}. In light of \textit{Weingarten’s} emphasis on the rights of the individual employee,\textsuperscript{221} the bargaining representative should not be permitted to waive, through its collectively bargained contract, the statutory rights of the union’s individual constituents.

F. Right to Consultation with Employee Representative Prior to the Investigatory Interview

In \textit{Climax Molybdenum Co.},\textsuperscript{222} the Board extended the employee’s right to union representation to pre-interview consultation with a union official. The Tenth Circuit, however, denied enforcement of the Board’s order and concluded that \textit{Weingarten} could not be read so

\begin{itemize}
  \item \textsuperscript{215} Id.
  \item \textsuperscript{216} Id. at 682.
  \item \textsuperscript{217} Id.
  \item \textsuperscript{218} Id.
  \item \textsuperscript{220} Id. The contract provided that, “[f]or a minor offense, counseling in private shall be the method of dealing with the offense. Counseling is a private matter between the supervisor and the employer.” Id.
  \item \textsuperscript{221} See notes 145-46 and accompanying text supra.
  \item \textsuperscript{222} 227 N.L.R.B. 1189, \textit{enforcement denied}, 584 F.2d 360 (10th Cir. 1978).
\end{itemize}
In Climax, the source of the employee's right to union representation at interviews lay not only in precedent but also in the particular collective bargaining agreement between the employer and the union. Following an argument between two employees, the foreman in charge notified the union grievance representative to appear for an investigation of the incident. The union grievance representative then requested permission to speak with the two employees in advance of the investigatory meeting, but the employer denied the request stating that the representative would have ample opportunity to speak with the employees during the interview itself. Although the union's request for pre-interview consultation was denied, the representative was present during the actual interview. As a result of the proceeding, both employees received oral warnings.

In a three to two decision, the Board held that the employer violated section 8(a)(1) of the Act when it refused to permit the union to consult with the employees prior to an investigatory meeting which an employee might reasonably believe could result in disciplinary action. In so holding, the Board concluded that the Wengarten right "includes the right of the employee to confer with the union representative before the interview."

In support of its holding, the Board quoted a portion of the Wengarten opinion in which the Supreme Court discussed the utility of a union representative's presence at an investigatory meeting. According to the court, a "knowledgeable union representative" could help

223. Climax Molybedenum Co. v. NLRB, 584 F.2d 360, 363 (10th Cir. 1978).
224. 227 N.L.R.B. at 1189. The bargaining agreement provided that a union representative had the right to be present whenever an employee was subject to any employer action that could affect his employment record or result in discipline or discharge. Id. The pertinent portion of the contract stated that "[a] Vice-President or his designee shall be present during any subsequent formal investigation which might result in discipline or discharge." Id. The parties stipulated that the interview at issue was a "formal investigation" within the meaning of the bargaining agreement. Id.
225. Id. The employer apparently notified the union representative as part of the disciplinary procedure established under the bargaining contract. 584 F.2d at 361. On appeal, the Tenth Circuit noted that the employees neither requested the union representative's presence at the disciplinary session, nor requested to talk to the representative prior to the interview. Id. at 363.
226. 227 N.L.R.B. at 1189. Reviewing the record, the Tenth Circuit found that the union representative was not even informed of the employees' names or of the nature of the altercation giving rise to the investigation which he was noticed to attend. 584 F.2d at 360.
227. 227 N.L.R.B. at 1189.
228. Id. at 1190.
229. Id.
the employer by eliciting facts from the employee who might be "too fearful or inarticulate to relate accurately the incident being investigated." Applying this language, the Board reasoned that for a representative to be "knowledgeable" and thus carry out his prescribed function at the meeting, it would be only logical to permit the representative to use a pre-interview consultation to gain familiarity with the facts.

In response to the dissenting Board members' concern that this holding would transform all interviews into adversarial confrontations, the Board stated that increasing the knowledge of the union representative would only enhance the fact-finding process. The dissenting Board members also argued that because the union, rather than the employees themselves, requested the pre-interview consultation, section 8(a)(1) of the Act was not violated. The Board defended its position on two grounds. First, it declared that the argument "lacked merit" in light of the collective bargaining agreement's provision for union representation. Secondly, the Board observed that even if no such provision existed, the union must have the opportunity to advise the employee of his right to representation, prior to the interview, if the right is to have any substance, and it is the "knowledgeable" union representative who is likely to be informed as to such matters.

The Board mentioned, but did not squarely address, the employer's argument that permitting a pre-interview consultation would

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230. 420 U.S. at 263. The Court stated that a knowledgeable representative could both aid the employer, by clarifying the facts of the incident in order to speed its resolution and save production time, and further the purpose of the Act: protection of employee's exercise of freedom of association for mutual aid or protection. Id. at 261-63.

231. 227 N.L.R.B. at 1190. The Board suggested that the Supreme Court, which had clearly endorsed the role of the "knowledgeable union representative," could not have meant "to put blinders on the union representative by denying him the opportunity of learning the facts" through pre-interview consultation. Id. The dissenting Board members, however, understood the Supreme Court to be endorsing a union representative who was knowledgeable about grievance resolution, rather than versed as to the particular facts of the incident. Id. at 1193 (Penello & Walther, Members, dissenting).

232. Id. at 1190.

233. Id. at 1194. (Penello & Walther, Members, dissenting). The dissent stressed that the right to representation was vested in the employee, and it could only be exercised by the employee. Id. The same fundamental interpretation of Weingarten led the trial examiner and the Board in Coca-Cola Bottling Co. to conclude that it was the employee's burden to request an alternate representative if the official first requested was unavailable. See Coca-Cola Bottling Co., 227 N.L.R.B. 1276, 1276 n.6 (1977).

234. 227 N.L.R.B. at 1190.

235. Id.
undermine Weingarten’s objective of placing the parties at equal bargaining positions by giving the employee an advantage. This seems to be a legitimate employer concern, and the Board’s failure to address it, in addition to several other concerns expressed by the dissenting Board members, suggests that its expansion of Weingarten could not be fully supported.

Sensitive to some of the employer’s concerns which the Board overlooked, the Tenth Circuit refused to enforce the Board’s order in Climax. The court first declined to expand the Weingarten rule to cover situations where the union, not the employee, invokes the right of representation. Secondly, consonant with the employer’s concern regarding the investigatory interview itself, the Tenth Circuit concluded that pre-interview consultation would result in an adversarial interview, and thus would destroy its intended fact-finding character. Finally, citing Mount Vernon Tanker Co. v. NLRB and Coca-Cola Bottling Co., where the right to representation was also denied, the Tenth Circuit observed that Weingarten’s holding did not extend to all meetings between the employee and the employer.

At the conclusion of its opinion, however, the Tenth Circuit indicated the parameters of its decision, and, in so doing limited its holding substantially. The court stated that while its holding precluded a union or employee from demanding an opportunity to consult prior to the investigatory interview on company time, it did not preclude union-employee pre-interview consultation on the employee’s own time.

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236. Id. at 1189.
237. See id. at 1193-94 (Penello & Walther, Members, dissenting).
238. 584 F.2d at 363-64.

Nevertheless, the Board’s argument as to the potential benefits of pre-interview consultation has merit. See Comment, The Repercussions of Weingarten: An Employee’s Right to Representation at Investigatory Interviews, 64 MARQ. L. REV. 173, 195-96 (1980). The representative who is well-versed both in the facts of the incident and grievance procedure will be able to both protect the employee and clarify the facts for the employer. Id. at 196. Furthermore, such effective representation may deter an employer from pursuing a meritless case. Id.

239. 584 F.2d at 365. The Tenth Circuit emphasized the Supreme Court’s caveat in Weingarten that the right of representation should not interfere with legitimate employer prerogatives. Id. at 363. The court noted that the employer interest in such interviews stemmed from a good business motive. Furthermore, in the mining business (as in Climax) where safety is a key concern, any disciplinary problems must be fully investigated in a cooperative rather than adversarial context. Id.

240. Id.
241. Id. at 363-64.
242. 549 F.2d 571 (9th Cir. 1977) (Weingarten held inapplicable in a maritime setting).
243. 227 N.L.R.B. 1276 (1977) (no right to a specific union representative under Weingarten).
244. 584 F.2d at 364-65.
time. Furthermore, it interpreted Weingarten as requiring the employer to arrange the interview far enough in advance to give ample opportunity for the employee and union to hold their interview. While the Tenth Circuit may have limited the Board’s expansion of Weingarten in one respect, it apparently expanded Weingarten in another, by imposing this additional obligation on the employer.

In the very recent decision of Pacific Telephone & Telegraph Co., the Board reaffirmed its earlier position taken in Climax. In Pacific Telephone, over a strong dissent, the Board held that an employee is entitled to a pre-interview consultation with a union representative. The Board further held that, prior to the pre-interview consultation, an employee is also entitled to be informed of the subject matter of the prospective investigatory interview.

The Board reasoned that in order for the employee to be assured his full right to representation, he must be granted a pre-interview consultation with his representative and be informed of the nature of the prospective interview. Moreover, the Board concluded, “the act of ‘consultation’ is no less ‘concerted activity for mutual aid and protection’ than the act of representation itself.”

245. Id. at 365.
246. Id. The court did not elaborate on the parameters of this additional obligation, but one commentator has interpreted the decision as requiring the employer 1) to provide a reasonable time and place for the interview so that representation will be available and 2) to facilitate pre-interview consultation on noncompany time. See Comment, supra note 238, at 196.
248. Id. slip op. at 2. For a discussion of the Board’s decision in Climax, see notes 222-38 and accompanying text supra.
249. See 262 N.L.R.B. No. 127, slip op. at 8-17 (Hunter, Member, dissenting). For further discussion of Member Hunter’s dissent, see note 255 and accompanying text infra.
250. 262 N.L.R.B. No. 127, slip op. at 2.
251. See id.
252. See id. at 3. The Board observed that the representative is precluded from performing his role as a “knowledgeable representative” if he is not afforded a prior consultation with the employee. Id. (citing Climax Molybdenum Co., 227 N.L.R.B. 1189 (1977), enforcement denied, 584 F.2d 360 (10th Cir. 1978)). Prior consultation “enables the representative to ‘assist the employer by eliciting favorable facts and save the employer production time by getting to the bottom of the incident.’” Id. (citing NLRB v. Weingarten, Inc., 420 U.S. 251, 263 (1975)). Further, according to the Board, prior consultation with the employee allows the representative to “counsel and assist the employee who may be ‘too fearful or inarticulate to relate accurately to the incident being investigated.’” Id. at 3-4 (citing NLRB v. Weingarten, Inc., 420 U.S. 251, 263 (1975)).
253. Id. at 4. The Board reasoned that “if the right to prior consultation, and, therefore, the right to representation, is to be anything more than a hollow shell, both the employee and his representative must have some indication as to the subject matter of the investigation.” Id.
254. Id.
The majority then addressed the dissent’s concern that the pre-interview right to consultation may both obfuscate the subsequent interview and transform it into an adversary bargaining session.255 The majority stated that the dissent failed to take into account the balance which section 7 seeks to achieve between employer prerogatives and employee concerted activities.256 In analyzing the burden placed on employer prerogatives, the majority noted that the pre-interview consultation “need be nothing more than that which provides the representative an opportunity to become familiar with the employees’ circumstances.”257 The requirement that the employer inform the employee of the subject matter of the interview only compels the employer to identify the misconduct for which discipline may be imposed.258 In contrast, the majority viewed the employee’s interest in protection against the employer’s “investigatory machinery” to be significant.259 Consequently, the majority concluded that the rule announced in Climax represented “a proper balance between the rights of employers and their employees.”260

255. Id. at 4-7. The dissent disagreed with the majority’s interpretation of the Weingarten Court’s use of the term “knowledgeable representative.” Member Hunter contended that a “knowledgeable representative” was not one “who is completely versed with the employee’s version of the events,” as the majority envisioned, but rather, one “who is generally knowledgeable about grievance resolution.” Id. at 12-13 (Hunter, Member, dissenting) (citations omitted). The dissent concluded that the majority’s misconceived notion of the proper role of the union representative created the risk of transforming the representative’s function from that of fact-finder to that of counsel. Id. at 14 (Hunter, Member, dissenting). The dissent also warned that employer investigatory interviews would be transformed into full-scale, formal adversarial contests with all the attributes of criminal proceedings. Id. at 15. These probable developments, the dissent concluded, would result in gross, unwarranted interference with legitimate employer prerogatives. Id.

256. Id. at 6-7.
257. Id. at 5.
258. Id.
259. Id. at 6-7. The Board noted that the Weingarten Court had expressed concern with certain techniques of investigation used by employers:

There has been a recent growth in the use of sophisticated techniques—such as closed circuit television, undercover security agents, and lie detectors—to monitor and investigate the employees’ conduct at their place of work . . . . These techniques increase not only the employees’ feeling of apprehension, but also their need for experienced assistance in dealing with them. Thus often . . . an investigative interview is conducted by security specialists; the employee does not confront a supervisor who is known or familiar to him, but a stranger trained in interrogation techniques. Id. at 7 n.12 (citing NLRB v. Weingarten, Inc. 420 U.S. at 265 n.10).

260. Id. at 7.
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G. Union-Initiated Request to be Present During the Investigatory Interview.

In Appalachian Power Co.,261 the Board squarely addressed the issue of whether a union's request for representation was sufficient to trigger the employee's Weingarten rights.262 Although the Board did not mention the Tenth Circuit's opinion in Climax,263 it appeared to be swayed by the Climax rationale when it concluded that the employee, not the union representative, must request representation in order for the Weingarten right to vest.264 The Board reasoned that if the right to be present at an investigatory interview could be asserted by the union, the employee would be deprived of the opportunity to decide whether the presence of the representative would be beneficial or inimical to his interests.265

H. The Non-Union Employee's Right to Representation

Anchortank, Inc.266 represents perhaps the most significant post-

262. See id. at 932-33.
263. For a discussion of the Tenth Circuit's decision in Climax, see notes 223, 239-46 and accompanying text supra.
264. See 253 N.L.R.B. at 933. Although the issue of whether a union representative could precipitate the employee's right to representation at an investigatory interview was not squarely before the Tenth Circuit in Climax, the language of this decision was certainly broad enough to encompass that situation. See 584 F.2d at 362.
265. See 253 N.L.R.B. at 933. The Board explained:

The reason for vesting their choice with the employee is clear. As the Court explained in Weingarten, it is the individual employee who has an immediate stake in the outcome of the disciplinary process for it is his job security which may be jeopardized in any confrontation with management. Therefore, it should be the employee's right to determine whether or not he wishes union assistance to protect his employment interests . . .

If, as General Counsel contends, the right to be present at a disciplinary interview could be asserted by the union representative, the employee no longer would have the choice of deciding whether the presence of the representative was more or less advantageous to his interests.

Id.

A difficult situation arises when a union has secured through collective bargaining the right to be present at all investigating interviews, and an employee facing an investigatory interview does not wish representation. See Comment, supra note 238, at 183. This commentator contends that

[a] case such as this would necessitate the balancing of the union's interest as the exclusive representative of the bargaining unit and its obligations and rights under the collective bargaining agreement, and the employee's individual rights under Weingarten and his interest in resolving his disciplinary problems in a private manner.

Id.

266. 239 N.L.R.B. 430 (1978), enforced in part, 618 F.2d 1153 (5th Cir. 1980).
Weingarten expansion of the right to representation by the Board.267  Viewed broadly, this case stands for the proposition that the Weingarten right to representation inheres to non-unionized employees as well as unionized employees.268

In Anchortank, the union won the representation election, but it was not yet certified as the bargaining representative.269 The Board disregarded the status of the employees as non-union members, however, and held that the employer violated section 7 of the Act when it denied the request of two of its employees for union representation during interviews.270 The Board reasoned that Weingarten's focus was on the ability of the individual employee "to act concertedly for protection in the face of a threat to job security, and not upon the right to be represented by a duly designated collective-bargaining representative."271

The Fifth Circuit ordered partial enforcement of the Board's order in Anchortank, Inc. v. NLRB.272 The court noted that the record did not reveal whether the requested representative was an employee of Anchortank;273 it therefore assumed that the requested representa-

267. For a discussion of cases leading up to Anchortank, see note 271 infra.
268. 239 N.L.R.B. at 431. In Anchortank, the narrow factual question presented to the Board was whether an employee was entitled to union representation at an investigatory interview held during the hiatus between the union's challenged victory in a representation election and its subsequent certification as bargaining representative. Id. However, the rationale employed by the Board indicated that the Board intended to extend the Weingarten right to representation to non-unionized employees. Id. at 432. The Board stressed:

[W]e are persuaded that, in Weingarten, the Court's primary concern was with the right of employees to have some measure of protection when faced with a confrontation with the employer which might result in adverse action against the employee. These employee concerns remain whether or not the employees are represented by a union.

Id. (citations omitted) (emphasis added).
269. Id. at 430.
270. See id. at 431. On March 25, 1977, a supervisor required Anchortank employee Herbert Charles to attend an investigatory interview without the assistance of a representative. Id. at 430. On May 29, 1977, the plant manager required Anchortank employee Moshinobu Kittley to submit to a disciplinary interview without the aid of a representative. Id.
271. See id. at 431. See also Oil, Chemical & Atomic Workers Int'l Union v. NLRB, 547 F.2d 575, 592 (D.C. Cir. 1976), cert. denied, 431 U.S. 966 (1977) ("Section 7 protects the right to act in concert, not merely the right to act in concert with a recognized union"); NLRB v. Columbia Univ., 541 F.2d 922, 931 (2d Cir. 1976) ("the protection afforded to concerted activities under the NLRA applies equally to workers in unionized or in non-unionized firms"); Glomac Plastics, Inc., 234 N.L.R.B. 1309, 1311 (1978), enforced, 600 F.2d 3 (2d Cir. 1979) (violation of § 8(a)(1) to deny non-unionized employee's request for representation, because "Section 7 rights are enjoyed by all employees and are in no wise dependent on union representation for their implementation.").
272. 618 F.2d 1153, 1169 (5th Cir. 1980).
273. Id. at 1158.
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...ative was not an Anchortank employee. Consequently, the court addressed the narrower question of whether an employee’s section 7 rights are violated when the employer denies the employee’s request for a union affiliated nonemployee representative at an investigatory interview after the union has won an election, but before the union has been certified. Narrowing the broader implications of the Board’s decision, the court held that an employee’s request for union representation during the Weigarten investigatory interview became protected “concerted activity,” within the meaning of section 7 of the Act, only after the union election. Nevertheless, it agreed with the Board that certification of the union was not a prerequisite to an employee’s successful invocation of his Weingarten rights, and thus with regard to one of the employees in Anchortank, upheld the Board’s decision.

274. Id. Prior to this, the court stated that if the record had established that the requested representative were an Anchortank employee, “concerted activity” clearly would have been established. Id. at 1157 (citing NLRB v. Weingarten, Inc., 420 U.S. 251, 269 n.1 (1975) (Powell, J., dissenting); Oil, Chemical & Atomic Workers Int’l Union v. NLRB, 547 F.2d 575, 592 (D.C. Cir. 1976), cert. denied, 431 U.S. 966 (1979); NLRB v. Columbia University, 541 F.2d 922, 931 n.5 (2d Cir. 1976)).

275. 618 F.2d at 1162. The court observed that “concerted activity,” a term of art, has been susceptible to divergent interpretation. Id. at 1160. The courts have split over the question whether the action of a single employee must involve both a concerted purpose and a concerted effect to obtain section 7 protection, or whether a concerted effect alone is sufficient. Id. (citing NLRB v. Interboro Contractors, 388 F.2d 495, 500 (2d Cir. 1967) (crucial inquiry in determining whether single employees’ activities were “concerted” for purposes of section 7 is whether the employee’s activity had an “effect” on his fellow employees, and not whether group activity was intended); Mushroom Transp. Co. v. NLRB, 330 F.2d 683-85 (3d Cir. 1964) (activities of a single employee are concerted only if they “are engaged in with the object of initiating or inducing or preparing for group action.”)). See generally Note, Constructive Concerted Activity, supra note 93.

In Anchortank, the Fifth Circuit concluded that before a representative election, an employee’s request for union representation failed to satisfy even the more lenient Interboro approach because, “the presence of a union representative does not have the effect on other employees essential to the satisfaction of the Interboro standard of concerted activity.” 618 F.2d at 1161. However, the Fifth Circuit further noted that the situation was “radically altered” after a union has won a representation election, even if that victory has been challenged. Id. at 1162. The court concluded that, at this point, an employee’s request for union representation at an investigatory interview satisfied the rigorous Mushroom “purpose” test because, “[a]fter the union has won the election, the employee quite properly perceives his request to be one for the concerted mutual aid and protection of his fellows, for the union then stands in for all the unit employees.” Id.

276. See 618 F.2d at 1165-69. The Fifth Circuit granted only partial enforcement of the Board’s order. Id. at 1169. Since the factual record did not indicate whether the employee’s “disciplinary” interview contained the necessary investigatory element or was merely a meeting to inform him or his employer’s pre-determined resolve to discipline him, the court of appeals remanded the matter to the Board to determine the nature of the interview. Id. at 1168-69.

277. See id. at 1165.
In *Materials Research Corp.*, the Board was confronted with a situation in which an employee, who was not represented by a statutory bargaining representative, was denied his request to have a co-worker accompany him to an investigatory interview. Although the Board acknowledged that *Weingarten* spoke explicitly in terms of the right to the assistance of a "union representative," it contended that the *Weingarten* Court adopted this language because it accurately portrayed the facts of that particular case, and not because the Court wished to limit the right exclusively to unionized employees. Since the protection offered by section 7 has been held not to depend on whether or not employees are unionized, the Board held that the employer violated section 8(a)(1) by denying the employee's request.

Similarly, in an earlier decision, *Illinois Bell Telephone Co.*, the Board held that in a unionized unit, when the union representative is not available, an employee facing an investigatory interview can designate a fellow union employee as representative even if his designee is not currently a union official. The Board concluded that the

278. 262 N.L.R.B. No. 122 (1982).
279. Id. at 1-2.
280. Id. at 7 (citing NLRB v. Weingarten, Inc., 420 U.S. at 261).
281. Id. at 7-8. The Board argued that the *Weingarten* Court's rationale supported its conclusion that the right to representation during investigatory interviews vests in nonunionized as well as unionized employees. The Board noted that the *Weingarten* Court had emphasized that the right to representation derived from the employee's § 7 rights, and not from the union's § 9 right to act as exclusive bargaining representative. Id.

In relying upon *Washington Aluminum*, the *Materials Research Corp.* Board noted: It is by now axiomatic that, with only very limited exceptions, the protection afforded by Section 7 does not vary depending on whether or not the employees involved are represented by a union, or whether the conduct involved is related, directly or indirectly, to union activity or collective bargaining.

262 N.L.R.B. No. 122, slip. op. at 9 (citations omitted).
283. 251 N.L.R.B. 932 (1980), enforced in part, 674 F.2d 618 (7th Cir. 1982).
284. Id. at 932-33. In reaching its conclusion, the Board relied heavily on its earlier decision in *Anchortank*, where it stated that "[t]he Court and the Board [in *Weingarten*] placed the emphasis upon the employer's [sic] right to act concertedly for protection in the face of a threat to job security, and not upon the right to be represented by a duly designated collective-bargaining representative." Id. at 933 (quoting Anchortank, Inc., 239 N.L.R.B. 430 (1978)). The *Illinois Bell* Board also noted that in *Anchortank*, it had stated that the representative's function at an investigatory interview was not that of a bargaining representative; consequently a fellow employee, with no official union status, could serve as effectively as a union official. Id. at 933-34 (citing Anchortank, Inc., 239 N.L.R.B. 430, 431 (1978)).
I. The Role of the Representative During the Weingarten Investigatory Interview.

In a line of cases beginning with Southwestern Bell Telephone Co., the Board attempted to define the role that the representative was permitted to play during the investigatory interview. Weingarten had stated that "the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview." Prior to Southwestern Bell, the extent to which the union representative could participate in the interview had not been examined by the Board.

In Southwestern Bell, an employer conducted an investigatory in which he told the union representative not to say anything, while telling the employee to answer in his own words. The Board held that because the representative was required to remain silent, the employee was denied the effective representation to which he is entitled under section 8(a)(1). In so holding, the Board expanded the representative's function from that of a mute, passive observer to an active participant.

The Board reasoned that the Supreme Court in Weingarten intended to strike a balance between the right of an employer to investigate the conduct of his employees, and the right of an employee to fair representation. The Board concluded that "it is clear from the Supreme Court's decision in [Weingarten] that the role of the statutory representative at an investigatory interview is to provide 'assistance' and 'counsel' to the employee being interrogated." Because the union steward in Southwestern Bell had attempted only to provide such assistance and counsel, and not to transform the interview into a bargaining session, which was expressly prohibited by Weingarten, the Board held that the employer had violated section 8(a)(1) of the Act.

The Fifth Circuit denied enforcement of Southwestern Bell. The court of appeals noted that although a representative must be allowed...
to assist the employee and clarify the facts, the Supreme Court had stated in *Weingarten* that "[t]he employer . . . is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter."

According to the Fifth Circuit's interpretation of the facts of *Southwestern Bell*, there was no section 8(a)(1) violation in this case: although the employer had requested the representative to remain silent during one portion of the interview, at the conclusion of the interview the employer told the representative that he was free to make any additions, suggestions or clarifications.

In a footnote, the court in *Southwestern Bell* distinguished *NLRB v. Texaco, Inc.*, a case decided by the Ninth Circuit, by observing that *Texaco* involved the employer's refusal to permit any participation whatsoever in the investigatory interview. In *Texaco*, at the outset of an investigatory interview, the employer's foreman informed the union representative that he would not be permitted to say anything during the interview. Enforcing the Board's order, the Ninth Circuit in *Texaco* rejected the employer's contention that, since *Weingarten* did not compel the employer to bargain with the representative during the investigatory interview, the employer could thereby insist on hearing only the employee's account. Relying upon language from *Weingarten*, the *Texaco* court of appeals concluded that the employer's absolute position was contrary to both the spirit and letter of the Supreme Court's decision. According to the court of appeals, "[t]he representative should be able to take an active role in assisting the employee to present the facts."

Viewed together, *Southwestern Bell* and *Texaco* stand for the proposition that an employer violates the Act by refusing to permit the union representative to clarify certain matters both before the inter-

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294. *Id.* at 473 (quoting *NLRB v. Weingarten, Inc.*, 420 U.S. at 259-60).
295. *See id.*
296. 667 F.2d at 474 n.3.
297. *Id.* (citing *NLRB v. Texaco, Inc.*, 659 F.2d 124 (9th Cir. 1981)).
298. 659 F.2d at 125.
299. *Id.* at 126.
300. *See id.* (quoting *NLRB v. Weingarten, Inc.*, 420 U.S. at 260). The *Texaco* court quoted the following language from *Weingarten*:

>The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation.

*Id.*
301. *See id.*
302. *See id.* (citing Alfred M. Lewis, Inc. v. *NLRB*, 587 F.2d 403, 409-10 (9th Cir. 1978); *Southwestern Bell Tel. Co.*, 251 N.L.R.B. 612 (1980)).
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view and afterwards. But the employer does not violate the Act by requiring the representative to remain silent during the interview so long as subsequent clarification of the matters discussed is permitted.

J. Evolving Remedies for Employer Violations of the Weingarten Rule

The traditional make-whole remedies of reinstatement, back pay, and expungement of records are not invariably assured when Weingarten violations are established. Section 10(c) of the National Labor Relations Act provides in part that "[n]o 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 back pay, if such individual was suspended or discharged for cause." Relying on this language, the Board and the courts have been reluctant to enforce make-whole remedies if the employer relied on information obtained outside of the unlawful interview to discipline the employee.

The initial approach adopted by the Board after Weingarten was to grant full make-whole remedies to the employee if the employer was found to have engaged in an unlawful investigatory interview without the requested representation. However, in 1980 the Board in Kraft Foods articulated a bifurcated test to determine whether make-whole remedies should be awarded to an employee whose Weingarten rights had been violated. The employee in Kraft Foods was discharged for engaging in a fight. The ALJ found that the employer conducted an investigatory interview in violation of Weingarten.

303. The Board has the authority to restore the status quo ante (and order make-whole remedies) where restoration is necessary to "undo the effects of violations of the Act" and where the remedy is "well designed to promote the policies of the Act." Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 216 (1964) (quoting NLRB v. Seven Up Bottling Co., 344 U.S. 344, 346 (1957)).


305. For a discussion of the general approach adopted by the Board and the courts to granting make-whole remedies, see notes 306-48 and accompanying text infra.

306. See, e.g., Certified Grocers of Cal., 227 N.L.R.B. 1211 (1977), enforcement denied, 587 F.2d 449 (9th Cir. 1978) (Board ordered back pay and expungement of employee's record where employer conducted an unlawful interview that resulted in disciplinary layoff of employee, even though Board concluded the decision to discipline the employee had been made prior to the interview); See also Potter Elec. Signal, 237 N.L.R.B. 1289 (1978), enforcement denied, 600 F.2d 120 (1979). For a discussion of Potter, see notes 317-23 and accompanying text infra.


308. Id. at 598.

309. Id. The employee was discharged for assaulting a fellow employee after their fork lifts collided. In an unlawful investigatory interview, conducted by the employer, the employee denied that the assault ever occurred and identified a photograph of the site of the forklift collision. The employer independently interviewed
and ordered reinstatement and back pay for the employee.\textsuperscript{310} The Board affirmed the finding of a \textit{Weingarten} violation but issued only a cease and desist order. The employee remained discharged.\textsuperscript{311}

Central to the Board's bifurcated test was the question of whether the disciplinary decision was based on information obtained during the unlawful interview.\textsuperscript{312} According to the Board, the charging party must first make a \textit{prima facie} showing that an investigatory interview was held in violation of \textit{Weingarten} representation rights and that the employee was then disciplined for the conduct which was the subject of the unlawful interview.\textsuperscript{313} Upon establishment of the \textit{prima facie} case, the burden shifts to the employer to show that the employer's decision to discipline the employee was not based on information gleaned from the unlawful interview.\textsuperscript{314}

In \textit{Kraft}, the respondent successfully met this burden. The majority concluded that the employer's decision to discharge was made on the strength of independent witnesses' corroboration of the assault, rather than on the basis of the employee's denial of the incident in the unlawful investigatory interview.\textsuperscript{315} Therefore, only a cease and desist order for the section 8(a)(1) violation of the \textit{Weingarten} right to representation was issued and the employee remained discharged.\textsuperscript{316}

In \textit{NLRB v. Potter Electric Signal Co.},\textsuperscript{317} a decision issued prior to the date of the case, several witnesses to the assault. This independent information was the basis for the discharge decision. \textit{Id.}

\textsuperscript{310} \textit{Id.}
\textsuperscript{311} \textit{Id.} at 599.
\textsuperscript{312} \textit{Id.} at 598.
\textsuperscript{313} \textit{Id.}
\textsuperscript{314} \textit{Id.} See also Gulf State Mfg., 261 N.L.R.B. No. 119, 110 L.R.R.M. (BNA) 1132 (1982) (employee was not granted make-whole remedy of revocation of written warning that was issued after unlawful interview because Board found that the decision to discipline had been made prior to the interview); ITT Corp., 261 N.L.R.B. No. 34, 110 L.R.R.M. (BNA) 1025 (1982) (employee was not granted any make-whole remedies because his discharge was not based on information obtained at the unlawful interview because he had refused to answer questions at the interview); Coyne Cylinder Co., 251 N.L.R.B. 1503 (1980) (employee who was discharged for "smoking pot" was not awarded a make-whole remedy because the decision to discharge was based solely on information obtained before the unlawful interview). \textit{But see E.I. DuPont De Nemours 259 N.L.R.B. 1210 (1982) (employee was granted the make-whole remedy of rescission of a written reprimand because the Board found that the discipline was an outgrowth of the unlawful interview).}

\textsuperscript{315} 251 N.L.R.B. at 598. Because the employee simply identified a picture of the site of the fork-lift collision and denied the assault, there was no information obtained at the interview which could provide "cause" for the discipline as required by § 10(c) of the National Labor Relations Act. \textit{Id.} at 599. For the text of § 10(c), see text accompanying note 304 \textit{supra}.

\textsuperscript{316} \textit{Id.}
\textsuperscript{317} 600 F.2d 120 (8th Cir. 1979). In \textit{Potter}, two employees engaged in a loud argument during working hours which resulted in one employee striking the other. A
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Kraft, the Eighth Circuit affirmed the Board’s finding of an unlawful investigatory interview in violation of Weingarten, but denied enforcement of the Board’s make-whole order.\(^{318}\) In setting forth its reasons for the denial of the remedy, the court established a more stringent test than the Board in Kraft for determining whether make-whole remedies are appropriate.\(^{319}\) Unlike the Board in Kraft, the Potter court based its decision not on the source of the information leading to the disciplinary action, but rather on a determination of whether the employees were discharged for requesting union assistance.\(^{320}\) In a subsequent decision, Montgomery Ward & Co. v. NLRB,\(^{321}\) the Eighth Circuit relied on Potter, and stated that it stood for the proposition that “where it is clear that employees were discharged for good cause and not for requesting union assistance at an investigatory interview, Section 10(c) of the Act . . . precludes an order of back pay and reinstatement under such circumstances.”\(^{322}\) This is the approach that has been generally adopted by the courts of appeals.\(^{323}\)

While neither the Board nor the courts explicitly follow Kraft or Potter, in general, courts are more reluctant than the Board to order make-whole remedies.\(^{324}\) For example, the Eleventh Circuit in NLRB v. Southern Bell Telephone Co.\(^{325}\) affirmed the Board’s cease and desist order but denied enforcement of the make-whole remedy ordered by the Board.\(^{326}\) The employee in Southern Bell was suspended for discrepancies in her work records after offering no explanation for them supervisor came to the scene, shut down the production line and told the two employees to punch out and report to the cafeteria. Both employees’ requests for union representation at the subsequent investigatory interviews were denied. \textit{Id.} at 123.

\(^{318}\) \textit{Id.} at 124.

\(^{319}\) For a discussion of the test designed by the Board in Kraft, see notes 307-16 and accompanying text supra.

\(^{320}\) 600 F.2d at 123. The court concluded that “it is clear that the employees were discharged for a fight that resulted in shutting down the production line and that the section 8(a)(1) violation was only incidental to the investigation which preceded the firing.” \textit{Id.}

\(^{321}\) 664 F.2d 1095 (8th Cir. 1981).

\(^{322}\) \textit{Id.} at 1097 (citations omitted). In this case, two employees admitted stealing company property at an unlawful interview and were subsequently discharged. The court reasoned that “the employees effected their own discharge by stealing and the section 8(a)(1) violation was simply incidental to the investigation which preceded the firing.” \textit{Id.}

\(^{323}\) For a discussion of appellate courts which have cited the Potter approach, see notes 332-33 & 337 and accompanying text infra.


\(^{325}\) 676 F.2d 499 (11th Cir. 1982).

\(^{326}\) \textit{Id.} at 502-03.
at an unlawful investigatory interview conducted by the employer.\textsuperscript{327} The Eleventh Circuit rejected the Board’s contention that the employee was punished for exercising her right to request union representation rather than for her inaccurate work.\textsuperscript{328} Instead, the court concluded that no “causal connection” could be inferred “between the suspension and the failure to explain, from Southern Bell’s mere refusal to accede to [the employee’s] request for a union representative.”\textsuperscript{329} The court observed that the Supreme Court in \textit{Weingarten} “implicitly rejected such inference.”\textsuperscript{330} To support this construction of the \textit{Weingarten} decision, the Eleventh Circuit pointed to the Supreme Court’s allowance for an employer’s denial of representation so long as the employer refrained from acting on any information obtained at the interview.\textsuperscript{331}

Purporting to rely on \textit{NLRB v. Potter Electric Signal Co.},\textsuperscript{332} the Sixth Circuit in \textit{General Motors Corp. v. NLRB}\textsuperscript{333} also refused to order enforcement of make-whole remedies. In \textit{General Motors}, the employer’s security guard observed the employee at a bowling alley during working hours.\textsuperscript{334} The employee subsequently admitted this during an unlawful investigatory interview.\textsuperscript{335} Although the court cited \textit{Potter} for support, it did not follow \textit{Potter}'s reasoning. Instead of inquiring into whether the employee was fired for requesting union representation, the court considered whether there was “independent

\textsuperscript{327} Id. at 500. The employer discovered inaccuracies in the tickets completed by the employee which were designed to monitor certain equipment. The employee was interviewed by her supervisor but refused to answer any questions without a union representative present. Subsequently, the employee received a two-week disciplinary suspension. \textit{Id.}
\textsuperscript{328} Id. at 500-501.
\textsuperscript{329} Id. at 501.
\textsuperscript{330} Id.
\textsuperscript{331} Id. The court noted that Southern Bell had not terminated the interview after the employee’s request for representation but the court also refused to find a causal link between the discipline and the employee’s refusal to explain work discrepancies. The interview was not hostile and no incriminating information was obtained during it. Accordingly, the court concluded that the case involved only a denial of union representation which was not itself enough to grant a make-whole remedy. \textit{Id.} at 502.
\textsuperscript{332} 600 F.2d 120 (8th Cir. 1979), \textit{denying enforcement}, 237 N.L.R.B. 1289 (1978). For a discussion of the \textit{Potter Electric Signal} decision, see notes 317-22 and accompanying text supra.
\textsuperscript{333} 674 F.2d 576 (6th Cir. 1982).
\textsuperscript{334} Id. at 577.
\textsuperscript{335} Id. The employee was questioned on three occasions. At the third investigatory interview, the employee requested representation. Although the request was ignored, the employee continued to respond to the questioning and admitted to being at the bowling alley during working hours. The employee was discharged the next day. \textit{Id.}
evidence of good cause for discharge.\textsuperscript{336}

In \textit{NLRB v. Illinois Bell Telephone Co.}, \textsuperscript{337} the Seventh Circuit also cited \textit{Potter} with approval, but like the Sixth Circuit in \textit{General Motors}, \textsuperscript{338} its reliance on \textit{Potter} was not borne out in its reasoning. The employee in \textit{Illinois Bell} was a long distance telephone operator.\textsuperscript{339} During an unlawful investigatory interview, she admitted that she had improperly reduced certain time charges and had made personal calls.\textsuperscript{340} In its opinion, the Board\textsuperscript{341} used the test devised by the Board in \textit{Kraft},\textsuperscript{342} and concluded that the employer in \textit{Illinois Bell} had "failed to meet its burden of showing that the decision to discharge was not based upon information obtained at the unlawful interview."\textsuperscript{343} Accordingly, it ordered reinstatement, back pay, and expungement of records.\textsuperscript{344}

The Seventh Circuit enforced the Board's order in all requests except the remedy, and remanded the case to the Board for additional fact-finding.\textsuperscript{345} Following the reasoning of \textit{Potter}, the court initially stated that it was clear that the employee had not been

\textsuperscript{336} \textit{Id.} at 578. The "independent evidence of good cause" test is closer to the Board's approach in \textit{Kraft} which also looked to the existence of evidence obtained independent of the unlawful interview. For a discussion of the \textit{Kraft} test, see notes 307-16 and accompanying text \textit{supra}.  

\textsuperscript{337} 674 F.2d 618 (7th Cir. 1982), \textit{denying enforcement}, 251 N.L.R.B. 932 (1980).  

\textsuperscript{338} 674 F.2d 576 (6th Cir. 1982). For a discussion of the \textit{General Motors} decision, see notes 333-36 and accompanying text \textit{supra}.  

\textsuperscript{339} 674 F.2d at 620.  

\textsuperscript{340} \textit{Id.} at 621. Because the union representative was not available at the time of the interview, the employee requested to be represented by a fellow union member. Her request was denied and during the subsequent unlawful interview, the employee admitted her improper activities. She was discharged two days later. \textit{Id.}  

\textsuperscript{341} Illinois Bell Tel. Co., 251 N.L.R.B. at 934.  

\textsuperscript{342} For a discussion of the test developed by the Board in \textit{Kraft}, see notes 307-16 and accompanying text \textit{supra}.  

The Board, in \textit{Illinois Bell}, did not explicitly rely on \textit{Kraft}, although it did describe a two-part analysis that required an initial showing of an unlawful interview and then a shifting of the burden to the employer to show that the decision to discipline was not based on information obtained at the interview. 251 N.L.R.B. at 934. \textit{Kraft} was cited by the majority in a footnote which noted that the concurring Board member in \textit{Illinois Bell} had argued in his dissenting opinion in \textit{Kraft} that the Board's two-part test was too broad. \textit{Id.} at 934 n.18.  

\textsuperscript{343} \textit{Id.} at 934-35. The Board noted that the employer had "in fact admitted that it based its decision to discharge . . . [the employee] on her oral admissions at the interview." \textit{Id.} at 934.  

\textsuperscript{344} \textit{Id.} at 935.  

\textsuperscript{345} 674 F.2d at 623. The court reasoned that the company was entitled to show that its discharge of the employee was not based solely upon evidence obtained at the unlawful interview and remanded the case to the Board to determine whether the company had sufficient independent evidence to support the discharge. \textit{Id.}
discharged for requesting union representation. However, instead of concluding from this that the Board's remedy was inappropriate, the Seventh Circuit considered, as the Board had done in *Kraft*, whether the discharge could have been supported by evidence obtained outside the interview. Finding the record inadequate on this point, the court remanded the case to the Board to determine the availability of such independent evidence. Thus, while articulating the reasoning of the Eighth Circuit in *Potter*, the Seventh Circuit ultimately applied the more liberal test set down by *Kraft* in determining the propriety of a make-whole remedy.

V. CONCLUSION: POLICY OVERVIEW AND PROSPECTUS FOR FUTURE DEVELOPMENTS

*Weingarten* was a fundamentally sound and appropriate decision. It clarified and resolved unsettled issues in a troubled area of labor relations law. The decision emphasized the statutory right of an individual employee to have representation at an investigatory employer interview which the employee reasonably feared might result in adverse employment consequences. By affirming the Board's objective test of the reasonableness of the employee's apprehension under all of the particular circumstances, *Weingarten* abandoned the practice of relying on the employer's stated purpose for the interview. In so doing, the Court made a positive and timely contribution to restoring the parity between management and labor that is essential to harmonious and productive labor relations. The Court managed to safeguard the rights of the individual employee without giving him the power to insist on representation at every possible discussion with the employer. Important post-*Weingarten* decisions have been characterized by a complex elaboration of exceptions and expansions on the right to representation.

As the Supreme Court stated in *Weingarten*, the right to union representation arose only where the employee requested representa-

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346. For a discussion of the *Potter* decision see notes 317-22 and accompanying text *supra*.

347. *Id.* The court reasoned that it must "balance the need of the company to maintain an honest and efficient workforce, with the duty to enforce the policies of the Act . . . ." *Id*.

348. *Id.* at 621. While the approach adopted by the Seventh Circuit resembles *Kraft* because of its requirement that independent evidence exist, it is not a strict application of *Kraft*. The Board would require the granting of a make-whole remedy if the employer had failed to meet the burden of proof in showing that the decision was not based on the information obtained during the unlawful interview. For an example of when the Board concluded that the employer had not met this burden of proof, see notes 341-344 and accompanying text *supra*. 
A related issue that has arisen is whether upon the union’s request an employer is obligated to permit the union to confer with the employee prior to the interview. Equating this issue with that decided by Weingarten, the Tenth Circuit declared that the employer had no such obligation. Nevertheless, there is dictum in the Tenth Circuit’s opinion which suggests that the union’s request will be honored where the pre-interview consultation is on the employee’s time. The Tenth Circuit also stated in dictum that the employee and his representative have a right to advance notice of the investigatory interview so that they can arrange for a pre-interview consultation on the employee’s time.

Weingarten also left for later courts the task of defining the precise role of the union representative during the investigatory interview. One court has greatly limited this role by permitting the employer to direct the union representative to postpone comments until after the interview.

Perhaps most importantly, the right to representation has been extended to employees who have elected a union, but whose union has not yet been certified. Additionally, the Board has held that employees are not limited to union officials as their representatives and has indicated that when they are unavailable the employees may call upon fellow employees to represent them at investigatory interviews.

These important post-Weingarten decisions have both resolved and raised troubling questions. Throughout the course of future decisions, the Board and the courts must strive to maintain parity between labor and management.

349. 420 U.S. at 257.
350. For a discussion of this issue, see notes 222-60 and accompanying text supra.
351. See notes 239-46 and accompanying text supra.
352. See note 245 and accompanying text supra.
353. See note 246 and accompanying text supra.
354. See notes 294-95 and accompanying text supra.
355. See notes 266-77 and accompanying text supra.
356. See notes 278-85 and accompanying text supra.