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Labor Law - Concerted Activities under Section 7 of the National Labor Relations Act - A Nonunion Employee Has a Right to the Presence of a Co-Worker Witness at an Investigatory Interview Where the Employee Reasonably Believes That Discipline Will Result

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LABOR LAW—"CONCERTED ACTIVITIES" UNDER SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT—A NONUNION EMPLOYEE HAS A RIGHT TO THE PRESENCE OF A CO-WORKER WITNESS AT AN INVESTIGATORY INTERVIEW WHERE THE EMPLOYEE REASONABLY BELIEVES THAT DISCIPLINE WILL RESULT


On November 15, 1978, Walter Slaughter, an employee of E.I. du Pont de Nemours & Company (Du Pont), posted a notice to fellow employees on the cafeteria bulletin board. Immediately thereafter, Thomas Farley, Slaughter's supervisor, informed Slaughter that he had violated company policy by putting up the poster without permission. Farley ordered Slaughter to remove the notice, but Slaughter refused, protesting "that Farley was interfering with his lawful right to organize." Farley attempted to initiate a discussion of the incident with Slaughter on two separate occasions that same morning. On both occasions Slaughter stated that he would discuss the event only if he could have a co-worker serve as a witness during the interview; Farley rejected Slaughter's request both times. Later, after obeying Farley's order to report to the shift supervisor's office, Slaughter

1. E.I. du Pont de Nemours & Co. (Chesnut Run) v. NLRB, 724 F.2d 1061, 1063 (3d Cir. 1983). The "Notice to Employees" was a printed poster which explained the basic rights of employees under the National Labor Relations Act (Act). Id. at 1063 n.1. Slaughter received this poster from the Regional Office of the National Labor Relations Board in response to his request for information regarding union organizing. Id. The Chesnut Run plant where Slaughter was employed was then a nonunion workplace. Id. at 1064.

2. Id. at 1063. Farley had been present in the cafeteria at the time of the posting. Id.

3. Id. Farley then told Slaughter that he wanted to discuss the incident later. Id. A few weeks prior to this confrontation, Farley had placed Slaughter on probation, and had warned Slaughter that he was to follow the company rules closely in the future and that his performance would be reviewed monthly. Id. at 1063 n.2.

The majority's rendition of the facts, which was practically identical to the Board's version, began to differ from the dissent's rendition at this point. The dissent essentially adopted the Administrative Law Judge's findings of fact. For a discussion of the dissenting judge's rendition of the facts, see note 111 and accompanying text infra.

4. 724 F.2d at 1063. Shortly after the incident, Farley telephoned Slaughter and requested that he report to his office to discuss the incident. Id. Approximately one hour later, Farley approached Slaughter on the plant floor and again attempted to discuss the posting incident with him. Id.

5. Id. Farley terminated both conversations by stating that he would talk with Slaughter later. Id.

6. Id. Farley had first ordered Slaughter to gather his personal belongings and report to the foreman's desk. Id. Slaughter was then told to report to the front office

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made a final, unsuccessful attempt to bring in two co-workers as witnesses.\(^7\)
After a last attempt to engage Slaughter in a discussion of the infraction without the presence of a co-worker witness, Farley informed Slaughter that his job was “in jeopardy,” dismissed him pending further notice, and sent him home.\(^8\) On November 29, 1978, fourteen days after the posting incident, Slaughter was permanently discharged.\(^9\)

The National Labor Relations Board (Board), affirming the decision of the Administrative Law Judge with modification,\(^10\) found that Slaughter had the right under section 7 of the National Labor Relations Act (Act)\(^11\) to demand the presence of an employee witness at an investigatory interview when he had reasonable grounds for believing that disciplinary action would result.\(^12\) The Board concluded that by discharging Slaughter for asserting his section 7 right, Du Pont had violated section 8(a)(1) of the Act.\(^13\) Du

and then to the shift supervisor’s office. \(\text{Id.}\) Slaughter obeyed these orders promptly and without protest. \(\text{Id.}\)

7. \(\text{Id.}\) Slaughter first brought fellow employee Jimmy Fields into the room, offering him as a witness. \(\text{Id.}\) Fields was an official of the local chapter of the NAACP, a fact which was known to both Slaughter and Farley. \(\text{Id.}\) at 1063 n.3. Farley refused to enter into any discussion with Fields present and ordered Fields to return to work. \(\text{Id.}\) at 1063. Farley then offered as a witness either Maynard Ritter, a shift supervisor, or Dick Robinson, an industrial relations supervisor. \(\text{Id.}\) Slaughter rejected both men on the ground that they were representatives of management. \(\text{Id.}\) Slaughter then asked Sheila Wilson, a co-worker in the accounting department, if she would be a witness for him, stating: “It appears I’m going to be disciplined in some way.” \(\text{Id.}\)

8. \(\text{Id.}\) at 1063-64. Before being sent home, Slaughter was informed by Farley that his dismissal did not constitute a final discharge. \(\text{Id.}\) at 1064. Moreover, during the course of his suspension, Du Pont officials continued to insist that he meet with them to discuss the incident. \(\text{Id.}\) On November 24, 1978, Slaughter did meet with Dick Robinson, though unaccompanied by a co-worker witness. \(\text{Id.}\)

9. \(\text{Id.}\) at 1064.

10. E.I. du Pont de Nemours, 262 N.L.R.B. 1028, 1028 (1982). The Board’s modifications were limited to minor changes in the chronology of events and a reevaluation of the record in light of an intervening decision by the Board. 724 F.2d at 1064 n.4 (citing Wright Line, A Div. of Wright Line, Inc. 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982)). For a discussion of the differences between the Third Circuit majority and dissent as to the chronology of events, see note 3 supra and note 11 infra. For a discussion of Wright Line and the Board’s reevaluation of the record, see notes 26 & 108 and accompanying text infra.

11. 29 U.S.C. § 157 (1982). Section 7 states in pertinent part that “[e]mployees shall have the right . . . to engage in other concerted activities for the purpose of . . . other mutual aid or protection.” \(\text{Id.}\) For a further discussion of § 7, see notes 28-34 and accompanying text infra.

12. E.I. du Pont de Nemours, 262 N.L.R.B. 1028, 1029 (1982). The court of appeals summarized the Board’s factual findings as follows: first, Farley had on four occasions attempted to discuss the posting incident with Slaughter; second, Slaughter on each occasion had expressed a willingness to discuss the incident, on the condition that a fellow employee be present; and third, Slaughter otherwise followed all orders without protest or delay. 724 F.2d at 1064.

13. E.I. du Pont de Nemours, 262 N.L.R.B. 1028, 1029 (1982). Section 8(a)(1) provides that “[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7].”
Pont appealed the Board's decision, contending that the section 7 right to have a co-worker present, as established by the Supreme Court in *NLRB v. Wengarten, Inc.*, 14 did not apply in a nonunion setting, and that the Board's factual findings were not supported by substantial evidence. 15 The United States Court of Appeals for the Third Circuit 16 enforced the Board's decision, holding that an employee in a nonunionized workplace has a right under the Act to refuse to submit to an investigatory interview without the presence of a co-worker representative, if the employee reasonably believes that the interview might result in discipline. *E.I. du Pont de Nemours & Co. (Chesnut Run) v. NLRB*, 724 F.2d 1061 (3d Cir. 1983).

The National Labor Relations Act, 17 enacted by Congress in 1935, provides the framework for resolving disputes between labor and management. 18 Fundamental employee protections are embodied in sections 7 and

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15. 14. 724 F.2d at 1064.

16. The case was heard by Circuit Judges Adams and Garth, and Judge Ackerman of the United States District Court for the District of New Jersey, sitting by designation. Judge Ackerman wrote the opinion of the court and Judge Garth filed a dissenting opinion.

17. 17. 29 U.S.C. §§ 151-169 (1982). The Act explicitly grants certain protections to "employees." *Id.* § 152(3). An employee is defined under the Act as "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment." *Id.* The Act does not protect agricultural laborers, domestic laborers, independent contractors, supervisors, and individuals employed by employers subject to the Railway Labor Act or by any "persons" not "employers" under the Act, such as the United States Government. *Id.* § 152(2), (3).

18. R. Gorman, *Basic Text on Labor Law: Unionization and Collective Bargaining* 1 (1976). The Act was developed in three major steps. First, the Wagner Act of 1935 established the Act's major provisions, providing that unfair labor practice charges would be adjudicated by an administrative agency, the National Labor Relations Board. See 29 U.S.C. §§ 153, 160 (1982). The Board was empowered to regulate union elections, in which employees could freely and anonymously choose a bargaining representative. See *id.* § 159(e). In addition, the Board could remedy unfair labor practices by ordering the responsible party to cease from such practices and to take "affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act]." *Id.* § 160(c). Persons aggrieved by final orders of the Board could obtain review in the United States courts of appeals. See *id.* § 160(f).

Second, the Taft-Hartley Act of 1947 separated the Board's prosecutorial and adjudicative functions, removed supervisors and independent contractors from the Act's coverage, and gave the courts of appeals greater authority to set aside the Board's findings. See *id.* §§ 152(3), 160-161.

Finally, the Landrum-Griffin Act of 1959 established elaborate reporting re-
8 of the Act. Section 7 grants to employees the right to organize, to bargain collectively, and to "engage in other concerted activities for the purpose of . . . mutual aid or protection." Section 8 protects an employee's exercise of these rights by prohibiting certain "unfair labor practices" by employers. More specifically, interference with employee activity protected under section 7 violates section 8(a)(1) of the Act and constitutes an unfair labor practice under section 8. In determining whether a violation of section 8(a)(1) has occurred, the Board will normally examine the employer's actions under an objective standard, balancing the extent of interference, restraint, or coercion in the exercise of employees' section 8 rights with the requirements for unions in order to combat corruption within union leadership. See id. §§ 431-441. The Landrum-Griffin Act also formulated a "bill of rights" for union members concerning internal union affairs. See id. §§ 411-415. For a brief outline of labor law history in the United States, see R. GORMAN, supra, at 1-6.

For a discussion of these protections, see notes 20-27 and accompanying text infra.

20. 29 U.S.C. § 157 (1982). Section 7 provides in pertinent part as follows: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . .

Id. A violation of an employee's § 7 rights constitutes an "unfair labor practice" under § 8(a)(1). Id. § 158(a)(1).

21. Id. § 158. The following employer conduct constitutes unfair labor practices under § 8 of the Act: (1) interference with, restraint of, or coercion of employees in the exercise of § 7 rights; (2) domination of or interference with the formation or administration of a labor organization; (3) discrimination in regard to hiring, tenure, or any conditions or terms of employment to either encourage or discourage union membership; (4) discrimination against an employee for filing charges or giving testimony under the Act; and (5) refusal to bargain collectively with employee representatives. Id. § 158(a)(1)-(5). Subsections 8(a)(1), (3), and (5) are the provisions most commonly invoked to protect employees' rights. For a discussion of these subsections, see notes 22-27 and accompanying text infra.

While violations of § 8(a)(2)-(5) also come within the broad language of § 8(a)(1), the more specific provisions do not "measure the complete range" of § 8(a)(1). R. GORMAN, supra note 18, at 132. Thus, a violation of § 8(a)(1) may either be "derivative," if it also constitutes a violation of § 8(a)(2)-(5), or "independent," if it does not. See ABA SECTION ON LABOR RELATIONS LAW, THE DEVELOPING LABOR LAW 66 (C. Morris ed. 1971). For a thorough discussion of rights of employees pursuant to § 8(a)(1), see generally id. at 65-68. For the pertinent text of § 8(a)(1), see note 22 infra.

22. 29 U.S.C. § 158(a)(1) (1982). Section 8(a)(1) provides that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7] of this title." Id.

23. R. GORMAN, supra note 18, at 132-33. First, the test for a § 8(a)(1) violation is objective because the General Counsel of the Board must only "show that the employer's actions would tend to coerce a reasonable employee;" there is no requirement that particular employees were in fact coerced. Id. at 132. Second, the General Counsel must only demonstrate that the employer's action "has the effect of restraint or coercion;" he need not establish employer intent to produce that result. Id. at 133 (emphasis in original). See, e.g., Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 269 (1965) (violation of § 8(a)(1) "presupposes an act which is unlawful even absent a discriminatory motive").
employer's "interest in plant safety, efficiency or discipline." Section 8(a)(3) is violated whenever an employer encourages or discourages union membership "by discrimination in regard to hire or tenure of employment or any term or condition of employment." The motive of the employer becomes a key consideration in cases in which violations of this section are alleged. Under section 8(a)(5), an employer engages in an unfair labor

24. R. GORMAN, supra note 18, at 133 (citing Republic Aviation Corp. v. NLRB, 324 U.S. 793, 797-98 (1945)). The Supreme Court has stated that unless the employer can demonstrate "that his action [in refusing to reinstate striking employees following their strike] was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice" under § 8(a)(1) and § 8(a)(3). NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967) (quoting NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967)). Note that a violation of § 8(a)(2)-(5) also can constitute a derivative violation of § 8(a)(1). For a discussion of these "derivative" violations of § 8(a)(1), see note 21 supra. The Supreme Court has also stated that "some employer [business] decisions are so peculiarly matters of management prerogative that they would never constitute violations of § 8(a)(1) . . . unless they also violated § 8(a)(3)." Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 269 (1965) (examining the motives of the employer under § 8(a)(3)). Establishing a violation of § 8(a)(3), unlike § 8(a)(1), normally requires a showing of an employer's antiunion animus. American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 311 (1965).

25. 29 U.S.C. § 158(a)(3) (1982). The Board and the courts, in finding violations of the Act under § 8(a)(3) and § 8(a)(1), have balanced the protected rights of the employee with the business interests of the employer. See NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967). For a discussion of this balancing approach, see note 24 and accompanying text supra. Section 8(a)(1), however, focuses upon the employer's conduct, while § 8(a)(3) focuses upon the employer's motivation. See R. GORMAN, supra note 18, at 137. For a discussion of § 8(a)(1)'s objective standard, see note 23 and accompanying text supra.

Thus, in applying § 8(a)(3), the Board and the courts "purport to search for specific proof of antiunion animus to make out a violation." R. GORMAN, supra note 18, at 328. See American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965) (a finding of a § 8(a)(3) violation usually turns on the motivation of employer). According to Professor Gorman, the clearest example of a § 8(a)(3) violation "is the discharge of an employee whom the employer knows to be a union organizer and who is discharged specifically in order to penalize the employee, to impede the union's progress and to instill fear among other employees who would otherwise be sympathetic to the union cause." R. GORMAN, supra note 18, at 326-27.

In 1967 the Supreme Court held that in order for an employer's discriminatory and discouraging activity to be in violation of § 8(a)(3), it must normally be motivated by an antiunion purpose. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33-34 (1967). The Court then formulated two principles of proof on this issue. Id. at 34. First, if the employer's conduct is "inherently destructive" of employee rights, no proof of antiunion animus is required to find an unfair labor practice, even if the conduct was motivated by business purposes. Id. Second, if the conduct's negative effect on employee rights is "comparatively slight," an antiunion motivation must be proved if the employer has presented "evidence of legitimate and substantial business justifications for the conduct." Id.

26. See American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 311 (1965). For a discussion of employer motivation, see note 25 and accompanying text supra. In analyzing employee discharge cases, which comprise a significant portion of § 8(a)(3) cases, the Board and the courts have developed various causation and burden of proof tests. See Wright Line, A Div. of Wright Line, Inc., 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

Originally, the Board employed the "in part" causation test, which "provides
practice when he refuses "to bargain collectively with representatives of his employees."\textsuperscript{27}

Most cases involving employer discipline for the exercise of section 7 rights involve employees who are engaged in the various union activities enumerated in section 7 and who therefore clearly come within the protection of the Act.\textsuperscript{28} In the absence of a union, however, employee conduct will be protected only if it can be classified as "concerted activities for the purpose of . . . mutual aid or protection."\textsuperscript{29} The Supreme Court, in the recent case of \textit{NLRB v. City Disposal Systems, Inc.},\textsuperscript{30} interpreted "concerted activity" that if a discharge is motivated, 'in part,' by the protected activities of the employee, the discharge violates the Act even if a legitimate business reason was also relied on." \textit{Id.} at 1084 (citing \textit{The Youngstown Osteopathic Hosp. Ass'n}, 224 N.L.R.B. 574, 575 (1976)). In 1980, the Board in \textit{Wright Line} abandoned the "in part" causation test and replaced it with the "mixed motive" test. \textit{Id.} at 1089. The mixed motive test required that the employer's antiunion animus be not only a partial motivation for dismissal, but that it be the "but for" cause of the discharge. \textit{Behring Int'l, Inc. v. NLRB}, 675 F.2d 83, 87 (3rd Cir. 1982), vacated and remanded, 103 S. Ct. 3104 (1983).

First, the Board required that the General Counsel make "a \textit{prima facie} showing . . . that protected conduct was a 'motivating factor' in the employer's decision." \textit{Wright Line}, 251 N.L.R.B. at 1089. The burden then shifts to the employer to show "that the same action would have taken place even in the absence of the protected conduct." \textit{Id.}

The Third Circuit originally did not follow the \textit{Wright Line} mixed motive test. \textit{See Behring}, 675 F.2d at 90. Instead of shifting the burden of proof to the employer, the Third Circuit required that the burden remain with the General Counsel to prove "that the employer's antiunion animus was the real cause of the discharge." \textit{Id.} In 1983, however, the Supreme Court endorsed the \textit{Wright Line} test and vacated \textit{Behring}, doing away with the Third Circuit's former burden of proof standard. \textit{NLRB v. Transportation Management Corp.}, 103 S. Ct. 2469 (1983).


Sections 8(a)(2) and 8(a)(4) of the Act are less frequently invoked than are the sections discussed above. Section 8(a)(2) forbids an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." 29 U.S.C. § 158(a)(2) (1982). Finally, § 8(a)(4) forbids an employer "to discharge or otherwise discriminate against an employee" for filing charges or giving testimony under the Act. \textit{Id.} § 158(a)(4). For a discussion of § 8(a)(2) and § 8(a)(4), see \textit{R. Gorman}, supra note 18, at 142-43, 195-208.

28. \textit{See}, e.g., \textit{Republic Aviation Corp. v. NLRB}, 324 U.S. 793 (1945) (employees disciplined for distributing union literature); \textit{Cooper Tire & Rubber Co. v. NLRB}, 443 F.2d 338 (6th Cir. 1971) (employees suspended for seeking change in union leadership while outside workplace and off duty). \textit{See also R. Gorman}, supra note 18, at 297.


30. 104 S. Ct. 1505 (1984). In \textit{City Disposal Systems}, the Court held that a single employee's invocation of a right under a collective-bargaining agreement is concerted
as clearly embracing "the activities of employees who have joined together in order to achieve common goals." The Board has adopted similarly broad interpretations. The requirement of "mutual aid or protection" has also been interpreted liberally by the Board and the courts as referring to all acts of concerted activity and therefore entitled to protection under § 7. In so holding, the Court affirmed the well-known "Interboro doctrine" which had been adopted by several circuits. Id. at 1516 (citing Interboro Contractors, Inc., 157 N.L.R.B. 1295 (1966), enforced, 388 F.2d 495 (2d Cir. 1967)). For two other court of appeals decisions affirming Interboro, see NLRB v. Ben Pekin Corp., 452 F.2d 205 (7th Cir. 1971); NLRB v. Selwyn Shoe Mfg. Corp., 428 F.2d 217 (8th Cir. 1970). In Interboro, the Board held that an individual employee's complaints constituted protected activity because they were made in an effort to enforce certain provisions of a collective bargaining agreement. 157 N.L.R.B. at 1298.

31. 104 S. Ct. at 1511 (citing Meyers Indus., Inc., 268 N.L.R.B. No. 73, [5 Labor Relations] Lab. L. Rep. (CCH) ¶ 16,019, at 27,291 (Jan. 6, 1984)). The Court added that Congress had never indicated an intention to limit § 7 protection to specific situations in which an employee's activity combines with that of another employee in any particular way. Id. at 1513. Rather, the Court looked to the Act's purpose of equalizing the bargaining power between the employee and the employer by permitting employees to join together in various activities "in confronting an employer regarding the terms and conditions of their employment." Id. These activities include labor organizing, collective bargaining, and enforcement of collective bargaining agreements. Id.

For other interpretations of concerted activity by federal courts, see NLRB v. J. Weingarten, Inc., 420 U.S. 251, 260 (1975) (an individual employee's invocation of a right to union representation at an investigatory interview which he reasonably believes may result in discipline is protected concerted activity); NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962) (walkout by employees who believe it is too cold to continue working is protected concerted activity, even though employees were not union members); NLRB v. Pepsi-Cola Bottling Co., 449 F.2d 824 (5th Cir. 1971) (strike to protest discharge of fellow employee is protected concerted activity even though unrelated to union activity), cert. denied, 407 U.S. 910 (1972).

32. See, e.g., Meyers Indus., Inc., 268 N.L.R.B. No. 73, [5 Labor Relations] Lab. L. Rep. (CCH) ¶ 16,019 (Jan. 6, 1984). In Meyers, the Board defined "concerted" as "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." Id. See also Traylor-Pamco, 154 N.L.R.B. 380 (1965) (employee interaction in support of a common goal considered concerted activity); Root-Carlin, Inc., 92 N.L.R.B. 1313, 1314 n.5 (1951) (concerted activity includes interaction among employees with the goal of union organization). For examples of specific activities considered by the Board to be "concerted," see Washington State Serv. Employees State Council No. 18, 188 N.L.R.B. 957 (1971) (employee of one company demonstrated with the employees of another company against the latter company's discriminatory hiring); Ohio Oil Co., 92 N.L.R.B. 1597 (1951) (two employees protested cutback in overtime, reflecting discontent of other employees).

Where an individual employee's actions are too remotely related to the activities of other employees, his actions are not "concerted." See City Disposal Systems, 104 S. Ct. at 1512 n.10 (purely personal complaining not concerted activity). See also NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714 (5th Cir. 1973) (individual employee's complaints about commission payments not concerted activity); NLRB v. Office Towel Supply Co., 201 F.2d 838 (2d Cir. 1953) (employee's complaints about working conditions not concerted activity); Maietta Trucking Co., 194 N.L.R.B. 794 (1971) (employee's wage complaints which asserted no right under any collective bargaining agreement not concerted activity).
reasonably related to the jobs of workers or to their status as employees. Some concerted activity engaged in for mutual aid or protection, however, is not protected under section 7, and the Board and the courts have developed a "common law" defining such unprotected activity.

Because information elicited from an employee at an investigatory interview may be used as a basis for disciplining that employee, the Board, courts, and commentators have recognized the critical need for the employee's right to representation at such interviews. Several theories have

33. See, e.g., NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503 (2d Cir. 1942) (employees' announcement of support for work stoppage at another company is protected activity); Washington State Serv. Employees State Council No. 18, 188 N.L.R.B. 957 (1971) (demonstrations by one or more employees in protest of discriminatory hiring policies of another employer is protected activity); General Elec. Co., 169 N.L.R.B. 1101 (1968) (collecting contributions for another company's agricultural workers is a protected activity), enforced per curiam, 411 F.2d 750 (9th Cir. 1969).

In a 1977 decision, the Board found that the distribution by employees of a union-sponsored circular during non-working time at a unionized plant was for mutual aid or protection. Eastex, Inc., 215 N.L.R.B. 271, 274 (1974), enforced, 550 F.2d 198 (5th Cir. 1977), aff'd, 437 U.S. 556 (1978). In affirming the Board's interpretation of mutual aid and protection, the Supreme Court noted that the phrase encompasses employee activity in support of employees of other employers and activity to improve employment conditions or status "through channels outside the immediate employee-employer relationship." Eastex, Inc. v. NLRB, 437 U.S. 556, 564-65 (1978).

34. R. GORMAN, supra note 18, at 302. As Professor Gorman has stated, "[t]he Board and the courts will find employee activity unprotected when the means utilized are characterized as illegal, reprehensible, indefensible, disloyal or inconsistent with the terms or spirit of the Labor Act." Id. at 306. The Ninth Circuit has established four requirements which must be met before concerted activity will be protected under § 7: (1) [T]here must be a work-related complaint or grievance; (2) the concerted activity must further some group interest; (3) a specific remedy or result must be sought through such activity; and (4) the activity should not be unlawful or otherwise improper." Shelly & Anderson Furniture Mfg. Co. v. NLRB, 497 F.2d 1200, 1202-03 (9th Cir. 1974) (quoting 18B T. KHEEL, LABOR LAW § 10.02(3), at 10-21 (1973)).

For examples of unprotected concerted activities, see NLRB v. Local Union No. 1229, 346 U.S. 464 (1953) (distribution by employees of handbills making public a disparaging attack on employer's business); Southern S.S. Co. v. NLRB, 316 U.S. 31 (1942) (deliberate disobedience of lawful commands of captain by seamen); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939) (sit-down strike and violence to the employer's property); Liberty Mut. Ins. Co. v. NLRB, 592 F.2d 595 (1st Cir. 1979) (employee's personal rebellion and failure to perform assigned duties); Cleaver-Brooks Mfg. Corp. v. NLRB, 264 F.2d 637 (7th Cir. 1973) (protest based on personal antipathy toward new foreman), cert. denied, 361 U.S. 817 (1959); Hoover Co. v. NLRB, 191 F.2d 380 (6th Cir. 1951) (employee boycott designed to coerce employer to violate a section of the Act). See also Boeing Airplane Co. v. NLRB, 238 F.2d 188 (9th Cir. 1956) (unprotected concerted activity includes "slow-down, sit-down strike, wildcat strike, damage to business or to plant and equipment, trespass, violence, refusal to accept work assignment, physical sabotage, refusal to obey rules and other such activities"). For a general description of unprotected concerted activity, see Gregory, Unprotected Activity and the NLRA, 39 VA. L. REV. 421 (1953). See also R. GORMAN, supra note 18, at 296-325.

35. See, e.g., NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975); Anchortank, Inc. v. NLRB, 618 F.2d 1153 (5th Cir. 1980); Materials Research Corp., 262 N.L.R.B. 1010 (1982); Gregory, The Employee's Right to Representation During Employer Investigatory
been asserted under section 8 of the Act in support of such a right. First, the Board has held that the dismissal of an employee for her refusal to meet with a representative of management without having a union representative present violates section 8(a)(3) because it discourages union membership through discrimination with regard to tenure of employment. Second, the Board has acknowledged the right to representation under section 8(a)(1) by finding that an employer's denial of representation interferes with and restrains the employee in the exercise of his or her section 7 rights. Finally, the Board has reasoned that an employer's denial of representation violates his obligation under section 8(a)(5) "to bargain with the union concerning the terms and conditions of employment of the employees it represents."


36. Ross Gear & Tool Co., 63 N.L.R.B. 1012, 1034 (1945), enforcement denied, 158 F.2d 607 (7th Cir. 1947) (employee not discharged because of employer's discrimination, but because of employee's insubordination). The Board in Ross Gear & Tool stated that because the employee was interviewed partly as a member of a union committee, her right to representation was based upon union membership and not upon her status as an employee. Id. at 1032-34. For a further discussion of the Board's decision in Ross, see notes 40-43 and accompanying text infra. For a discussion of the Seventh Circuit's denial of enforcement, see note 45 and accompanying text infra. For a discussion of § 8(a)(3), see notes 25-26 and accompanying text supra.

37. See Texaco, Inc., Houston Producing Div., 168 N.L.R.B. 361, 362 (1967), enforcement denied, 408 F.2d 142 (5th Cir. 1969) (court of appeals denied enforcement under § 8(a)(5)). In Texaco, as in several other cases, the Board granted the right to representation under more than one subsection of § 8(a). See id. at 362. See also Texaco, Inc., Los Angeles Sales Terminal, 179 N.L.R.B. 976 (1969); Ross Gear & Tool Co., 63 N.L.R.B. 1012 (1945), enforcement denied, 158 F.2d 607 (7th Cir. 1947). For a further discussion of the Board's decision in Texaco Inc., Houston, see notes 50-51 and accompanying text infra. For a discussion of the Fifth Circuit's denial of enforcement, see note 52 and accompanying text infra. For a discussion of § 7 and § 8(a)(1), see notes 20 & 22-24 and accompanying text supra.

In a later decision, the Board again found a violation of § 8(a)(1) when an employee's request for union representation was refused and he was forced to meet with his employer unassisted. Mobil Oil Corp., 196 N.L.R.B. 1052, 1052 (1972), enforcement denied, 482 F.2d 842 (7th Cir. 1973) (representation at investigatory interviews is not the kind of concerted activity which § 7 protects). The Board stated that the employee's right to engage in concerted activities for mutual aid or protection under § 7 had been denied by the employer's refusal. Id. For a further discussion of the Board's decision in Mobil Oil, see notes 58-61 and accompanying text infra. For a discussion of the Seventh Circuit's denial of enforcement, see note 62 and accompanying text infra.

38. Texaco, Inc., Houston Producing Div., 168 N.L.R.B. 361, 362 (1967), enforcement denied, 408 F.2d 142 (5th Cir. 1969). In two other § 8(a)(5) cases following Texaco Inc. Houston, the Board recognized a distinction between investigatory, or fact-finding, interviews and those involving discipline, and it permitted an employer to have a representative in the latter, but not the former, proceedings. See Jacobe-Pearson Ford, Inc., 172 N.L.R.B. 594 (1968); Chevron Oil Co., 168 N.L.R.B. 574 (1967). The significance of this distinction was later reduced when the Board formulated a new test, shifting the focus from the employer's stated purpose for the interview to the objective manifestation of this purpose. See Texaco, Inc., Los Angeles Sales Terminal, 179 N.L.R.B. 976, 983 (1969). For a discussion of this "objective manifestation," see notes 55-56 and accompanying text infra. Finally, the investigatory/disciplinary distinction under § 8(a)(5) was rendered virtually moot when the Board shifted its
Using these three theories, the Board has recognized an employee’s right to union representation at investigatory interviews when disciplinary action is threatened. The courts of appeals, however, have generally refused to accept this position. The first major decision on the right to representation at investigatory interviews was the 1945 case of Ross Gear & Tool Co. In Ross, employee Mae Ford refused to meet with her company supervisor unless fellow members of the union bargaining committee were permitted to attend. The employer denied Ford’s request and promptly dismissed her for insubordination. The Board held that Ford’s discharge, based upon her demand for representation, constituted an interference with union activities and discouraged union membership, thereby violating sections 8(a)(1) and 8(a)(3) of the Act. Upon petition by the Board, the Seventh Circuit denied enforcement of the Board’s order, stating that Ford’s discharge was based upon neither her status as a union official nor any employer intent to restrain, intimidate, or coerce, but upon her insubordination, magnified by her poor work record.

previous emphasis on § 8(a)(5) as the basis for the cause of action and instead relied on § 7 and § 8(a)(1). See Mobil Oil Corp., 196 N.L.R.B. 1052 (1972), enforcement denied, 482 F.2d 842 (7th Cir. 1973).

39. For a discussion of the courts of appeals’ denials of enforcement of Board orders, see notes 45, 52 & 62 and accompanying text infra.

40. 63 N.L.R.B. 1012 (1945), enforcement denied, 158 F.2d 607 (7th Cir. 1947).

41. Id. at 1033-34. As a union bargaining committee member, Ford had aided in the successful challenge of the plant policy which permitted only men to smoke in the workplace. Id. at 1021. Ford’s efforts created some animosity between herself and a few of her nonunion co-workers. Id. at 1022-23. According to Ford’s supervisor, the meeting with Ford was called to discover the cause of this animosity. Id. at 1028.

42. Id. at 1033.

43. Id. at 1034. Because the employer intended to discuss Ford’s activities as a member of the union committee, the Board concluded that Ford had a right to have the committee present. Id. The Board stated that even if “an individual employee is not entitled to insist upon union representation whenever he or she may be called in by management” for disciplinary reasons, Ford was called in as a member of a union committee about a matter which the employer had addressed in meeting with that committee. Id. at 1033-34. The Board concluded that “[u]nder these circumstances . . . Ford was within her statutory rights in refusing to handle the matter alone and in insisting that [the company’s labor relations representative] take it up with the entire union committee, of which she was a member.” Id. at 1034.

44. Although the Board possesses fact-finding and investigatory powers, Board orders promulgated pursuant to a finding of an unfair labor practice are enforceable only by a federal court of appeals upon a petition by the General Counsel. See 29 U.S.C. § 160(b)-(m) (1982). For a general discussion of the petitioning process, see R. Gorman, supra note 18, at 10-14.

45. NLRB v. Ross Gear & Tool Co., 158 F.2d 607, 613-14 (7th Cir. 1947). The court discussed the dissention Ford had caused among some of the employees, and described her as having a record for tardiness, being “a general trouble maker,” and having “an exaggerated idea of her importance.” Id. at 612. The Seventh Circuit further stated that the employer’s request to meet with Ford alone was not motivated by a predetermined decision to discipline her, but by a desire to resolve the discord she had caused, about which the employer had received a complaint. Id. The court concluded that the employer was justified in discharging Ford for violating a com-
It was not until approximately twenty years later, in *Dobbs Houses, Inc.*\(^4^6\) that the Board was again confronted with the issue of co-worker representation in investigatory interviews.\(^4^7\) In *Dobbs*, the employee alleged that her employer had violated section 8(a)(1) by refusing to allow a union staff representative to be present during a disciplinary meeting which ultimately resulted in the employee's discharge.\(^4^8\) The Board, in upholding the discharge, limited the right to representation to situations in which an employee is disciplined for conduct related to "legitimate union or concerted activity."\(^4^9\)

In *Texaco, Inc., Houston Producing Division*,\(^5^0\) the Board found that the employer's refusal to allow a union representative to accompany the employee at a meeting concerning the employee's suspension violated the employer's duty under section 8(a)(5) to bargain with the union concerning the terms and conditions of employment.\(^5^1\) However, the Fifth Circuit denied enforcement of the Board's order, finding that the right to representation attaches only to disciplinary interviews and not to those which are purely investigatory in character.\(^5^2\)

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47. See id. at 1570-71. *Dobbs* was the first Board decision to address squarely the issue of a union employee's right to have a third party present during an investigatory interview, since the situation in *Dobbs*, unlike the *Ross* setting, was not limited to the case of an employee in a special union capacity. Id. at 1571.
48. 145 N.L.R.B. at 1570-71. The employee had on numerous occasions violated an express company rule prohibiting union solicitation on company time. Id. She was discharged following a disciplinary meeting which concerned derogatory remarks which she made about the employer on the day after a prior reprimand for her solicitation activities. Id. at 1570. At the disciplinary meeting, the employer refused her request that a union staff representative be brought in as a participant. Id. at 1570-71.
49. Id. at 1571. The Board adopted the trial examiner's finding that the employee had not been interviewed for involvement in protected union activity. Id. The Board also adopted the finding that an employer "has the right to maintain day-to-day discipline" and need not permit the presence of a representative in every disciplinary situation. Id.
50. 168 N.L.R.B. 361 (1967), enforcement denied, 408 F.2d 142 (5th Cir. 1969). In *Texaco Inc., Houston*, an employee accused of stealing company property was suspended without pay. Id. at 361. Though not a member of the union, the employee was a member of a collective bargaining unit represented by that union. Id. Various requests by the union and the employee for representation at the disciplinary meeting concerning the alleged theft were denied by the employer. Id.
51. 168 N.L.R.B. at 362. The Board based its finding that the employer "refused to deal" with the union on the employee's request for union representation and the union's willingness to represent him. Id. The Board noted that the company's management had been aware of both the employee's request and the union's willingness to help him. Id. For a discussion of § 8(a)(5), see note 27 and accompanying text *supra*. The Board also found that the employer had violated § 8(a)(1), since it had interfered with and restrained the employee in the exercise of his § 7 rights. 168 N.L.R.B. at 362.
52. *Texaco, Inc., Houston Producing Div. v. NLRB*, 408 F.2d 142, 144-45 (5th Cir. 1969). The court characterized the employee-employer meeting in *Texaco* as in-
After the Board and the courts adopted this distinction between investigatory and disciplinary interviews, a distinction which limited an employee’s right to representation under the Act,\textsuperscript{53} the Board, in \textit{Texaco, Inc., Los Angeles Sales Terminal},\textsuperscript{54} adopted a new, objective test for determining when an employee’s right to representation attached.\textsuperscript{55} This new test shifted the focus from the employer’s stated purpose for the interview to the objective manifestation of that purpose.\textsuperscript{56} Applying this test, the Board reasoned that the investigatory because it was called to discover additional facts regarding the employee’s alleged misconduct, not to deal with the consequences of the alleged misconduct. \textit{Id.} at 144-45.

One commentator found that implicit in the court’s distinction between investigatory and disciplinary interviews was its view that only disciplinary meetings directly affected the terms and conditions of a worker’s employment, thus coming under the protection of \textsection{8}(a)(5). \textit{See} Gregory, \textit{supra} note 35, at 578. For a further discussion of this distinction, see note 60 \textit{infra}.

In making this distinction between investigatory and disciplinary interviews, the Fifth Circuit relied in part upon two Board decisions decided subsequent to the NLRB decision in \textit{Texaco, Inc., Houston}. \textit{408 F.2d} at 144-45 (citing Chevron Oil Co., \textit{168 N.L.R.B.} 574 (1967); Jacobe-Pearson Ford, Inc., \textit{172 N.L.R.B.} 594 (1968)). In \textit{Chevron}, the employer held meetings for the purpose of considering all the circumstances relating to the employees’ alleged misconduct. \textit{168 N.L.R.B.} at 577. The Board found no \textsection{8}(a)(5) violation because the employer had not decided on any disciplinary action before the initial fact-finding meetings, and because the particular interviewer lacked the authority to take disciplinary action. \textit{Id.} at 577-78. Similarly, the Board in \textit{Jacobe-Pearson Ford} found that neither \textsection{8}(a)(1) nor \textsection{8}(a)(5) was violated when the employer denied the employee union representation at a meeting scheduled only to inquire as to the employee’s version of his refusal to accept a job assignment the day before. \textit{172 N.L.R.B.} at 594-95. The Board found that, at the time of the meeting, the employer had not reached any decision to discipline the employee. \textit{Id.} The Board based its decision on the employer’s stated purpose for calling the meeting rather than the objective manifestation of his purpose as viewed by the employee. \textit{Id.} at 594-95. For a discussion of the “objective” approach, see note 23 and accompanying text \textit{supra} and notes 55-56 and accompanying text \textit{infra}.


\textsection{54}. \textit{179 N.L.R.B.} 976 (1969). In \textit{Texaco, Inc., Los Angeles}, an employee of Texaco had refused to drive a truck which needed repairs on certain safety features. \textit{Id.} at 978. The employer denied requests by both the employee and the union for representation at a meeting concerning the incident. \textit{Id.} at 979. The employee was discharged shortly after the meeting for insubordination in refusing to comply with a supervisor’s direction. \textit{Id.} at 979-80.

\textsection{55}. \textit{Id.} at 983. The Board adopted the trial examiner’s statement that the right to representation vests “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.” \textit{Id.} (emphasis in original).

\textsection{56}. \textit{Id.} The Board agreed with the trial examiner that the cases which had characterized meetings between employers and employees as either investigatory or disciplinary according to the employer’s stated purpose had created a “false dichotomy” because there were many situations which could not be grouped into either category. \textit{Id.} at 982. For a discussion of these cases, see note 52 \textit{supra}. In adopting the objective test, the Board determined that it would be as much a mistake to look only to the employee’s subjective feelings as it would be to look only at the employer’s stated purpose for the interview. \textit{179 N.L.R.B.} at 983.
employee's temporary suspension without pay did not reflect a "pre-meeting managerial decision" that disciplinary action would follow the meeting, and it therefore concluded that the employee's section 8(a)(1) and section 8(a)(5) rights were not violated.57

Three years later, in Mobil Oil Corp.,58 the Board relied upon sections 7 and 8(a)(1) rather than section 8(a)(5) to find a violation of the Act by the employer.59 In so doing the Board avoided the investigatory/disciplinary distinction which it had utilized in its earlier section 8(a)(5) decisions.60 The Board reasoned that the employer's denial of the employees' request for union representation interfered with the employees' right to engage in concerted activities because they were required to meet with their employer unassisted.61 The Seventh Circuit, however, denied enforcement of the Board's order, concluding that representation at an investigatory interview is not the kind of concerted activity which section 7 protects.62

In 1975, the Supreme Court finally addressed the issue of union representation at investigatory interviews in the companion cases of International

57. 179 N.L.R.B. at 986-87. The Board found that the record contained no evidence that the employee "knew or had reasonable grounds for belief" that he might lose his job or suffer some other form of discipline. Id. at 987 (emphasis in original).

58. 196 N.L.R.B. 1052 (1972), enforcement denied, 482 F.2d 842 (7th Cir. 1973). In Mobil Oil, five employees charged with theft of company property were denied union representation at interviews with the employer's security agents. Id. at 1058-59. The employees were subsequently discharged. Id. at 1059.

59. Id. at 1052. The Board characterized the employer's refusal of an employee's request for representation as "unwarranted interference with [the employee's] right to insist on concerted protection." Id. It was this finding of "interference" which transformed the unfair labor practice from a § 8(a)(5) violation into a § 8(a)(1) violation. See 29 U.S.C. § 8(a)(1), (5) (1982).

60. In those earlier decisions, the Board held that the duty of the employer to bargain collectively under § 8(a)(5) attached only with regard to matters affecting "the employment tenure of the represented employees," but not with regard to every inquiry engaged in by the company. Chevron Oil Co., 168 N.L.R.B. 574, 578 (1967). Thus, the distinction between disciplinary and investigatory interviews had become a key component of § 8(a)(5) analysis. For a discussion of the cases decided under § 8(a)(5), see note 52 and accompanying text supra. This distinction, however, was not applied in cases involving alleged violations of § 8(a)(1). See 29 U.S.C. §§ 157, 158(a)(1) (1982) (applying to all concerted activities). Because the distinction had been employed only in analyzing cases under § 8(a)(5), the dichotomy was irrelevant in Mobil Oil's analysis under § 7 and § 8(a)(1).

61. 196 N.L.R.B. at 1052. The Board stated: "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 . . . ." Id. The Board also applied an objective standard virtually identical to the one used in Texaco, Inc., Los Angeles, stating that the employees "had reasonable grounds to fear that they were suspected of theft of company property and therefore that the interviews could adversely affect their employment status." Id.

62. Mobil Oil Corp. v. NLRB, 482 F.2d 842 (7th Cir. 1973). Section 7, stated the court, was primarily concerned with the ability of employees "to organize and to apply economic pressure against their employers in appropriate situations." Id. at 846-47 (footnote omitted). According to the court, union representation at investigatory interviews was not such a situation. Id. at 847.
Ladies’ Garment Workers’ Union v. Quality Manufacturing Co.63 and NLRB v. J. Weingarten, Inc.64 The Fourth and Fifth Circuits had denied the employee’s right to representation at investigatory interviews.65 The Supreme Court

64. 420 U.S. 251 (1975).

The Board distinguished its earlier cases which had employed the investigatory/disciplinary distinction under § 8(a)(5), focusing instead upon § 8(a)(1). Id. at 198. The Board stated that the earlier cases had not directly considered the § 7 right of employees to act in concert for mutual aid and protection. Id. Rather, the Board characterized these cases as involving “a determination of whether the right of the union to bargain collectively was such that an employer could not legally deny its request to participate in the interview.” Id. For a discussion of these earlier § 8(a)(5) cases, see notes 52-57 and accompanying text supra. The Board found that an employee’s § 7 right to act in concert for mutual aid or protection is abridged if he can insist on union representation at an investigatory or disciplinary meeting only under penalty of additional or more severe disciplinary action. 195 N.L.R.B. at 198. The Board concluded that the right to representation arises “where the employee has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action.” Id. at 200. Employing this objective test, which was first proposed in Texaco, Inc., Los Angeles, the Board found that because the employee had reasonable grounds to believe that discipline might result from the interview and because she was discharged for insisting on representation, the employer had violated § 7 and § 8(a)(1) by discharging her. Id. at 198-99. The Board noted, however, that while an employee may choose to forego a meeting unless he is afforded union representation, the employer may still act on the basis of whatever information he has already collected. Id.

The Fourth Circuit denied enforcement, finding that the Board had ruled improperly because it had never established in prior cases that § 7 requires an employer to permit union representation whenever the employee reasonably fears discipline will result. Quality Manufacturing, 481 F.2d at 1024-25. Moreover, the Fourth Circuit noted that the Board had failed to suggest any legislative history which supported its decision. Id. at 1025.

In Weingarten, a store employee was interviewed by her supervisor and a security guard regarding the theft of company property. J. Weingarten, Inc., 202 N.L.R.B. 446, 448, enforcement denied, 485 F.2d 1135 (5th Cir. 1973), rev’d, 420 U.S. 251 (1975). The employee’s requests for representation by a union member at the interview were refused by the employer. Id. at 448. Although the charges against the employee were dropped after an investigation, she brought suit alleging a violation of her § 8(a)(1) rights. Id. at 446, 448. The Board adopted the trial examiner’s findings that the employer had violated § 8(a)(1) by denying the employee the right to engage in § 7 concerted activities. Id. at 499 (citing Mobil Oil, 196 N.L.R.B. 1052). As in Quality Manufacturing, the trial examiner employed the objective standard in deciding whether a right to representation arose, looking to the employee’s reasonable fear of discipline. Id.

The Fifth Circuit denied enforcement, pointing to the earlier decisions by courts of appeals in Mobil Oil and Quality Manufacturing which denied a right to such representation. Weingarten, 485 F.2d at 1137. Moreover, the court, employing the investigatory/disciplinary distinction under § 8(a)(5), labeled the interview in Weingarten as
reversed those decisions, holding that an employee has a right under sections 7 and 8(a)(1) to have a union representative present at investigatory interviews where the employee reasonably fears that discipline will result. 66

After so holding, the Court identified five justifications for such a construction of the Act: (1) all employees would benefit by the “vigilance” of a union representative “to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly,” 67 regardless of whether the employee alone has an immediate stake in the outcome of the investigatory interview; 68 (2) the presence of the representative provides an assurance to fellow employees that they too can obtain aid and protection if they must face an investigatory interview; 69 (3) one of the most basic policies of the Act—the elimination of the inequality of bargaining power between employers and employees—would be served; 70 (4) an employee who may be purely investigatory and concluded that a right to representation did not attach. 71

66. Weingarten, 420 U.S. at 262. Because the Court in Quality Manufacturing referred to Weingarten for its analysis, all further references in this discussion will be to Weingarten.

The Court stated that the Board’s interpretation of the Act in granting such a right to representation was “a permissible construction of ‘concerted activity for... mutual aid or protection’ by the agency charged by Congress with enforcement of the Act, and should have been sustained.” Id. at 260.

In affirming the Board’s interpretation of the Act, the Court endorsed the conditions imposed by the Board in granting the right to representation, concluding that an employee must request the representation and must reasonably believe that the investigatory interview will result in disciplinary action. Id. at 257. The Court also referred to two Board-imposed limitations on the right to union representation. Id. at 258-60. First, the Court found that “[t]he employer has no obligation to justify his refusal to allow union representation,” and is free to act on the basis of information from other sources if the employee refrains from being interviewed without representation. Id. at 258-59. Thus, the right to representation “may not interfere with legitimate employer prerogatives.” Id. at 258. Second, the Court emphasized that while the employer must permit the presence of a union representative at the investigatory interview if the employee so requests, the employer is not required to bargain with the representative because in investigatory interviews the representative is present only to assist the employee and clarify facts. Id. at 259-60. In disciplinary interviews, however, the employer has a “mandatory affirmative obligation” to bargain with union representatives. Id. at 260 (citing Texaco, Inc., Houston, 168 N.L.R.B. 361; Chevron Oil Co., 168 N.L.R.B. 574 (1967); Jacobe-Pearson Ford, Inc., 172 N.L.R.B. 594 (1968)).

67. Id. at 260-61 (quoting Comment, Union Presence in Disciplinary Meetings, 41 U. CHI. L. REV. 329, 338 (1974) (“The quantum of proof that the employer considers sufficient to support disciplinary action is of concern to the entire bargaining unit.”)).

68. Id. at 260. The Weingarten Court determined that an employee has such a stake in the outcome when he seeks “aid or protection” against a threat to his job security. Id.

69. Id. at 261. The Court supported this justification by quoting a Second Circuit decision in which the court stated that when all the workers in a shop strike in support of a fellow workman’s individual grievances, they engage in concerted activity for mutual aid or protection because “each of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping.” Id. (quoting NLRB v. Peter Cailler Kohler Swiss Chocolate Co., 130 F.2d 503, 505-06 (2d Cir. 1942)).

70. Id. at 261-62 (citing 29 U.S.C. § 151 (1982)). The Weingarten Court ex-
"too fearful or inarticulate" to accurately describe the alleged incident, or "too ignorant to raise extenuating factors," would receive needed support; and (5) the presence of a third party could assist the employer and expedite the resolution of differences by "eliciting favorable facts" and focusing on the circumstances surrounding the incident in question. The Court then concluded that it was appropriate to defer to the Board's construction of section 7, through which the Board granted employees the right to representation in investigatory interviews.

Since Weingarten, the Board has been confronted with numerous cases testing the parameters of the newly recognized right to representation at an investigatory interview where the employee reasonably believes discipline will result. In Anchortank, Inc., the Board for the first time considered the
question of whether the Weingarten right inured to nonunion employees. Although the case involved the narrow issue of whether an employee had a right to union representation at a fact-finding interview during the interim between the union's election victory and Board certification, the Board's broad language indicated an intent to extend Weingarten to nonunion employees. The Fifth Circuit, however, circumscribed the Board's expansive language by finding that such a request for representation was protected only after the union election.

In Materials Research Corp., the Board again recognized a nonunion employee's right to representation, stressing that Weingarten rested on policy considerations having equal applicability in the nonunion context. The Board also cited a 1962 Supreme Court decision holding that § 7 protected
Board addressed this issue for a third time in *E.I. du Pont de Nemours & Co.*, and held that a nonunion employee, who had been dismissed for insisting on the presence of a representative at a meeting with the employer, had a right to representation under section 7 of the Act. However, the Court of Appeals for the Ninth Circuit denied enforcement of the order, asserting that "there is no concerted activity in this single employee's request for 'any' co-worker to witness his disciplinary proceeding." The Ninth Circuit stated that in the nonunion context the Board must show explicitly "that the requesting employee acts as a part of a group.

Against this background, the Third Circuit considered the question of whether a nonunion employee has the right to the presence of a co-worker in an investigatory interview where the employee has reason to believe that discipline may result. After beginning its analysis by discussing the deference traditionally afforded the expertise of the Board, the court turned to unorganized employees who had walked off the job to protest inadequate heating in their plant. In referring to this case, the 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." In this case, a portion of an employee's paycheck had been withheld in response to his unauthorized visit to a physician. The employee, who along with his fellow workers was unrepresented by a union, refused to sign his time card for that pay period and was then suspended. At a subsequent interview with his supervisors, the employee refused to sign, in the absence of a co-worker witness, both an interview record listing his work-related deficiencies and a document setting forth a development program listing the terms for the employee's continued employment. This request for a witness was denied, and the employee was discharged for refusing to sign the documents.

The Board reasoned that because the right to engage in concerted activity for mutual aid or protection does not depend on the existence of a union, neither would the application of the *Weingarten* doctrine. The Board recognized that the same inequality of bargaining power exists in both the union and nonunion settings, and that § 7 accords the same rights to both unionized and nonunionized employees. The Board ordered the employer to reinstate the employee.

The court explained that § 7 by its express language protects collective activity, not "the isolated conduct of a single employee." The request by one employee for representation is transformed into concerted action only against "the backdrop of other group activity." The court also noted that the substantial evidence test gov-
the primary issue of whether the Board’s application of the Weingarten rule to a nonunion workplace was a permissible construction of the Act.87

The court noted that the Board, in Quality Manufacturing and Mobil Oil, had first interpreted section 7 as affording an employee in a unionized workplace representation during investigatory interviews.88 The court recognized that the Supreme Court upheld this construction of section 7 in Weingarten.89 Stating that nowhere in the Weingarten opinion had the Supreme Court expressly grounded its holding on the existence of a union,90 the Third Circuit concluded that the reasoning of Weingarten carried equal force in the nonunion setting.91

The court of appeals then identified the five factors used by the Supreme Court in Weingarten to justify the Board’s construction of the Act.92 Applying the Weingarten factors to a nonunion setting, the court first found

97. Id. at 1064-66. For a discussion of the Weingarten rule, see notes 66-73 and accompanying text supra.

98. 724 F.2d at 1065 (citing Quality Manufacturing, 195 N.L.R.B. 197 (1972), enforcement denied, 481 F.2d 1018 (4th Cir. 1973), rev’d, 420 U.S. 276 (1975); Mobil Oil, 196 N.L.R.B. 1052, enforcement denied, 482 F.2d 842 (7th Cir. 1973)). For a discussion of Quality Manufacturing, see notes 63 & 65-66 and accompanying text supra. For a discussion of Mobil Oil, see notes 58-62 and accompanying text supra.

99. 724 F.2d at 1065. For a discussion of Weingarten, see notes 64-73 and accompanying text supra.

100. 724 F.2d at 1065. The court of appeals further asserted that the Weingarten Court must have been aware of the possibility that its holding would be applied to a nonunion context, “for Justice Powell noted this potential extension of the majority’s analysis in his dissent.” Id. (citing Weingarten, 420 U.S. at 270 n.1 (Powell, J., dissenting)). For a discussion of Justice Powell’s dissent in Weingarten, see note 73 supra. The majority added that if the Weingarten majority had wished to limit its holding to the unionized workplace, it could have done so with explicit language. 724 F.2d at 1065.

101. 724 F.2d at 1065. To reach this conclusion, the court determined that each of the Weingarten justifications was also present in the nonunion context. Id. at 1066. For a discussion of the Weingarten justifications, see notes 67-72 and accompanying text supra.

Judge Ackerman, however, noted that Judge Adams had reservations concerning the wisdom of applying the Weingarten rule to a nonunion context in the same manner in which it is applied in a union context. Id. at 1065 n.5. In a footnote, Judge Ackerman observed: “Judge Adams believes that the Board’s decision in this case may generate unforeseen difficulties because a non-unionized coworker representative lacks the objectivity and expertise of a union steward and because such nonunion representatives do not operate under the constraints imposed by an established labor organization.” Id. (citing Materials Research, 262 N.L.R.B. at 1019, 1021-22 (Van De Water, Chmn., dissenting in relevant part) (Hunter, Member, dissenting in relevant part)). However, according to Judge Ackerman, Judge Adams was unprepared to hold that the Board’s decision was inconsistent with the Act, in light of the Weingarten opinion. Id.

102. 724 F.2d at 1065. For a further discussion of the factors identified in Weingarten, see notes 67-72 and accompanying text supra.
that an employee's right to have a co-worker witness present at an investigatory interview "builds solidarity and vigilance among employees" in a non-union setting no differently than in a workplace where a union has been recognized.93 Second, the Third Circuit found that the co-worker's voluntary presence engenders an atmosphere of "mutual support and assistance," assuring other nonunion employees that they also can obtain such aid if necessary.94 Third, the court stated that the extension of the Weingarten rule to the nonunion context helps to "eliminate the inequality of bargaining power between employees and employers."95 Fourth, the court reasoned that there might be an even greater need, in the absence of a union, for a co-worker representative to assist an apprehensive and inarticulate employee to accurately relate the incident under investigation.96 Finally, the court recognized that the presence of a fellow nonunion employee "may facilitate a more expeditious, efficient and equitable disposition of disputes, and perhaps even serve to help settle them informally," just as in the union context.97

The court then criticized and distinguished E.I. du Pont de Nemours & Co. v. NLRB, a decision in which the Ninth Circuit rejected the Board's interpretation of concerted activity as inconsistent with the language of the Act.98

93. 724 F.2d at 1065-66. The Third Circuit quoted with approval the Supreme Court's statement in Weingarten that the presence of a representative safeguards the interests of all employees by exercising "vigilance over the fairness and uniformity of the employer's disciplinary practices." Id. at 1065 (citing Weingarten, 420 U.S. at 260-61). For a further discussion of this first justification, see notes 67-68 and accompanying text supra.

94. 724 F.2d at 1065-66. The court recognized that "[b]oth the initial request by the employee and the willingness by the co-worker to respond by lending his assistance assures the co-worker, 'in case his turn ever comes, of the support of the one [he is] then helping.' " Id. at 1066 (quoting NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 505 (2d Cir. 1942)). The majority concluded that the voluntary presence of one employee on behalf of another may cause others to follow the example. Id. For a further discussion of this justification, see note 69 and accompanying text supra.

95. 724 F.2d at 1066. The court recognized that the presence of a representative thus "serves the most fundamental purposes of the Act" by helping to "redress the perceived imbalance" between labor and management of both economic and bargaining power. Id. at 1065 (citing Weingarten, 420 U.S. at 261-62). For a further discussion of this justification, see note 70 and accompanying text supra.

96. 724 F.2d at 1065. The court of appeals stated that "the perception by workers of an imbalance of power may be heightened in the absence of a union, and the risks of improper or even unintentional intimidation of employees by management may be accentuated." Id. at 1066. For a further discussion of this justification, see note 71 and accompanying text supra.

97. 724 F.2d at 1066. The Third Circuit recognized that the representative may act "as the catalyst in the amicable resolution of disputes." Id. at 1065 (citing Weingarten, 420 U.S. at 263 & n.7). For a further discussion of this justification, see note 72 and accompanying text supra.

98. 724 F.2d at 1066. The court noted that the Ninth Circuit had been the only other federal court of appeals to consider the issue of co-worker representation in a nonunion context. Id. The Ninth Circuit had stated that the employee's "attempt to obtain a witness from the ranks of his fellow employees" did not qualify as concerted activity. Du Pont, 707 F.2d at 1079. It had reasoned that "[t]he possibility of concerted activity—that this might be incipient group activity—is wholly speculative."
The Chesnut Run majority asserted that the Ninth Circuit’s narrow interpretation of concerted activity was inconsistent with the Supreme Court’s broad construction of section 7 in the Weingarten opinion. The Third Circuit concluded that it must defer to the Board’s construction of the Act until congressional legislation or a Supreme Court decision demands a more restricted view.

The majority next examined the factual determinations made by the Board, finding that substantial evidence supported the Board’s determination that Du Pont had violated Slaughter’s section 7 rights. The court concluded that the evidence in the record was sufficient to support the Board’s finding that Slaughter had had a reasonable belief that the interview might result in discipline. The Third Circuit also found substantial evidence that Slaughter would not have been discharged had he not participated in protected activity by refusing to be interviewed without a co-worker witness present.

Id. For a further discussion of the Ninth Circuit’s decision in Du Pont, see notes 83-84 and accompanying text supra.

99. 724 F.2d at 1066. The Third Circuit noted that while the Ninth Circuit had recognized the Weingarten decision as not necessarily being limited to employees represented by a union, it had required an explicit showing that the employee was requesting representation as part of a group. Id. (citing Du Pont, 707 F.2d at 1079). The Third Circuit, however, asserted “that the proper focus in evaluating the requirement of concertedness in this context should be on the literal nature of the activity that would take place if the employee’s request was granted,” not on the nature of the activity which had already transpired. Id. (citing Mobil Oil, 482 F.2d at 847). In other words the court implied that even if the employee requested representation on behalf of himself only, the request would still be considered concerted activity because the employee and his representative would act in concert in the investigatory interview. See id.

The Third Circuit also distinguished the Ninth Circuit’s Du Pont decision by pointing out that in that case, the employee’s encounters with his supervisors could not be characterized as investigatory interviews. Id. at 1067 n.6. For this reason, the court stated that Weingarten might not have been applicable in Du Pont even if the factual setting had involved a union shop. Id. For a discussion of the nature of the Du Pont meeting, see note 128 and accompanying text infra.

100. 724 F.2d at 1066-67.

101. Id. at 1067. For a discussion of the dissent’s conclusion as to substantial evidence, see note 113 and accompanying text infra.

102. 724 F.2d at 1067. This reasonable belief that discipline would result, noted the court, was a prerequisite to establishing protected activity under § 7. Id. The court listed the “uncontradicted” evidence in support of the Board’s finding as follows: (1) Farley had earlier placed Slaughter on probation for an unexcused absence; (2) Slaughter had been told by Farley to “follow the rules to the hilt;” (3) Slaughter had been told by Farley that his unauthorized posting of the notice was a violation of company policy; and (4) Slaughter believed that Farley “intended to question him about this unauthorized posting.” Id. Applying Weingarten’s objective standard, which looks to the objective manifestations of the employer’s conduct in holding an investigatory interview, the court concluded that substantial evidence supported the Board’s initial finding. Id. (citing Weingarten, 420 U.S. at 257 n.5). For a discussion of this objective standard, see notes 55-56 and accompanying text supra.

103. 724 F.2d at 1067. According to the court, the Board had first considered Du Pont’s claim that Slaughter would have been lawfully discharged, regardless of
Finally, the majority addressed Judge Garth's dissenting contention that the case should be remanded to the Board for findings based upon the "mixed motive" test announced by the Board in Wright Line, A Division of Wright Line, Inc.,104 and approved by the Supreme Court in NLRB v. Transportation Management Corp.105 The majority shared Judge Garth's concern about resolving significant legal issues on the basis of an insufficient factual record, but it found that, in Chesnut Run, "the recent developments in the law of mixed-motive discharges did not affect the decisions of either the ALJ or the Board."106 In addition, the court found that any analytical problem with the ALJ's decision was cured on appeal to the Board because the Board, not the ALJ, is ultimately responsible for fact-finding.107 Repeating his "concerted activity," because of his posting of the notice. Id. The court noted that Du Pont had conceded before the Administrative Law Judge that Farley had not intended to discipline Slaughter for the posting incident. Id. (citing E.I. du Pont de Nemours, 262 N.L.R.B. 1028, 1029 (1982)).

The court also approved the Board's rejection of Du Pont's contention that Slaughter would have been legitimately discharged for insubordination, independent of his protected activity. Id. The court cited with approval the Board's reasoning as follows: (1) Slaughter was willing to submit to an interview provided that he was allowed a witness; (2) he was never disorderly, violent, nor disrespectful; (3) he complied immediately with all orders to report to various places following the incident; and (4) he offered two co-workers as witnesses, but Du Pont refused to admit them to the interview. Id. The court agreed with the Board's statement that the only possible "insubordination" on the part of Slaughter "was restricted to his insisting on having an employee of his choice present at any discussion concerning the posting incident." Id. (quoting Du Pont, 262 N.L.R.B. at 1029). The Third Circuit found that Slaughter, by insisting on representation, was asserting his Weingarten right, "and he could not be disciplined under the guise of 'insubordination' . . . for exercising that right." Id. (quoting Du Pont, 262 N.L.R.B. at 1029).


106. 724 F.2d at 1067-68. The court stated that the Wright Line mixed motive test was irrelevant according to the ALJ's analysis because Slaughter had been discharged for the sole reason of refusing to submit to an interview without the presence of a co-worker witness. Id. at 1068. Therefore, the court determined that it did not matter that the ALJ's decision preceded Wright Line. Id.

In support of this finding, the court pointed to three statements in the ALJ's opinion showing that Du Pont's only reason for discharging Slaughter was his insubordination in refusing to be interviewed without a co-worker witness present. See id. The court noted that the ALJ made such statements in his "Discussion" and "Conclusions of Law," and also that the ALJ had determined that Du Pont had conceded that Slaughter was terminated for insubordinately refusing to submit to an interview without the presence of a fellow employee. Id. Because the ALJ determined that "Slaughter's discharge was motivated solely by Du Pont's improper animus," the court found that there was no reason to apply the mixed motive test, and that to do so would be a waste of judicial resources. Id.

107. Id. at 1068. The Third Circuit noted that the Board had "performed an independent analysis of the record" and found that Du Pont had failed to meet its burden of persuasion under Wright Line. Id. (citing E.I. du Pont de Nemours, 262 N.L.R.B. 1028, 1029 (1982)). For a discussion of the tests used by the Board in evaluating Slaughter's discharge, see notes 108 & 114 and accompanying text infra. Furthermore, the court criticized what it considered to be an independent determination
its determination that the Board's findings were amply supported by the record, and stating that remanding the case "would serve no useful purpose," the court denied Du Pont's petition for review and granted the Board's cross-petition for enforcement of its order. Judge Garth, in a lengthy dissent, criticized the majority for addressing the Weingarten issue in this case, in light of the incomplete state of the record. After presenting a version of the case's facts which differed somewhat from that presented by the majority, the dissent stated that Slaughter's "independent acts of insubordination," as alleged by Du Pont, "could clearly provide legitimate grounds for dismissal." Judge Garth of the facts by the dissent. Id. at 1068 n.9. For a discussion of the dissent's treatment of the facts, see note 111 and accompanying text infra.

108. Id. at 1068-69. The court noted that even though the Board had mistakenly employed the Third Circuit's old burden of proof rule in applying Wright Line, this made no difference in the final outcome, because the burden of proof employed and satisfied was more stringent than the burden now required under Transportation Management. Id. at 1069 n.10. For a discussion of Wright Line, Transportation Management, and the old Third Circuit rule, see note 26 supra and note 114 infra.

109. 724 F.2d at 1069.

110. Id. (Garth, J., dissenting). Judge Garth stated that because of the different causation and burden of proof tests used by the ALJ and the Board in assessing Slaughter's claim, the threshold question—whether the actual cause for Slaughter's dismissal was his request for a co-worker witness—could not be answered at that time. Id. For Judge Garth's description of the causation and burden of proof tests, see notes 114-15 and accompanying text infra. As the dissent reasoned, if Slaughter's dismissal was not caused by his request for a witness, then Weingarten principles would not be implicated and there would be no need to decide whether Weingarten extends its protection to nonunion employees. 724 F.2d at 1069-70 (Garth, J., dissenting). Judge Garth also stressed that even if Weingarten principles did apply, "an employee may be properly dismissed if, in addition to requesting a co-worker witness, he also commits other, independent acts of insubordination." Id. at 1070 n.2 (Garth, J., dissenting) (citing Roadway Express, Inc., 246 N.L.R.B. 1127 (1979)).

Observing that the extension of the Weingarten doctrine to a nonunion context was an issue of first impression in the Third Circuit, Judge Garth noted the Ninth Circuit decision which had addressed the same issue and had returned a result opposite from that of the Third Circuit. Id. at 1069 & n.1 (Garth, J., dissenting) (citing Du Pont, 707 F.2d 1076). Moreover, Judge Garth stated that there was no reason to reach the merits of the case at bar, and he criticized the majority for reaching the merits and creating an intercircuit conflict. Id. at 1069 n.1 (Garth, J., dissenting).

111. Id. at 1070 (Garth, J., dissenting). Judge Garth, adopting in large part the ALJ's version of the facts, characterized Slaughter's actions as follows: (1) Slaughter refused to accompany Farley to his office to answer questions, even though Farley had not stated what the meeting was about; (2) Slaughter gave as the reason for his refusal each time the failure of Farley to provide a witness of Slaughter's choosing; (3) Slaughter loudly announced in a hallway at one point that he would not discuss union business without the presence of a witness; (4) as a result of this insubordination, Farley was suspended and ultimately dismissed. Id.

For a discussion of the majority's rendition of the facts, see notes 1-9 and accompanying text supra.

112. 724 F.2d at 1070 (Garth, J., dissenting) (citing Roadway Express, Inc., 246 N.L.R.B. 1127 (1979)). Judge Garth questioned the ALJ's conclusion that Du Pont's only reason for discharging Slaughter was his refusal to submit to an interview without the presence of a fellow employee. Id. Judge Garth pointed out that the ALJ had discredited Slaughter's testimony and that Slaughter had been the only witness.
also found that it was impossible for the court to determine if substantial evidence supported the Board's decision, since "nothing appears in the ALJ's opinion or the Board's adoption of his findings and conclusions to inform us as to the evidence upon which either of them relied." The dissent was most concerned, however, with the various causation and burden of proof tests used to analyze the case throughout its short life. Judge Garth reasoned that as a result of such a record, the factual findings would inevitably be fatally tainted. Judge Garth concluded that he would remand the case to the Board "for findings based on a uniform test of causation."

113. Id. at 1071-72 (Garth, J., dissenting) (footnote omitted). Judge Garth emphasized that an administrative agency is required to inform the reviewing court of the bases of its decision "in order that [the] court may perform its reviewing function properly and thereby guarantee the integrity of the administrative process." Id. at 1072 (Garth, J., dissenting) (citing SEC v. Chenery Corp., 332 U.S. 194 (1947)).

114. Id. at 1073 (Garth, J., dissenting). In explaining the chronology of these tests, Judge Garth stated that when the ALJ heard the case, the "in part" causation test was in force because the Board's decision in Wright Line had not yet been announced. Id. For a discussion of this test, see note 26 supra. Because Wright Line was decided one week after the ALJ's decision but before the Board's hearing, the Board operated under the Wright Line "mixed motive" test. 724 F.2d at 1074 (Garth, J., dissenting). However, according to Judge Garth, the Board made no finding as to the first element of that test, which required a showing that the employer's animus against the employee's protected activity was a motivating factor in the dismissal decision. Id. at 1074 & n.8 (Garth, J., dissenting). For a discussion of the mixed motive test, see note 26 supra. At the time the case was argued before the Third Circuit, the court's own burden of proof standard was in effect, in conflict with the Wright Line standard. 724 F.2d at 1074 (Garth, J., dissenting) (citing Behring Int'l, Inc. v. NLRB, 675 F.2d 83 (3d Cir. 1982), vacated and remanded, 103 S. Ct. 3104 (1983)). For a discussion of this standard, see note 26 supra. Since that time, the Supreme Court has endorsed the Board's Wright Line test over the Third Circuit's test. 724 F.2d at 1074 (Garth, J., dissenting) (citing Transportation Management, 103 S. Ct. 2469). For a discussion of Transportation Management, see note 26 supra. As a result of Transportation Management, the Third Circuit's old test is no longer applicable. 724 F.2d at 1074 (Garth, J., dissenting) (citing Behring Int'l, Inc. v. NLRB, 714 F.2d 291 (3d Cir. 1983)).

115. 724 F.2d at 1074 (Garth, J., dissenting). First, Judge Garth noted that the ALJ used the "in part" test now rejected by the Board and the Supreme Court. Id. Second, he concluded that the Board, by "giving cursory mention to Wright Line," but accepting the ALJ's findings without further analysis, "necessarily infected its own decision with the erroneous allocation of burdens of proof and persuasion contained in the ALJ's 'finding' and opinion." Id. at 1074-75 (Garth, J., dissenting).

The dissenting judge added that the majority erred in attempting to avoid the question of the misallocation of burdens of proof by claiming that the sole reason for Slaughter's discharge was his refusal to interview without a witness, thereby making a "mixed motive" analysis unnecessary. Id. at 1075 (Garth, J., dissenting). Judge Garth argued that the majority should have utilized the "mixed motive" test from the beginning to determine which reason or reasons actually motivated the discharge. Id.

116. Id. at 1076 (Garth, J., dissenting). Judge Garth believed it would be "ill-
Analyzing the court's decision, it is submitted that the court correctly
determined that the right to representation in a nonunion setting is within
the scope of protection of sections 7 and 8(a)(1) of the Act.117 If Congress
had intended to limit the protection of these sections to union employees, it
would have expressly so stated.118 Moreover, the Supreme Court has re-
quired that federal courts "accord special deference to the expertise of the
Board."119 Because the Board recently stated that nonunion employees con-
fronting their employers have the same concerns and the same section 7 pro-
advised" to pass on such a "novel question of law" since it was uncertain whether, "if
the evidence in this case were correctly assessed and measured by the appropriate
standard, such an issue would even arise." Id. at 1075-76 (Garth, J., dissenting).

117. The activity sought to be protected in this case is "concerted," that is, it
involves "employees who have joined together in order to achieve common goals." City Disposal Systems, 104 S. Ct. at 1511 (citation omitted). Slaughter asserted his
alleged right to the presence of a fellow employee to aid him throughout his investi-
gatory interview. 724 F.2d at 1063. In the course of his confrontations with Farley,
Slaughter asked two co-workers to represent him. Id. At least one of the co-workers
agreed to do so. Id. It is submitted that if Farley had granted Slaughter's request for
a co-worker witness, the investigatory interview would have indeed constituted con-
certed activity, for two employees would have joined together to protect the rights
and job security of one. As the court correctly stated, the proper focus in determining
the concerted nature of the activity should be on the actual nature of the activity that
would occur if the employee's request were granted. Id. at 1066.

In addition, the activity sought to be protected here is engaged in for the pur-
pose of "mutual aid or protection," as it is "reasonably related to the employees' jobs
or to their status or condition as employees." Eastex, Inc. v. NLRB, 550 F.2d 198,
203 (5th Cir. 1977) (emphasis in original), aff'd, 437 U.S. 556 (1978). Slaughter be-
lieved that his job was threatened, and he requested the presence of a representative
with the hope that the representative would help prevent him from being discharged
or otherwise disciplined as a result of the investigatory interview. 724 F.2d at 1067.
It is generally suggested that because several employees in a nonunion plant may at
some time have the need for representation at investigatory interviews concerning
their continued employment, such representation is for "mutual aid or protection."

For a further discussion of the scope of § 7, see notes 28-34 and accompanying
text supra.

118. For Justice Powell's treatment of this argument, see note 90 supra. Instead,
the express language of § 7 seeks to protect all concerted activity engaged in for the
purpose of mutual aid or protection, collective bargaining being only one form of
such activity. See 29 U.S.C. § 157 (1982). For the pertinent text of § 7, see note 20
supra. As the court stated in Chesnut Run, it must defer to the Board's construc-
tion "[u]ntil Congress or the Supreme Court commands a narrower view." 724 F.2d at
1066-67.

119. 724 F.2d at 1064 (citing Transportation Management, 103 S. Ct. at 2475). As
the Supreme Court stated in Weingarten.

Reviewing courts are of course not "to stand aside and rubber stamp"
Board determinations that run contrary to the language or tenor of the Act, NLRB v. Brown, 380 U.S. 278, 291 (1965). But the Board's construction
here, while it may not be required by the Act, is at least permissible under it, and insofar as the Board's application of that meaning engages in the
"difficult and delicate responsibility" of reconciling conflicting interests of
labor and management, the balance struck by the Board is "subject to lim-
ited judicial review."

420 U.S. at 266-67 (quoting NLRB v. Truck Drivers Local Union No. 449, 353 U.S.
87, 96 (1957)).
tection as union employees, such an interpretation is entitled to deference from the courts.\textsuperscript{120}

It is further submitted that while the court has correctly deferred to the Board’s construction of section 7, its reliance on each of the five justifications in this nonunion setting may not be entirely appropriate.\textsuperscript{121} Although the first four \textit{Weingarten} justifications apply with equal force in the nonunion situation,\textsuperscript{122} it is suggested that the court’s reliance on the fifth justification—that the representative may “facilitate a more expeditious, efficient

\begin{itemize}
\item \textsuperscript{120} See Anchortank, 239 N.L.R.B. at 431; Materials Research, 262 N.L.R.B. at 1012; Du Pont, 262 N.L.R.B. at 1044. The Board held in each of these cases that the protection of \textit{Weingarten} extends to nonunion employees. It is submitted that this interpretation by the Board is permissible under the Act and is therefore entitled to deference by the court. See \textit{Weingarten}, 420 U.S. at 266-67. For a discussion of the Board decisions, see notes 75-77 & 79-82 and accompanying text supra.
\item \textsuperscript{121} It is suggested, however, that the absence of one or two of these justifications here need not weaken the court’s decision. It remains the duty of the Board, not the court, to balance the “conflicting interests of labor and management.” \textit{Weingarten}, 420 U.S. at 267. For a discussion of the \textit{Weingarten} justifications, see notes 67-72 and accompanying text supra. For a discussion of the Third Circuit’s application of these justifications to a nonunion setting, see notes 92-97 and accompanying text supra.
\item \textsuperscript{122} First, it is agreed that the presence of a representative in an investigatory interview safeguards the interests of all employees by discouraging an employer from “imposing punishment unjustly.” \textit{Weingarten}, 420 U.S. at 260-61 (footnote omitted). An employer will be compelled to be fairer in his treatment of individual employees if his actions are being observed by other employees in the workplace.
\item It is also agreed that such representation establishes “a matrix of mutual support and assistance” among employees in a plant. \textit{Chesnut Run}, 724 F.2d at 1066. When fellow employees realize that they too may someday need assistance in an investigatory interview, they will be encouraged to support one another.
\item Third, the grant of a right to representation does further the primary goal of the Act—“to eliminate the ‘inequality of bargaining power between employees . . . and employers’”—by providing employees under investigation with the additional support and confidence needed to correct that inequality. \textit{Weingarten}, 420 U.S. at 262 (quoting 29 U.S.C. § 151 (1982)). See also \textit{City Disposal Systems}, 104 S. Ct. at 1513 (Congress intended “to create an equality in bargaining power between the employee and the employer”).
\item Some observers, however, believe that Congress has mandated only one means of redressing the inequality in bargaining power: the selection of a collective bargaining representative in accordance with the procedures set forth in § 9 of the Act. See 29 U.S.C. § 159 (1982). For example, Board Chairman Van de Water stated in \textit{Materials Research}:
\begin{quote}
While [the majority] may be correct that their decision does improve the employees’ position in the balance of power, the simple fact remains that Congress has declared that the means by which employees are to redress such economic imbalance is utilization of the Act’s processes for majority selection of an exclusive collective-bargaining representative.
\end{quote}
\begin{itemize}
\item 262 N.L.R.B. at 1018 n.37 (Van de Water, Chmn., concurring in part and dissenting in part). It is suggested, however, that this interpretation is inconsistent with the language and purpose of § 7. For a discussion of the scope of § 7, see notes 28-34 and accompanying text supra.
\item Fourth, the court correctly asserted that a nonunion employee may be too intimidated by the employer to adequately discuss the incident under investigation. See \textit{Chesnut Run}, 724 F.2d at 1066. In addition, the Third Circuit correctly stated that the absence of union support necessarily increases the chances that an employee will be
\end{itemize}
\end{itemize}
and equitable disposition" of the dispute—is inappropriate because most nonunion representatives will probably be inexperienced and react emotionally rather than rationally in the interview situation. In addition, the nonunion representative, unrestrained by any responsibilities imposed upon him by a union, may simply aggravate any tension existing between the employer and the employee under investigation. It is asserted, however, that the absence of this one justification does not weaken the court’s decision.

It is also asserted that the court correctly distinguished the Ninth Circuit’s Du Pont decision. First, the meeting which took place between the employee and supervisors in Du Pont did not include an investigation into the facts of any incident involving the employee, and therefore did not constitute an “investigatory interview.” Second, while Slaughter had found at least one fellow employee who was willing to attend the interview, there was no evidence in Du Pont that the employee had the support of a co-worker who was willing to represent him. Finally, it is suggested that the Ninth Circuit interpreted section 7 too narrowly in light of two factors: the expansive interpretation of section 7 by both the Board and the courts, and the intimidated by his employer at an investigatory interview. Representation by a co-worker witness thus becomes vital to the interests of the employee.

123. 724 F.2d at 1066.

124. Board Member Hunter voiced such a concern in Materials Research: [T]here are practical reasons that argue against extending Weingarten to cover situations involving unrepresented employees. . . . [T]he employer in the nonunion situation is likely to find itself confronted by a “representative” who has few or even an absence of the skills or responsibilities that one would expect from a union steward. It must therefore deal with a person who has no experience in dealing with these situations and who, out of probable friendship for the interviewee, may be involved emotionally in the interview.

262 N.L.R.B. at 1021 (Hunter, Member, concurring in part and dissenting in part).

125. Thus, although Judge Adams joined in the Chesnut Run majority, he questioned the wisdom of applying the Weingarten rule to a nonunion setting “because a nonunionized coworker representative lacks the objectivity and expertise of a union steward and. . . . [does] not operate under the constraints and responsibilities imposed by an established labor organization.” 724 F.2d at 1065 n.5 (citations omitted).

126. Each “justification” is, after all, simply that; it is not a Court-imposed requirement for granting the right to representation under § 7. Rather, it is submitted that the five justifications are used by the Board in balancing the diverse interests of labor and management to determine the rights of employees under § 7. For an additional discussion of this balancing, see note 121 supra.

127. For a discussion of the Chesnut Run court’s treatment of the Ninth Circuit opinion, see notes 98-99 and accompanying text supra.

128. See Chesnut Run, 724 F.2d at 1067 n.6. Instead, the supervisors merely presented two documents to the employee and asked him to sign them. Du Pont, 707 F.2d at 1077.

129. For a discussion of the response of Slaughter’s co-workers to his request for representation, see note 7 supra.

130. 707 F.2d at 1079. Thus, while the employee in Du Pont may have been alone in his search for representation, Slaughter had the support of fellow employees and sought to engage in a “concerted activity” with them.
courts’ duty to defer to the Board’s expertise.\textsuperscript{131}

It is further asserted that the majority correctly disposed of the dissent’s concern regarding the varying causation and burden of proof tests employed throughout the \textit{Chesnut Run} litigation.\textsuperscript{132} The Board, which is the body “ultimately responsible for factfinding,”\textsuperscript{133} made an independent analysis of the record under \textit{Wright Line},\textsuperscript{134} and found that Du Pont had failed to meet its burden to show that Slaughter would have been discharged absent his protected activity.\textsuperscript{135} In addition, it is asserted that the Board’s failure to utilize the correct burden of proof test was harmless error because the test used by the Board was more stringent than that ultimately required by the Supreme Court.\textsuperscript{136}

The Third Circuit’s decision in \textit{Chesnut Run} is another in a series of post-\textit{Weingarten} decisions “characterized by a complex elaboration of exceptions

\textsuperscript{131} For a discussion of these two factors, see notes 29-33 & 73 and accompanying text \textit{supra}.

\textsuperscript{132} For a discussion of the majority’s analysis of these tests, see notes 104-08 and accompanying text \textit{supra}. For a discussion of Judge Garth’s dissenting views concerning the appropriateness of analyzing the case as a result of these tests at the appellate level, see notes 114-15 and accompanying text \textit{supra}.

\textsuperscript{133} 724 F.2d at 1068. The Act states that “the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.” 29 U.S.C. § 160(e) (1982).

\textsuperscript{134} Thus, any problem created by the ALJ’s failure to apply the \textit{Wright Line} mixed motive test was cured by the Board. 724 F.2d at 1068. For a discussion of \textit{Wright Line}, see note 26 \textit{supra}. Moreover, because the ALJ had found that the sole motive for Slaughter’s discharge was his request for representation, the ALJ’s use of the mixed motive test would have been inappropriate, as the majority suggests. For a discussion of the majority’s treatment of the \textit{Wright Line} analysis, see notes 104-08 and accompanying text \textit{supra}.

\textsuperscript{135} 724 F.2d at 1068. While the dissent argued that Slaughter’s “alleged independent acts of insubordination” could provide legitimate grounds for discharge, the majority correctly found that there was substantial evidence in the record to support a finding that Slaughter was dismissed only for requesting representation. \textit{Id.} at 1067. As Du Pont had admitted at its hearing before the ALJ, its intent in meeting with Slaughter was not to discipline him for posting the notice, but simply to question him. 262 N.L.R.B. at 1029. In addition, Slaughter complied with each of Farley’s orders with the exception of Farley’s demand that Slaughter attend the interview without a co-worker witness. \textit{Id.} For a further discussion of the court’s finding of substantial evidence, see notes 101-03 and accompanying text \textit{supra}.

Because the court’s role in reviewing decisions of the Board is limited to determining if substantial evidence supports the Board’s factual findings, it is suggested that Judge Garth’s independent analysis of the facts in this case, which differed from the Board’s analysis and which pictured Slaughter as more disorderly and disrespectful, is inappropriate. \textit{See} 29 U.S.C. § 160(e) (1982). For a discussion of Judge Garth’s factual analysis, see note 111 and accompanying text \textit{supra}.

\textsuperscript{136} The \textit{Chesnut Run} court stated: “If the General Counsel could establish a violation under the more stringent burden-of-proof rule which this Court adhered to before \textit{Transportation Management}, then surely [he] would prevail when aided by the shift in burden that \textit{Transportation Management} has now approved.” 724 F.2d at 1069 n.10. Because the more stringent, albeit incorrect, burden of proof standard had been satisfied, the record was not “fatally tainted.” 724 F.2d at 1074 (Garth, J., dissenting). For the majority’s discussion of the burden of proof standards employed, see notes 106-08 and accompanying text \textit{supra}. 

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and expansions on the right to representation." By expanding the scope of Weingarten to protect employees unrepresented by collective bargaining units, the court has furthered the parity between labor and management that is required for productive labor relations. Because the Third Circuit is the first circuit to hold that a nonunion employee has a right to representation at an investigatory interview, its Chesnut Run opinion will provide valuable precedent for other circuits faced with the same issue. The Third Circuit's decision, however, has deviated from the Ninth Circuit's result in Du Pont; the resultant intercircuit conflict will thus create confusion and uncertainty for both labor and management. A Supreme Court pronouncement will therefore be necessary to make uniform the application of the Act and to clarify this uncertain but developing area of labor law.*

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137. Gregory, supra note 35, at 620 (discussing Anchorank, Materials Research, and Du Pont). For a more detailed analysis of these decisions, see id. at 594-621. For a general discussion of some of these decisions, see notes 74-84 and accompanying text supra.

138. In so expanding the Weingarten principle, the court has necessarily broadened the coverage of § 7. For a discussion of § 7, see notes 20 & 28-34 and accompanying text supra. Nonunionized workers will now know that they too have a right under the Act to representation at investigatory interviews where they reasonably believe the interview will result in discipline. This expanded coverage will assure them that the Act exists to protect them as well as unionized employees.

139. The decision provides additional security to nonunionized workers and will increase their bargaining power, furthering the goals of the Act. See 29 U.S.C. § 151 (1982). The presence of a representative at an investigatory interview will act as a check on the accuracy and fairness of the employer's fact-finding, and will therefore strengthen the employees' ability to ensure a just outcome in the dispute. It is also submitted that the expansion of Weingarten will encourage fellow workers to increase their support for one another, hoping that others will be willing to represent them should the need arise. This expansion may also slightly reduce workers' incentive to unionize once they realize that they need not be members of a collective bargaining unit to be protected under the Act.

In response, employers will probably take more care in their methods of investigation and discipline, and will rely on means other than investigatory interviews to gather information concerning the conduct of their employees. In some cases, then, employees may have to forego any benefits that might have resulted from the interviews, such as unconcealed fact-finding by the employer, employee participation in the employer's decision, and the expedited resolution of disputes. See Weingarten, 420 U.S. at 258-59 (citing Mobil Oil, 196 N.L.R.B. at 1052). For the Weingarten Court's discussion of "legitimate employer prerogatives," see note 66 supra. It is suggested, however, that while an employer may develop other means to gather information, such as increased and covert observation of employees by supervisors, the employer's need for investigatory interviews will remain. An employer cannot possibly have knowledge of every activity of every employee in his plant, and he may be obligated under an employment contract to allow an employee under investigation to give his own version of the disputed incident before he can discipline the employee. Thus, the new methods of fact-finding which employers may develop will not totally circumvent the decision in this case.

* Editor's Note: Since the writing of this Note, the principal case has been procedurally active. Subsequent to the Third Circuit's decision in December, 1983, Du Pont filed a motion for panel rehearing and rehearing en banc on February 1,
The Third Circuit granted the Board's motion to vacate the court's December, 1983 decision and to remand the case to the Board. Noting that the permission to withdraw a petition for enforcement of a Board order rests in the discretion of the court, the Third Circuit exercised that discretion by deferring to the special expertise of the NLRB, "postponing further judicial involvement" until a "comprehensive adjudication" is completed by the Board. *Id.* at 297-98.

Judge Ackerman, author of the vacated opinion, dissented on the ground that he was unable to determine how "anyone's legitimate interests could be served by such a remand . . . ." *Id.* at 298 (Ackerman, J., dissenting) (emphasis added). Judge Ackerman criticized the "patently improper" actions of the new members of the National Labor Relations Board who sought "to exercise their jurisdiction over not only those cases which come before them in the normal course but also those decided by their predecessors." *Id.* at 301 (Ackerman, J., dissenting).