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Union Representation at Investigatory Interviews: The Subsequent Development of Weingarten

Kathy A. Wireman

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UNION REPRESENTATION AT INVESTIGATORY INTERVIEWS: THE SUBSEQUENT DEVELOPMENT OF WEINGARTEN

I. Introduction

This note focuses on the problems engendered and unresolved by the Supreme Court's 1975 decision in \textit{NLRB v. J. Weingarten, Inc.}\(^1\) \textit{Weingarten} held that section 7 of the Labor Management Relations Act (L.M.R.A.)\(^2\) creates a statutory right entitling an employee to union representation at an investigatory interview which the employee reasonably believes will result in disciplinary action. An employer's refusal to permit such representation and insistence that employee attend the interview unaccompanied constitutes an unfair labor practice.\(^3\)

The right to representation is subject to the satisfaction of four conditions: (1) the employee must request representation at the interview (although the employee may forego this right and attend the interview unaccompanied);\(^4\) (2) the employee must reasonably believe that the interview will result in disciplinary action;\(^5\) (3) "the exercise of the right may not interfere with the employer's legitimate prerogatives;"\(^6\) and (4) since "the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview,"\(^7\) the employer may insist that the interviewer is only

\footnotesize{1} 420 U.S. 251 (1975). Justice Brennan authored the majority opinion; Chief Justice Burger filed a dissenting opinion; Justice Powell, joined by Justice Stewart, also wrote a dissenting opinion.

This controversy began when a "Loss Prevention Specialist" hired by an employer was interrogating an employee about an alleged theft from employer's store. During the course of the interview the employee repeatedly requested a union representative, but such requests were denied by the specialist. After the specialist verified the employee's explanation, the specialist apologized for the inconvenience and said the matter was closed. The employee then became hysterical and blurted out that the only thing she had ever gotten from the store without paying was her free lunch. The store in question, unlike other of the employer's stores, did not have a free lunch policy. The employee was then closely interrogated about violations of the store's policy as to free lunches. The employee again requested the union steward be present, and again was refused. The specialist, after making inquiries of other individuals, concluded the interview with the employee. For a more detailed account of the facts, see \textit{Note, Employee Right to Union Representation During Employer Negotiation, NLRB v. J. Weingarten, Inc.}, 420 U.S. 251 (1975), 7 U. Tol. L. Rev. 298 (1975).

\footnotesize{2} 29 U.S.C. § 157 (1976) states in pertinent part: "Employees shall have the right . . . to engage in other concerted activities for the purpose of . . . mutual aid or protection. . . ."

\footnotesize{3} 29 U.S.C. § 158(a)(1) (1976) states: "(a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title. . . ."

In a companion case, \textit{ILGWU v. Quality Mfg. Co.}, 420 U.S. 276 (1975), the Court held that an employer also violates § 8(a)(1) by discharging or otherwise disciplining an employee who refuses to participate in an investigatory interview without a union representative in attendance.

\footnotesize{4} 420 U.S. at 257.

\footnotesize{5} \textit{Id.} The reasonableness of the employee's belief is to be tested by an objective standard. \textit{See} notes 52-61 \textit{infra} and accompanying text.

\footnotesize{6} 420 U.S. at 258. This restriction permits the employer to refuse to allow representation, without justifying his refusal, and to proceed with an inquiry by other means after giving the employee the option of attending the interview unaccompanied or foregoing the interview.

\footnotesize{7} \textit{Id.} at 259.

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interested, at that time, "in hearing the employee's own account of the matter under investigation."\(^8\)

*Weingarten* attempted to redress certain inequities inherent in the employer-employee relationship. The Court perceived the nature of an investigatory interview to be unreasonably coercive of an employee's right to protect his job interests.\(^9\) Such an interview traditionally took place prior to the imposition of discipline for an infraction,\(^10\) and employees usually were compelled to attend such interviews alone unless there was a provision in the collective bargaining agreement according employees the right of union representation at such interviews.\(^11\) The *Weingarten* Court's concern with investigatory interviews focused on the stressful nature of the interview and the possible impairment of an employee's ability to protect his interests, particularly in view of the potentially serious consequences of the interview.\(^12\)

Although the investigatory interview is closely linked to the grievance procedure,\(^13\) the Court rejected the argument that the grievance procedure would serve as an adequate correction to employer abuses incurred during an investigatory interview.\(^14\)

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8 *Id.* at 260.

9 *Id.* at 257.


11 Arbitral awards, however, had sustained the right of representation at an investigatory interview which the employee reasonably believed might result in disciplinary action, even where such a right was not explicitly provided in the agreement. Allied Paper Co., 53 Lab. Arb. & Disp. Settl. 227 (1969); The Arcods Co., 39 Lab. Arb. & Disp. Settl. 785 (1962); Valley Iron Works, 33 Lab. Arb. & Disp. Settl. 769 (1960); Schlitz Brewing Co., 33 Lab. Arb. & Disp. Settl. 57 (1959).

12 420 U.S. at 262.

13 An investigatory interview is a preliminary stage in the imposition of discipline. The employer will call the employee to the interview to hear the employee's version of the circumstances surrounding the employee's alleged misconduct. At the conclusion of the interview, or shortly thereafter, the employer will make the decision about discipline and then inform the employee. If discipline is imposed, the employee may then attempt to seek relief through the grievance procedure.

The general definition of a grievance usually relates to some action already taken by the employer. At the time of the investigatory interview the employer has only called the employee to the interview and nothing has happened to give the employee cause to seek relief through the grievance procedure. Technically the stages prior to any action adverse to the employee by the employer should be termed pre-grievance. If the focus is on the employee and his interests, then the grievance/pre-grievance distinction is less important. Brodie, *supra* note 10, at 3. The relationship between investigatory interviews and the grievance procedure was assumed in Comment, *Union Presence in Disciplinary Meetings*, 41 U. CHI. L. REV. 329 (1974), cited by the Court in *Weingarten*, 420 U.S. at 253 n.3.

A more extreme position advocates not separating the preliminary investigation from subsequent activities by analogizing the labor relations disciplinary system to the criminal law, which does not distinguish preliminary investigations from subsequent activities. Silard, *Rights of the Accused Employee in Company Disciplinary Investigations*, PROC. OF N.Y.U. 22d ANN. CONF. ON LAB. 217 (1970).

14 In response to the proposition that the grievance procedure is an adequate corrective, the *Weingarten* Court stated:

[The] respondent would defer representation until the filing of a formal grievance challenging the employer's determination of guilt after the employee has been discharged or otherwise disciplined. At that point, however, it becomes increasingly difficult for the employee to vindicate himself, and the value of any representation is correspondingly diminished. The employer may then be more concerned with justifying his actions than re-examining them.

420 U.S. at 263-64 (footnotes omitted).

The reasoning of the Court lacks explanation as to how the Court arrived at the conclusions (1)
The statutory right to representation is premised upon the theory of constructive concerted activity. This theory is based upon the rationale that a single employee, when pressing a complaint in reliance upon an agreement made by and for the benefit of the entire bargaining unit, is acting, by implication, for the other employees. Likewise, when an employee defends against a charge of misconduct, he is acting on behalf of other employees. Using this reasoning, the Weingarten Court made union representation at investigatory interviews a protected activity.

The right to representation is one of procedural due process, requiring that the employee receive a fair hearing. Weingarten represented a major breakthrough in the area of employee due process rights by establishing the basic framework of the right to representation. However, many questions remain unresolved as to exact parameters of this right. The undetermined issues involved such matters as invocation of the right, waiver, duty of fair representation, the scope of the employer’s responsibility, the role of the union, and extension of the right to employees not represented by a union. Some of these questions have been dealt with by the National Labor Relations Board (hereinafter the Board), the courts, and arbitrators. This article will address itself to the interpretation and application of Weingarten in the development of the right to representation.

II. INTERESTS AND ROLES OF THE PARTIES

The interests of the employer and the employee and union must be considered in any subsequent expansion or constriction of the Weingarten right to representation. The underlying interest of an employer is the maintenance of efficiency and productivity, while the fundamental objectives of the employee and union are job security and favorable working conditions. The Weingarten right interposes a barrier to the arbitrary and

that it is increasingly difficult for the employee to vindicate himself, and (2) that the employer is more concerned with justifying his actions than re-examining them. These conclusions are questionable in view of the fact that the grievance procedure has traditionally served as the corrective mechanism to the disciplinary system.


The constructive concerted activities cases resolve disputes in which the contract term is at issue. Although many disciplinary cases hinge on the interpretation of a contract term, some are purely factual disputes. Even if an employee contests only the factual allegations, however, the resolution of the case may affect other employees. Comment, supra note 13, at 338.

420 U.S. at 261. The Court noted:
The quantum of proof that the employer considers sufficient to support disciplinary action is of concern to the entire bargaining unit. A slow accretion of custom and practice may come to control the handling of disciplinary disputes. If, for example, the employer adopts a practice of considering [a] foreman's unsubstantiated statements sufficient to support disciplinary action, employee protection against unwarranted punishment is affected.

Id. at n.6.

Killingsworth, Management Rights Revisited in Arbitration and Social Change, Proc. 22d
capricious exercise of the discipline and discharge power by the employer.

When an employee is subjected to discipline or discharge, the fate of that employee is of concern to the other employees and the union. The action of an employer in unfairly or arbitrarily imposing discipline upon one employee represents a threat to the security of the other employees and to the position of the union as an advocate of the employee's interests.

In order to protect against the unjust imposition of discipline, the majority of collective bargaining agreements include a grievance procedure which may culminate in arbitration. Sufficient investigation of a dispute is implicit in grievance resolution. Failure by either the union or management to adequately investigate the circumstances which provided the basis for the imposition of discipline may result in that party losing the case at arbitration and incurring liability for a breach of the duty of fair representation.

The initial investigation is often determinative of the later actions of the employer and union. The need to utilize all steps of the grievance procedure and arbitration in order to achieve an equitable resolution of a discipline grievance could be minimized by full and accurate investigation at the inception of the dispute. This is usually the investigatory interview. At the early stages of a dispute, the parties are not yet locked into any position and are more receptive to considering additional facts and viewpoints. A rule which would encourage complete investigation during the earlier stages of the dispute is not only desirable but also would reduce the burden on the grievance-arbitration process.

Union representation at the investigatory interview is intended to benefit all the parties involved. The individual employee, the subject of the investigation, is entitled to representation by the union, which may present additional facts and viewpoints. The union's representation is also intended to benefit the employer and the other employees, as well as the union itself. The union's representation is not limited to consideration of discipline complaints. See generally id.

Both parties to an arbitration run the risk of non-persuasion. A party to an arbitration must offer sufficient material and evidentiary facts to support or justify its position. Without adequate investigation it is difficult to supply the requisite material and evidentiary facts. Gorske, *Burden of Proof in Grievance Arbitration*, 43 Marq. L. Rev. 135, 138 (1959).

"The failure of management of make a reasonable inquiry or investigation before assessing punishment [is] a factor [and sometimes the sole factor,] in the arbitrator's refusal to sustain the discharge or discipline as assessed by management." F. Elkouri & E. Elkouri, *How Arbitration Works* 632 (1973).

Inadequate investigation of grievances has been considered a factor in the overload of the grievance and arbitration process. This overload is not only costly to the employer and union in terms of time and money but also costly to the employee. The individual employee suffers a detriment when the employer and union indulge in trading of grievances to lighten the grievance workload. Comment, *supra* note 13, at 344 n.89.

One commentator observed: "[R]ules designed to encourage full consideration and effort at adjustment in the prior stages of the grievance procedure may be quite desirable." Schulman, *supra* note 25, at 1017.

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interview, is interested in the protection of his job security as well as the avoidance of unreasonable discipline. A union representative can aid the individual employee by eliciting favorable facts and by serving as a witness to the interview. Also, "[t]he union representative . . . safeguard[s] the interests of the entire bargaining unit by exercising vigilance to make certain the employer does not initiate or continue a practice of imposing punishment unjustly." The employer's interest in efficiency is enhanced by the elicitation of facts by the union representative, thus saving time, and the representative can sooner determine the merit of a grievance which would reduce the filing of unsubstantial grievances.

There are four interests of varying importance to consider in determining the employee's right to representation: (1) the employer's interest in retaining a relatively unfettered right to direct the workforce; (2) the individual employee's interest in his job security; (3) the collective interest in job security; and (4) the union's interest in fairly representing all employees. At times these interests conflict despite the effort in Weingarten to strike a balance among them. The conflict surfaces particularly in the following areas: coercion by the employer; the role of the representative; and waiver, either by contract or refusal to participate, of the right to representation by the union. Such conflict, within the framework of Weingarten, must be resolved by balancing the values and policies articulated by each interest.

III. THE PROGENY OF WEINGARTEN

When a new principle of law is established, the scope of that principle must be determined and the language creating it must be defined. The cases which were decided after Weingarten have begun the process of clarifying the right to representation.

A. THE ELEMENTS OF THE RIGHT TO REPRESENTATION

The definition of the components of the right to representation has proceeded primarily in two areas: in determining what constitutes an "investigatory interview" and what constitutes an employee's "reasonable belief that discipline may result." Weingarten defined an "investigatory interview" negatively. Since the right to representation established by Weingarten only arises when an interview is investigatory, the characteristics of an investigatory interview must be reasonably ascertainable in a positive sense.

1. RIGHT TO REPRESENTATION AT INVESTIGATORY INTERVIEWS

From Weingarten, it appears that for a meeting or discussion to be

29 Id. at 290.
30 Id. at 290-61 (footnote omitted).
31 Id. at 256. See also Caterpillar Tractor Co., 44 Lab. Arb. & Disp. Settl. 647, 651 (1965).
32 The Weingarten Court, quoting from Quality Mfg. Co., 195 N.L.R.B. 197 (1972), stated: We would not apply the rule to such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus . . . no reasonable basis for him to seek the assistance of his representative.
420 U.S. at 257-58.
characterized as an "investigatory interview" it must vary, in some manner, from the normal, everyday subject matter and procedure of discussion between the employer and employee.\textsuperscript{33} In defining investigatory interview, the threshold question is whether the subject matter and purpose of the discussion have a reasonable nexus to the disciplinary system.\textsuperscript{34} There are three categories of meetings or discussions which relate to discipline in varying degrees: instructional, investigatory, and disciplinary.

\textit{Weingarten} explicitly excluded instructional interviews from the scope of the representation rule.\textsuperscript{35} While such an interview carries with it the threat that discipline may follow if the employee cannot or will not comply with the directive, such latent threat does not invoke the right to representation.\textsuperscript{36} An instructional interview about work techniques lacks a sufficient nexus with the disciplinary systems since the immediate purpose of the interview is not "to obtain facts to support disciplinary action that is probable or that is being seriously considered."\textsuperscript{37}

An ostensibly instructional interview may, however, give rise to the right to representation if such interview is an integral part of the disciplinary system. In \textit{Alfred M. Lewis, Inc.},\textsuperscript{38} the Board held that counselling sessions to discuss production quotas were within the ambit of \textit{Weingarten}.\textsuperscript{39} The counselling sessions were mandatory for an employee who had failed to attain the production quota. If the employee continued to not achieve the production quota, he could be terminated.\textsuperscript{40} The counselling sessions were found to be an integral part of the progressive disciplinary process; the nexus between the sessions and discipline caused these meetings to be categorized as "investigatory interviews."

A meeting may qualify as an investigatory interview if it entails a questioning, discussion, criticism, or inquiry about the employee's conduct so that the employee is permitted to defend or explain his conduct prior to the final decision to discipline the employee. The \textit{Weingarten} Court perceived an

\textsuperscript{33} \textit{Id.}

\textsuperscript{34} A prerequisite to the right to representation is that the employee must reasonably fear discipline will result from the interview. For discipline to possibly result from an interview, the subject of the interview must have a reasonable relation to discipline. \textit{Id.} at 257.

\textsuperscript{35} \textit{Id.} at 257-58.

\textsuperscript{36} Alfred M. Lewis, Inc. v. NLRB, 587 F.2d 403 (9th Cir. 1978). The Ninth Circuit upheld the Board's order that an employer violated \textsection 8 (a) (1) by refusing to permit union representatives to be present at counselling sessions regarding employees' failure to meet the production quota. The court agreed with the Board's findings that the counselling sessions were an integral part of the disciplinary system and that the counselling sessions were investigatory in nature because the employees were questioned about their work performance.

If, subsequent to the counselling sessions, an employee continued to fail to meet the production quota, discipline would be imposed. The employer would then meet with the employee to advise the employee of the disciplinary action and the reasons for it. The Ninth Circuit refused enforcement of the Board's order which held these meetings to be within \textit{Weingarten} even though the meetings were "cut and dried." The court held that a meeting which lacks an investigatory element and is merely explanatory does not give rise to a right to representation.

\textsuperscript{37} \textit{Id.} at 410; see AAA Equip. Serv. Co. v. NLRB, 598 F.2d 1142, 1146 (8th Cir. 1979).

\textsuperscript{38} 587 F.2d 403 (9th Cir. 1978).

\textsuperscript{39} \textit{Id.} at 410.

\textsuperscript{40} Alfred M. Lewis, Inc., 229 N.L.R.B., 757, 757-58 & n.3 (1977), \textit{enforcement denied}, 587 F.2d 403 (9th Cir. 1978).
investigatory interview as a meeting which occurs prior to an employer's assessment of the appropriate discipline, to ascertain whether there is a basis for the imposition of discipline. This view is consistent with the function of investigation in the grievance process and the definition of investigatory interview applied by arbitrators.

The distinction drawn between a disciplinary interview and an investigatory interview depends upon whether the subject matter of the interview is dispositive of the imposition of discipline or whether the subject matter of the interview merely initiates the possibility of discipline being imposed. *Keystone Steel & Wire,* in which the employees were summoned to the supervisor's office and handed an infraction notice, exemplifies a disciplinary interview.

The distinction between disciplinary and investigatory interviews was blurred by the Board in *Certified Grocers of California,* a case with facts nearly identical to those in *Keystone Steel & Wire.* The Board, holding the meeting in *Certified Grocers* to be an investigatory interview within the scope of *Weingarten,* made the determination of whether an interview was investigatory depend upon whether the employee reasonably feared adverse consequences from the interview. If the employee reasonably believed discipline would result from the interview, then the interview was investigatory. The dissenting members of the Board noted that *Weingarten* had established two separate requirements: the interview must be investigatory, and the employee must reasonably believe adverse consequences will result from the investigatory interview. The standard which the dissent would have applied to determine if an interview was investigatory

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41 See note 1 supra.
42 The investigatory process is used to establish the existence of cause for discipline. See Brodie, supra note 10, at 1.
43 For the arbitral definition of investigatory interview, see Allied Paper Co., 53 Lab. Arb. & Disp. Settl. 226 (1969) (interview to question employee and inform employee that conduct would not be tolerated held to be investigatory as employee reasonably feared discipline); Caterpillar Tractor Co., 44 Lab. Arb. & Disp. Settl. 647 (1965) (conversation where employer berated and criticized employee so that employee reasonably feared discipline held to be an investigatory interview); The Arcods Co., 39 Lab. Arb. & Disp. Settl. 784 (1962) (employee reasonably feared discipline and interview entailed a discussion and questioning about misconduct of employee); Valley Iron Works, 33 Lab. Arb. & Disp. Settl. 769 (1960) (representation at interview is appropriate even though interview is prior to the filing of a grievance, if employee reasonably fears discipline); Schlitz Brewing Co., 33 Lab. Arb. & Disp. Settl. 57 (1959) (grievance in the formative stages when employee summoned for "corrective interview").
44 217 N.L.R.B. 995 (1975). Here, a company superintendent issued an infraction notice, to be delivered to the employees by the supervisor. The supervisor handed each employee a notice after a brief conversation with each of them. Held: the conversation "was more than investigatory meeting;" it was a disciplinary meeting. *Id.* at 997.
45 227 N.L.R.B. 1211 (1977), *enforcement denied,* 587 F.2d 449 (9th Cir. 1978). In this case, higher management issued a disciplinary notice. The employee's supervisor, at an office meeting, informed the employee of his unsatisfactory work performance; he was then handed the disciplinary notice.
46 As a dissenting Board member stated in *Certified Grocers:*

The [Weingarten] Court did not decide that an employee is entitled to have a union representative present at any meeting to which he is called by his employer so long as he reasonably believes that an interview resulting in disciplinary action against him may occur. It is only a particular kind of interview—an investigatory interview—which gives him this right.

227 N.L.R.B. at 1216 (Walther, dissenting) (emphasis added).
depended upon whether "the meeting [was] ... for the purpose of eliciting facts or permitting the employee to explain and/or defend his conduct. ... " The dissent's test would result in a decision more consistent with *Keystone Steel & Wire* and the purposes of *Weingarten*. The situation in *Certified Grocers* was "not an instance ... in which a union steward could aid in the developing of facts at an investigatory interview or help the employee to articulate his position — rather, the investigation had occurred prior to the meeting, and thus even before the meeting the [discipline] was a fait accompli." The Ninth Circuit, in refusing to enforce the Board's order, adopted the dissent's position, holding that the interview was appropriately classified disciplinary rather than investigatory, since the purpose of the interview was to dispose of the matter by informing the employee of the discipline to be imposed rather than to permit the employee to defend his actions.

A prerequisite for an interview or meeting to be classified as investigatory is that the subject matter of the meeting have a reasonable nexus to the disciplinary structure. Additionally, the dominant purpose of the interview should be to determine if any basis exists for the imposition of discipline. If an interview at which the employee is permitted to explain or defend his conduct results in the imposition of discipline, the interview should be considered investigatory. The interview is disciplinary if the decision to discipline the employee occurs prior to the interview.

2. The Employee's "Reasonable Belief"

*Weingarten* further required the employee to reasonably believe that the interview would result in disciplinary action. The reasonableness of an employee's belief was to be measured by objective standards under all circumstances of the case; the *Weingarten* Court rejected a rule which would require a probe of an employee's subjective motivations. Circumstances which would have a bearing on the resolution of the question of reasonableness should include the following: (1) the employee's past disciplinary record; (2) recent events in which the employee was involved that might prompt a charge of misconduct; (3) the proposed subject of the interview.

47 Id.
49 NLRB v. Certified Grocers of Cal., 587 F.2d 449 (9th Cir. 1979).
50 The "dominant purpose" requirement is necessary to distinguish between an interview solely for the purpose of imposing discipline (a disciplinary interview), and an interview to permit the employee to explain or defend his conduct, or to criticize the employee's work where discipline is imposed or is a possibility at the conclusion of the interview.
51 Amoco Oil Co., 238 N.L.R.B. No. 84, 99 L.R.R.M. 1250 (Sept. 27, 1978), where the Board held that an employer did not violate the L.M.R.A. by denying an employee's request for representation and then informing the employee of pre-determined discipline.
52 420 U.S. at 257.
53 Id. at 257 n.5.
54 Id.
55 Certified Grocers of Cal., 227 N.L.R.B. 1211 (1977), enforcement denied, 587 F.2d 449 (9th Cir. 1978).
56 Climax Molybdenum Co. v. NLRB, 584 F.2d 360 (10th Cir. 1978); Detroit Edison Co. & Local 233, 218 N.L.R.B. 61 (1975).
interview, if known to the employee;\textsuperscript{57} (4) formality of the interview;\textsuperscript{58} (5) rank of the interviewer in employer’s hierarchy;\textsuperscript{59} (6) place and manner of interview;\textsuperscript{60} and (7) the usual procedure for discussion between employer and employee.\textsuperscript{61}

Not all these factors need be present in any given situation, but merely a sufficient number to ensure that the employee’s belief was reasonable. Reasonableness, of course, is a question of fact to be determined by the fact-finder. The presence of some or all of these factors would serve to alert an employer that union representation at the investigatory interview may be required by \textit{Weingarten}.

\section*{B. Employees — the Protected Group}

1. Non-unionized Employees Have a Right to Representation

The emphasis of \textit{Weingarten} is clearly directed at the protection of the rights of employees. Throughout the decision, the Court repeatedly referred to the right to representation as the right to union representation. The logical question then is whether this right to representation extends to employees who are not represented by a union. Dissenting in \textit{Weingarten}, Justice Powell observed that “[w]hile the Court speaks only of the right to insist on the presence of a union representative, it must be assumed that the §7 right today recognized, affording employees the right to act ‘in concert’ in employer interviews, also exists in the absence of a recognized union.”\textsuperscript{62} Concerted action for mutual aid or protection by unorganized employees has been held to be protected activity under section 7 of the L.M.R.A.\textsuperscript{63} As the right to representation is derived from section 7, the extension of that right to non-unionized employees would be generally consistent with prior case law.

The courts and the Board have quickly enlarged the right of representation to include unorganized employees. In \textit{O.C. & Atomic Workers International Union v. NLRB},\textsuperscript{64} the court, considering it irrelevant that the discharged employee was not represented by a recognized union, held that the phrase “the right to act in concert” protected more than the right to act in concert with a recognized union.\textsuperscript{65}

The rationale for the expansion of \textit{Weingarten} was explained by the Board in \textit{Glomac Plastics, Inc.}\textsuperscript{66} There it was held that an employee has the right to representation at an investigatory interview, even in the absence of a recognized union, because the employer had unlawfully refused to bargain with a certified union. The Board stated:

\textsuperscript{58}Exxon Co., 223 N.L.R.B. 203 (1976).
\textsuperscript{59}Detroit Edison Co., 218 N.L.R.B. 61 (1975) (interviewer was a security investigator).
\textsuperscript{60}Exxon Co., 223 N.L.R.B. 203 (1976).
\textsuperscript{62}420 U.S. at 270 n.1 (Powell and Stewart, JJ., dissenting) (emphasis added).
\textsuperscript{64}517 F.2d 575 (D.C. Cir. 1976).
\textsuperscript{65}Id. at 592.
\textsuperscript{66}234 N.L.R.B. 1309 (1978).
Our own reading of *Weingarten* . . . persuades us that the Court's primary concern was with the right of employees to have some measure of protection against unjust employer practices, particularly those that threaten job security. *These employees' concerns obtain whether or not the employees are represented by a union.* Indeed, those concerns are more compelling where the employees are without union representation as a result of employer's misconduct. 67

In both cases, there was organizational activity in process, and in *Glomac Plastics, Inc.* the union had been certified as the bargaining representative even though the company refused to extend recognition. 68

Recently, in *Newton Sheet Metal,* 69 the Board held that the question of a union's statutory representative status is immaterial, since the section 7 right to representation is enjoyed by all employees and is not dependent upon union representation for implementation. The Board cited *Glomac Plastics, Inc.* 70 as authority for the principle that the right to representation extends to all employees regardless of whether they are represented by a union. This extension affirmatively establishes that the right is independent of the existence, or non-existence, of an organizational campaign, a certified but unrecognized union, a recognized union without a contract, or a full collective bargaining relationship. This is an appropriate application of *Weingarten* since the right to representation should not depend upon the nebulous issue of a union's statutory representative status. It is difficult to conceive of a rational reason to support an opposite conclusion. While such an expansion may not fulfill all the purposes of *Weingarten*, it may ensure the minimal goals of establishing a right to representation.

In discussing the role of the representative, the *Weingarten* Court stated: “[T]he representative is present to assist the employee, and may attempt to clarify facts or suggest other employees who may have knowledge of them.” 71 The assumption was made that the representative would have knowledge of the collective bargaining agreement and the grievance procedure. 72 If not represented by a union, an employee would usually request that a co-worker be permitted to attend the interview with him. 73 However, there is no assurance that a co-worker would have the knowledge of grievance resolution and discipline that a union representative, such as steward, would reasonably be expected to possess. Without this expertise, a co-worker could not fulfill the more active role envisioned by *Weingarten.*

The presence of a co-worker, however, might satisfy a lesser role. An employer, at his option, may refuse to permit the representative to participate in the interview. 74 If this occurs, such a representative would be merely a

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67 Id. at 1311 (emphasis added).
71 420 U.S. at 260.
72 Id. at 262-64 n.7.
73 NLRB v. Columbia Univ., 541 F.2d 922 (2d Cir. 1976).
74 NLRB v. J. Weingarten, Inc., 420 U.S. 251, 260 (1975). If an employer believes that such participation will impede the progress of the interview, he may prefer that the representative not participate. The amount of participation permitted is dependent upon whether the parties regard each other as adversaries or partners in the collective bargaining relationship.

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witness to the interview.\textsuperscript{75} Since the Weingarten Court, in allowing the employer this option, appeared to regard the mere presence of a representative as sufficient protection of an employee's section 7 right, it would not be inconsistent to conclude that it would be permissible to have a co-worker present simply as a witness. The section 7 right of representation thus applies equally to employees not represented by a union. While a co-worker may not be able to participate in the interview with the expertise of a union representative, the presence of a co-worker may have therapeutic value for the employee being interviewed by giving him moral support.

2. Invocation of the Right to Representation by the Employee

The right to representation does not automatically exist merely because an employee is summoned by the employer to an investigatory interview which the employee reasonably believes will result in disciplinary action. The employee must take affirmative action to avail himself of the right by expressing a request for representation to the employer.\textsuperscript{76}

One who is not an employee does not have the right to request representation.\textsuperscript{77} There are two good reasons for this. First, since the right to representation is derived from the N.L.R.A., an individual must be within the coverage of the Act to avail himself of the rights granted by the statute. Second, if an individual is not an employee, an investigatory interview poses no threat to job security.

If an employee fails to request representation in circumstances which would otherwise entitle the employee to such representation, the employee is deemed to have waived the right.\textsuperscript{78} If the employee waives representation, then under Weingarten the employer may proceed with the interview without committing an unfair labor practice.\textsuperscript{79} On the other hand, if the employee timely requests representation, then the employer has two options: the employer can either halt the interview until a representative is procured, or he can discontinue the interview and simply impose disciplinary sanctions upon the employee.\textsuperscript{80} The sanctions, however, must be based upon the conduct occasioning the interview and not invoked because the employee has elected

\textsuperscript{75} Id. at 273 n.5 (Powell and Stewart, JJ., dissenting).
\textsuperscript{76} Id. at 257.
\textsuperscript{77} Polson Indus., Inc., 242 N.L.R.B. No. 185, 101 L.R.R.M. 1344 (June 15, 1979). An "employee" is defined in the United States Code as follows: The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include 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. . . . 29 U.S.C. § 152 (1977).
\textsuperscript{78} NLRB v. Climax Molybdenum Co., 584 F.2d 360 (10th Cir. 1978) (employees' failure to "manifest any interest in consulting with their union representative" results in the loss of the right to representation).
\textsuperscript{79} 420 U.S. at 257.
\textsuperscript{80} Id; Chrysler Corp., 241 N.L.R.B. No. 169, 101 L.R.R.M. 1020 (April 20, 1979) (holding that employer did not violate L.M.R.A. by exercising its option of dispensing with the investigatory interview and simply handing a notice of suspension to the employee who requested representation); Amoco Oil Co., 238 N.L.R.B. No. 84, 99 L.R.R.M. 1250 (Sept. 27, 1978) (holding that employer did not violate L.M.R.A. when after employee's repeated insistence on union representation, employer confined itself to merely informing him of his suspension).
to exercise his section 7 rights. Once the employer discontinues the investigatory interview and proceeds with the imposition of discipline, the employee no longer has a right to representation under Weingarten.

The employee can also waive the right to representation if the request for representation is not timely made. Whether a request is timely depends upon two factors. First, the timeliness of the employee's request depends upon whether at that stage of the interview the assistance or presence of a representative would be beneficial. Clearly a request for representation made after the investigatory interview is not timely, and the employee will be deemed to have waived representation. After the interview, the presence of a representative merely to observe the imposition of sanctions would not fulfill the purpose of Weingarten because the representative would be unable to assist in the elicitation of facts or compilation of additional information.

The second test for the timeliness of a request for representation which is made after the outset of the interview is whether the request is made at the time the employee discovers that discipline may result from the interview. An employee's failure to request representation at the outset of the investigatory interview does not automatically deprive the employee of the right to request representation at some later point of the interview. It cannot be presumed that an employee will have the requisite reasonable fear of discipline at the instant when the employee is called for the investigatory interview.

This approach to the timeliness of a request provides flexibility. The employee need not request representation at the outset of the interview. While the request may be delayed until the employee reasonably fears discipline may result, the delay cannot exceed the point beyond which the representation would be ineffective — usually the end of the interview. The employee's option of requesting representation is thus protected until the point at which the employee would not derive any benefits from the hollow exercise of the Weingarten right.

C. Employers — Responsibilities and Duties

Weingarten firmly enunciated the rule that an employer commits an unfair labor practice when he refuses to allow employee representation and compels

81 Spartan Stores, Inc., 235 N.L.R.B. No. 75, 100 L.R.R.M. 1181 (March 30, 1978) (holding that employer committed an unfair labor practice by discharging an employee for asserting his protected right to refuse to participate without union representation in interview that he reasonably believed could result in disciplinary action). Accord, Chrysler Corp., 241 N.L.R.B. No. 169, 101 L.R.R.M. 1020 (April 20, 1979) (holding that the discharge of an employee was valid, since basis for discipline was not the request for representation but the underlying misconduct); NLRB v. Potter Elec. Signal Co., 600 F.2d 121 (8th Cir. 1979), where the court refused to enforce the Board's order on the ground that the Board was not warranted in ordering employer, which violated § 8(a)(1) of L.M.R.A. by requiring two employees who had engaged in fight at production line to attend investigatory interviews with management personnel without presence of union steward, to reinstate employees with back pay, where (1) employees were not discharged for requesting union assistance, especially in view of fact that employees did not insist upon that right and in fact participated in interviews, and (2) employees were discharged for fight that resulted in shutting down production line.


85 420 U.S. at 257.
the employee, who reasonably believes discipline will result, to attend an investigatory interview unaccompanied. 86 An employee, however, may voluntarily waive his right to representation. 87 The difference between an employer's blatant intimidation of an employee and an employee's voluntary waiver is one of degree. If an employee elects to forego his right to representation, such election must be clear, unmistakable, and free of duress. 88 If an employer could coerce or intimidate an employee into relinquishing such right, then the right would only exist in theory, clearly defeating the purpose of Weingarten. It would be an inappropriate result if the employer tactics which Weingarten was intended to prevent were utilized to defeat the safeguards created by Weingarten. 89

Coercion may be blatant or subtle. The difficulty is not in identifying the conduct which is obviously coercive; examples are plentiful. 90 The more difficult problem concerns identifying the behavior which is coercive in effect though not openly coercive. Although the prevention of coercion is a vital concern, adherence to an overly stringent standard of what constitutes coercion will severely diminish the ability of the parties to informally resolve a dispute at the lower levels of industrial hierarchy. 91 To resolve disputes concerning industrial relations, the use of informal mechanisms is emphasized to obtain more expeditious settlements. 92 Unfortunately, as due process procedural requirements are increasingly imposed upon the dispute adjustment procedure, flexibility and informality are correspondingly reduced.

Southwestern Bell Telephone Co. 93 illustrates the conflict between the protection of the exercise of the right to representation from intimidation or coercion and the preservation of informality and flexibility in dispute resolution. There the Board held coercive an employer's statement, made in response to employees' inquiries about union involvement in the investigatory interview, that involving the union in the matter would serve only to draw higher

86 See note 3 supra and accompanying text.
87 See notes 4, 78-82 supra and accompanying text. A waiver of the Weingarten right may not, however, be implied from the fact that an employee waived his rights under Miranda v. Arizona, 384 U.S. 436 (1966). The Board has held that an employee's Weingarten rights are unaffected by any Miranda rights he may also have possessed or been accorded, in view of the significant differences in foundation and scope between the two rights. United States Postal Serv., 241 N.L.R.B. No. 18, 100 L.R.R.M. 1520 (March 19, 1979).
88 See Comment, supra note 13, at 349 n.103.
89 One commentator has observed: "The right being waived is designed to prevent intimidation by the employer. It would be incongruous to infer a waiver without a clear indication that the very tactics the right is meant to prevent were not used to coerce a surrender of protection." Id. at 350.
91 Walther, supra note 48, at 194.
level management into the case. The dissenting Board members deemed this statement to be nothing more than a realistic, common sense appraisal of the employees' prospects for receiving fairer treatment from their first line supervisors, with whom they worked on a day-to-day basis, than from the more remote, higher levels of management. The dissent did not view the statement as a threat that union participation would result in the imposition of more severe discipline. The dissent's argument focused on the transformation of a relatively minor dispute, which could have been resolved informally in a short time by the individuals directly involved, into a formal and prolonged matter involving higher levels of management. Southwestern Bell Telephone Co. represents the movement towards an increasingly formal and adversary system of labor relations.

The trend toward an adversary labor-management relationship is undesirable because it represents an importation of criminal procedure concepts into the labor relations area. Although the labor discipline and grievance procedure and the adversary criminal law system have often been analogized, the fundamental differences between the two systems require that an importation of criminal procedure concepts into the labor relations setting be subject to severe scrutiny. The formalization of labor-management relations in the manner of the criminal system will promote the adversarial characteristics of the grievance process in derogation of the informality upon which the process is founded.

An employer is not the state, which possesses awesome powers to control the physical liberty of individuals. The informal grievance procedure cannot be fully equated with the complex and intricate judicial system. The relationship of employer and employee is a functional relationship which existed prior to the incident generating the interview and, possibly, will continue after the interview, unlike the relationship of the criminal and the police. The connection between an alleged criminal and his accusers has only negative connotations while the relation between employer and employee is fundamentally positive in that both benefit from the voluntary association. It is reasonable to fear that the positive aspects of the employer-employee relationship will be unduly impaired if, in a disciplinary context, the parties are forced to assume extremely antagonistic roles. In such case, the motivation for the parties to solve the disputes by mutual co-operation would be substantially reduced in contravention of the policy of Weingarten.

The fears of the dissenters in Southwestern Bell Telephone Co. may be realized if criminal law precepts continue to be employed in the labor relations area. Adjustment of disputes concerning employee conduct will

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94 Id. at 1225 (Penello and Walther, dissenting); see Walther, supra note 48, at 193.
95 227 N.L.R.B. at 1225 (Penello and Walther, dissenting).
97 However, as the Weingarten Court noted: "[The union representative's] presence need not transform the interview into an adversary contest." 420 U.S. at 263.
98 One commentator observed:

[In] Climax, Southwestern Bell Telephone, and Certified Grocers, the majority’s interpretation of Weingarten does not encourage parties to expeditiously and informally
require the care and propriety of a formal court proceeding and will discourage parties from informally and expeditiously resolving their problems. An increase in industrial tensions will result if disputes are not quickly and informally resolved. The incidence of litigation before the courts and agencies will increase every time another technicality is created. The greater the number of technical, due process limitations imposed upon the conduct of an employer towards an employee, the greater the impediments to the functioning of an informal dispute resolution mechanism.

D. The Union — A Nebulous Role

The role of the union representative in the investigatory interview, as perceived by the Weingarten Court, is to facilitate communications between employer and employee, ensuring an expeditious and just disposition of the problem.\(^{100}\) Neither the nature and scope of the union representative's function nor the rights and obligations of the union with respect to providing representation were settled by Weingarten.

1. Invocation by the Union of the Right to Representation

Clearly the individual employee may invoke or waive the right to representation at an investigatory interview as the employee so chooses.\(^{101}\) The issue of whether the union, by implication, is endowed with power to solve their own problems. Rather, it will increase controversy between labor and management by requiring that the adjustment of disputes concerning employee conduct be conducted with "the care and propriety of a formal court proceeding." Thus, the cause of industrial peace through jointly determined solutions to problems which is at the heart of the National Labor Relations Act and which was the Supreme Court's objective in Weingarten will be thwarted.

There is no doubt in my mind that the Board's Climax, Southwestern Bell Telephone Co., and Certified Grocers decisions will have still another negative effect—they will increase the incidence of litigation before our agency and the courts. You all know firsthand the savings in time, energy and money, not to mention the lessening of tensions in the work environment, when employees and management resolve their problems on an informal basis. The Climax decision and its progeny will lead to the opposite result—increased industrial tensions and the consequent filling of a greater number of charges with the Board because the Board has created another legal technicality upon which charges can be based. I think you will all agree that the cause of industrial harmony is best served when problems can be resolved without government intervention.

***The clear and unmistakable objective of the Supreme Court was to enhance matters related to the lower level grievance procedure and to help solve problems as they occur by encouraging stewards and supervisors to work them out together.

Walther, supra note 48, at 194 (footnotes omitted).

\(^{100}\) As Justice Brennan wrote for the Weingarten majority:

The representative is present to assist the employee, and may attempt to clarify the facts or suggest employees who may have knowledge of them.... [Participation by the union representative] might reasonably be designed to clarify the issues at this first stage of the existence of a question, to bring out the facts and the policies concerned at this stage, [and] to give assistance to employees who may lack the ability to express themselves in their cases.... The foreman, himself, may benefit from the presence of the steward by seeing the issue, the problem, the implications of the facts, and the collective bargaining clause in question more clearly.... The presence of the union steward is regarded as a factor conducive to the avoidance of formal grievances through the medium of discussion and persuasion conducted at the threshold of an impending grievance. It is entirely logical that the steward will employ his office in appropriate cases so as to limit formal grievances to those which involve differences of substantial merit.

\(^{420}\) U.S. at 260, 262-63 n.7.

invoke the employee's right to representation on behalf of the individual employee and the bargaining unit as a whole was not decided by Weingarten. One commentator has suggested there exists a sound basis for a right of the union to be represented at an investigatory interview, as distinguished from the right of the employee to request the union's presence. Various benefits may be derived from permitting union access to such meetings: (1) promotion of employee interests in future contract negotiations, since the union would be alerted to problems in disciplinary rules and procedures; (2) access to the meetings, a valuable weapon in the union's later prosecution of employee grievances; and (3) protection of the interests of the entire bargaining unit in the fair administration of the disciplinary system.

A conflict results where the employee may desire to confront the employer alone while the union wishes to intervene to protect the interests of the bargaining unit. The resolution of this conflict can be achieved by an understanding of the disciplinary system. The disciplinary process may be separated into four stages: investigation and investigatory interview, disciplinary hearing, grievance procedure, and arbitration. The union has the right to be present at the latter three stages; however, there is no mandatory duty upon the employer to permit the union to be present at an investigatory interview. Since the union is entitled to be present at all proceedings subsequent to the investigatory interview, there is no compelling reason to insist that the union also be permitted to attend the investigatory interview in its own right; the interests of the bargaining unit may be adequately protected at the later stages.

The Tenth Circuit adopted this view in Climax Molybdenum Co. v. NLRB, holding that the employer did not commit an unfair labor practice when it refused to permit a union representative to consult with the employees prior to the interview, since the employees had not requested union representation at the interview and there was no indication that they were interested in such representation. It is apparent from the court's holding that a union cannot claim a right to be present at an investigatory interview if the employee does not request such representation since the right is vested in the employee, not the union. This applies to both the situation where the employee remains silent as to his preferences and, particularly, the instance where the employee refuses representation.

2. Waiver by the Union of the Right to Representation

Although the union lacks the power to invoke the right to representation, a

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102 Comment, supra note 13, at 340.
103 Id. at 341.
104 Id.
105 Id. at 338.
108 584 F.2d 360 (10th Cir. 1978). See also Climax Molybdenum Co., 227 N.L.R.B. 1189, 1192 (1977) (Penello and Walther, dissenting).
109 584 F.2d at 363.
closely related question involves the ability of the union to waive the individual employee's right to representation by the terms of the collective bargaining agreement or by refusal to represent the employee at the investigatory interview.

The first type of waiver, negation of the right to representation through the collective bargaining process, is dependent upon the scope of the union's authority to relinquish a statutory right of an employee. It has been long established that a union may bargain away the statutory right to strike in order to promote the national policy of the peaceful settlement of labor disputes. Unlike the right to strike, sacrifice of the employees' right to representation serves no public interest. The right to representation provides the employee with the assurance of procedural due process. If an employee is deprived of this right, no benefit accrues to the public interest. A comparison of the right to representation and economic benefits is equally inapplicable. The argument against such a comparison may be stated as follows:

Where economic benefits are traded away in the bargaining process, employees who would have preferred what was sacrificed over what was received suffer only a bad bargain. In contrast, if this procedural right is bargained away, employees who would have preferred to keep it will suffer an increased risk of unfair discipline.

The union should not be permitted to waive an employee's right to representation during the collective bargaining process since the loss of the right by the individual employee benefits only the union. The decision to waive the right should remain the option of the individual employee. The employer will not derive a greater benefit from a contractual waiver since the employer can eliminate the presence of a union representative by dispensing with the investigatory interview.

Although this issue has not been directly confronted by the Board or the courts, New York Telephone Co. implies that the right to representation is waivable during collective bargaining negotiations. The issue of whether an employee is entitled to union representation at the investigating interview was considered dependent upon whether the union, during bargaining negotiations, had waived the employee's right to representation. The implication to be drawn from this case is that if the right to representation was bargained away by the union, then the employee is effectively deprived of the right. Such a rule is unfortunate because the only party whose interest is substantially impaired by such a waiver is the individual employee.

The second type of waiver, refusal to represent the employee at the investigatory interview, poses a problem as to the union's duty to provide fair representation. When a dispute has entered the grievance procedure, the union is permitted to refuse to process the grievance if, after a good faith investigation of the merits, the union concludes that the claim is insubstantial.

111 Comment, supra note 13, at 349.
112 Id.
or nonmeritorious. However, a distinction must be drawn between the refusal to pursue a grievance and the refusal to represent the employee at an investigatory interview. To fulfill the duty of fair representation, the union may only refuse to pursue a grievance after investigation. At the time of the investigatory interview, however, the union will not have had the opportunity to scrutinize the merits of the employee’s position. Consequently, the union should be under a duty to provide an employee with representation at an investigatory interview when the employee so requests. The only benefit to be derived from allowing the union to refuse representation at this stage is a benefit to the union because it would be relieved of responsibility. The union would have the power to negate the employee’s right to representation. A failure by the union to provide such representation, when the employee so requests, should constitute a breach of the duty of fair representation.

3. The Appropriate Representative: Identity and Scope of Duty

The Weingarten Court, envisioning an aura of cooperation between the employee and the union representative, phrased the role description of the representative in general terms, although frequent reference was made to the “union steward” in the discussion of the function of the representative. The precise identity of the representative, his duties, and scope of authority were not conclusively delineated in the Weingarten decision, although the Court did speak of a “knowledgeable union representative.” The Board has subsequently issued some decisions pertaining to the definition of the appropriate representative which deserve examination.

In Coca-Cola Bottling Co., the union steward was unavailable and, although the union business agent could have been summoned, the employee did not request the alternative representation. The Board held that the employer did not commit an unfair labor practice by conducting the investigatory interview without union representation. The qualifications of the business agent to serve as the representative were not discussed by the Board. This omission might imply that one union representative will suffice as well as another, provided either of the possible representatives is familiar with the grievance procedure.

This definition was expanded upon by the Board in Climax Molybdenum Co., where the phrase “knowledgeable union representative” was construed to mean a representative who has had time before the interview to

117 E.g., 420 U.S. at 261 n.6, 262-63 n.7.
118 Id. at 263.
120 It should be noted that in the Coca-Cola Bottling case, the employee insisted on the presence of the steward with full knowledge that the steward was on vacation. The unavailability of the steward was not due to the actions of the employer. Id. at 1278-79.
121 227 N.L.R.B. 1189 (1977), enforcement denied, 584 F.2d 360 (10th Cir. 1978).
fully acquaint himself with the employee's version of events. The Tenth Circuit did not directly discuss the Board's definition of a "knowledgeable representative" but noted that the union was not entitled to a consultation with the employees prior to the interview for the purpose of becoming acquainted with the events occasioning the interview.\(^{122}\) This holding would nullify the Board's definition of a knowledgeable representative, leaving as the only viable definition the one established by Coca-Cola Bottling Co.\(^{123}\) The approach of Coca-Cola Bottling Co. is more in accord with Weingarten because it restricts the concept of the appropriate representative to one who is generally knowledgeable about grievance resolution, rather than one who is versed in the particular facts of a particular grievance.\(^{124}\)

It appears that the Board has returned to the definition of the appropriate representative established by Coca-Cola Bottling Co. and the opinion of the Tenth Circuit in Climax Molybdenum Co. v. NLRB. In recent decisions by the Board, "union officers and committeemen"\(^{125}\) and "known union leaders"\(^{126}\) have been deemed to be appropriate representatives without discussion of the meaning of "knowledgeable." This omission can reasonably be interpreted to indicate that a "knowledgeable representative" need only be relatively familiar with the grievance process and contract.

The role of the union representative, as established by Weingarten, has been adhered to by the lower courts. The Weingarten Court firmly stated that the union representative's "presence need not transform the interview into an adversary contest."\(^{127}\) In Climax Molybdenum Co. v. NLRB\(^{128}\) the court was confronted with a situation where the avowed policy of the union was non-cooperation with the employer in an investigatory interview, thus transforming the interview into an adversary process. The court severely sanctioned this form of union behavior.\(^{129}\)

\(\text{Id.} \) at 1092-93.

\(^{122}\) Climax Molybdenum Co. v. NLRB, 584 F.2d 360 (10th Cir. 1978); see also Climax Molybdenum Co., 227 N.L.R.B. 1189, 1192 (1977) (Penello and Walther, dissenting).


\(^{124}\) This was the approach taken in Weingarten. 420 U.S. at 262 n.7. See Walther, supra note 48, at 191.


\[^{\text{A known union leader of the union movement at Respondent's plant, was suggested to [the employee] by [Respondent]. . . . [The employee] was asked about and received, the presence of a fellow union member who was an influential union force within the plant. The fact [that the union leader] did not bear the label "union representative" does not detract from the obvious conclusions to be drawn from his presence. A logical question is, what would a "union representative" have done for [the employee that the union leader] did not do? The answer, so far as the record shows, is nothing. Proper application of the rule in this case requires finding that Respondent did what is expected of it under Weingarten. The contention that [the employee] was deprived of his Weingarten rights because [the union leader] was only a "witness" is of no effect. (a) [The union leader] was readily accepted by [the employee]. (b) [The union leader] acted as more than a witness. (c) [The union leader] was a more competent representative. Id. at 1092-93.}

\(^{127}\) 420 U.S. at 263.

\(^{128}\) 548 F.2d 360 (10th Cir. 1978).

\(^{129}\) The court stated: Union officials had urged Union members (employees) not to cooperate with management in any investigatory interviews. [A union officer] candidly acknowledged
The disapproval voiced by the court in Climax Molybdenum Co. was appropriate and justifiable. It is unacceptable to permit the union representative to transform the interview into a formalized, adversary hearing in contravention of the express holding of Weingarten. In reference to the role of a representative it has been stated that "[t]he steward [should] not act like counsel in a criminal case, instructing the employee what to do or say or warning him of possible self-incrimination." Countenancing such behavior would unduly infringe upon the employer's prerogatives, since the employer has a significant interest in the investigation of plant conditions and job performance. The purpose of Weingarten was not to impair the ability of the employer to conduct an investigation but to protect the employee's interest in a fair hearing and to expedite the investigatory process. A policy of non-cooperation by the union, as exhibited in Climax Molybdenum Co., should be prevented through the imposition of unfair labor practice sanctions.

IV. CONCLUSION

The right to representation established by Weingarten represents a growth of due process concepts in the field of labor relations. As Weingarten has been expanded, many problems have arisen in the shaping of the parameters of this right.

The definition of what constitutes an investigatory interview is unclear. In the further development of such definition, care must be taken to distinguish between disciplinary and investigatory interviews. The two interviews occupy different positions in the disciplinary structure and do not serve the same purpose. The objective standards for determining whether an employee's belief that discipline will result from the interview is reasonable must be established so as to provide notice to an employer of when the presence of a union representative is mandated by Weingarten.

The expansion of the right to representation to non-unionized employees fulfills the purpose of Weingarten in a limited fashion. A co-worker's presence at an investigatory interview provides the employee with a sympathetic witness.

The area in which the expansion of Weingarten has been most detrimental to the labor-management relationship is the employer's responsibility with respect to the employee's right to representation. The standard for determining if the employer coerced the employee into relinquishing his that such was the Union's policy. . . . This approach is directly contrary to the very purpose of an investigative interview, i.e., to ascertain what the problem is, how it has developed and what, if any, solution or direction is dictated based upon the facts disclosed. The final outcome of some investigatory interviews very likely will lead to the dismissal of the employee. That, however, does not alter the fact that such interviews are investigatory in nature before the employer has committed himself to any disciplinary action against an employee. The Union's policy of non-cooperation exacerbates problems rather than resolving them. An investigatory interview is fact-finding in character, constituting an effort on the part of the employer to maintain discipline and plant security. The outcome or consequence cannot be determined until the nature of the employee's conduct is ascertained.

Id. at 363-64.

130 Comment, supra note 13, at 344.

131 Id. See Climax Molybdenum Co. v. NLRB, 584 F.2d 360, 363 (10th Cir. 1978).
section 7 right, as established by Southwestern Bell Telephone Co., is overly broad since it tends to discourage efforts by the parties to expeditiously and informally resolve their dispute. Such a tendency is undesirable because it contradicts the basic policy of labor relations. The recently created requirement that the employer provide the employee with a Weingarten warning unreasonably accelerates the transformation of an investigatory interview into an adversary hearing. Weingarten envisioned an enhancement of mutual co-operation, not an atmosphere of combativeness. A rule that emphasizes the adversary aspects of the employment relationship only impairs the functioning of that relationship.

The development of the rights and responsibilities of the union in regard to the right to representation is, thus far, well suited to the furtherance of the Weingarten policies. Refusing the union the right to invoke representation does not impair the ability of the union to adequately protect the collective interests of the bargaining unit. An investigatory interview is only the initial step in the disciplinary process. The union has sufficient opportunity at the subsequent stages, including the disciplinary hearing, the grievance procedure, and arbitration, to advance the interests of the entire bargaining unit. The union should not be permitted to waive the employee's right to representation in either the collective bargaining agreement or by a refusal to provide representation when it is so requested. A general waiver as part of the collective bargaining agreement only serves the interests of the union and the employer. The consequences of such a waiver are borne by the individual employee. If a union, on its own initiative, is permitted to refuse representation, the opportunity for the union to negate the employee's right to representation arises, and the possibility of discrimination is present. Such a refusal by the union should be a breach of the duty of fair representation. The definition of the appropriate union representative as one who is generally knowledgeable about grievance resolution is in full accord with Weingarten. The representative need not be fully versed in the employee's version of events to effectuate a fair and expeditious resolution of the matter.

The subsequent development of the Weingarten right poses a threat to the fundamental nature of the labor-management relationship. An excessively stringent and broad application of Weingarten will promote the potentially adversary nature of the disciplinary system to an unreasonable degree, thus reducing the flexibility and informality characterizing disciplinary procedures. There must be careful consideration of the nature of the employer-employee relationship and the fundamental policy favoring informal dispute resolution to avoid an adverse impact upon the labor relations system. Weingarten was intended to enhance the employer-employee relationship, not to undermine it. Future decisions interpreting Weingarten must incorporate reality into the abstract principles.

Kathy A. Wireman
