Ten Years After *Weingarten:* Are the Standards Really Clear?

**DANIEL J. HERRON**

I. INTRODUCTION

Succinctly (and perhaps superficially) stated, the U.S. Supreme Court in *NLRB v. Weingarten, Inc.,*1 enforced an NLRB ruling which recognized the right of an employee under section 7 of the National Labor Relations Act2 to upon request, engage in concerted activities for mutual aid or protection by having present a union representative at an investigatory interview with management when the employee reasonably believes that disciplinary action may occur or result. Specifically, this case indicated that interference with the rights of employees under certain circumstances to engage in concerted activities constituted an unfair labor practice under section 8(a)(1). The ruling poses four immediate questions that courts have been struggling with for the past nine years: 1) the definition of “reasonably believes”; 2) what constitutes “concerted activities for mutual aid or protection”; 3) role of the requested representative; and 4) the definition of an “investigatory interview.” The Supreme Court, however, in enforcing the Board’s ruling also adopted the rationale that the “exercise of the right may not interfere with legitimate employer prerogatives.”3 Thus, not only must the courts wrestle with the four immediate questions as posed above, but they also must balance this new employee right with “legitimate employer prerogatives.” Therefore,  

---

2. *National Labor Relations Act* (NLRA) specifically states: 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 have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.
3. 485 F.2d 1135 (5th Cir. 1973).
what may be a statutory due process right for the employee becomes a burden for the employer. The courts are thus required to draw a balance between the two.

II. BACKGROUND

A. WEINGARTEN ISSUE

Weingarten, Inc. operates a chain of retail stores. Based upon employee reports, the management investigated employee Leora Collins for possible theft and cash register shortages.4 Collins and other sales personnel were represented collectively by the Retail Clerks Union.5 During her interview with the store manager and company investigator, Collins repeatedly asked for a shop steward or union representative to be present. Collins' requests were denied.6 The investigations and subsequent interview exonerated Collins of her purported wrongdoing.7

After her examination, Collins reported the content of her interview to her shop steward. Based upon management's denial of Collins' requests for union representation during the interview, the union filed an unfair labor practice proceeding against the company with the NLRB.8

The Board ruled against the company and formulated what now is referred to as the Weingarten right.9 However, on appeal, the Fifth Circuit refused enforcement of the Board's ruling,10 citing what is characterized as an indisputable "long line of Board decisions, each of which indicates—either directly or indirectly—that no union representative need be present at an investigatory interview."11

---

5. Id.
6. Id. at 255.
7. Id.
8. Id. at 256.
9. Id.
10. 485 F.2d 1135 (5th Cir. 1973).
11. 420 U.S. 251, 264 (1975) (citing Weingarten, 485 F.2d 1135, 1137 (5th Cir. 1973)).

We agree that its NLRB's earlier precedents do not impair the validity of the Board's construction. That construction in no wise exceeds the reach of § 7 [of the NLRA], but falls well within the scope of the rights created by that section. Cf. note 1 supra. The use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decision making....

Weingarten, 420 U.S. at 265-66.
However, the Supreme Court held, in essence, that prior Board decisions are not binding upon the Board if the Board has a reasonable basis for its "new" decision and if its reasonable basis falls within the statutory authority afforded the Board by Congress. Moreover, it is not the province of the courts to enforce Board precedents, but merely to determine whether the Board has acted within its statutorily authorized discretion.

B. JUDICIAL REVIEW OF NLRB DECISIONS

This "abuse of discretion" approach that the Supreme Court developed for the review of NLRB (if not all administrative agencies) decisions has been clarified and reinforced time and time again. Yet, the Court has remained ever mindful, at least in passing, that the Board must continually balance employees' statutory rights and employers' legitimate prerogatives. In *Beth Israel Hospital v. NLRB*, the Supreme Court cited a 1956 case, *NLRB v. Babcock and Wilcox Co.*, stating "accommodation between [employee-organization rights and employer-property rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other." Yet that "accommodation" remains primarily a Board function, for

[it] is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy. Because it is to the Board that Congress entrusted the task of "applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms" ... that body, if it is to accomplish the task which Congress set for it, necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions.

12. It is the province of the Board, not the courts, to determine whether or not the "need" exists in light of changing industrial practices.... For the Board has the 'special function of applying the general provisions of the Act (NLRA) to the complexities of industrial life' (citations omitted).... 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 (citation omitted)...the Board's construction here, while it may not be required by the Act, is at least permissible under it....

*Weingarten*, 420 U.S. at 266-67.

13. *Id.*


17. *Beth Israel Hosp.*, 437 U.S. at 500-01 (citing Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945)).
Moreover, the Supreme Court had recognized and adopted the Board's "evolutional approach" as the appropriate method in developing labor policy. As was emphasized in *Weingarten:*

To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decision making. "Cumulative experience" begets understanding and insight by which judgments...are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single advisory litigation permits, differentiates perhaps more than anything else the administrative from the judicial process.

Clearly, the broad latitude that the Court has given the Board in freeing it from the rigid application of legal or administrative precedent allows the Board broad discretion in formulating administrative decisions.

However, this does not mean that courts merely "rubber stamp" Board decisions. Generally, if the Board's construction of the statute is "reasonably defensible," a reviewing court may not reject it, even if it has a preferred interpretation. In fact, the Court has rejected Board rulings where they had "no reasonable basis in law, either because the proper legal standard was not applied or because the Board applied the correct standard but failed to give the plain language of the standard its ordinary meaning." Moreover, the Court has denied a Board interpretation when that interpretation was "fundamentally inconsistent with the structure of the Act" and when that interpretation in effect usurped "major policy decisions properly made by Congress." Also, the Court has rejected any attempt by the board to move "into a new area of regulation which Congress had not committed to it."

A recent case of the Court refusing to enforce a Board inter-

18. See supra note 11.
20. *Weingarten,* 420 U.S. at 266.
22. *Ford Motor Co.,* 441 U.S. at 497 (citing Chemical and Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 166 (1971)).
The interpretation is *NLRB v. Yeshiva University*.\(^{25}\) In *Yeshiva*, the NLRB found that faculty members at Yeshiva University qualified under the NLRA as "employees."\(^{26}\) The university maintained that the faculty possessed enough indicia of "managerial status" sufficient to exclude them from the NLRA's jurisdiction.\(^{27}\) The Supreme Court agreed with the university, holding that the Board's opinion lacked relevant findings of fact.\(^{28}\) In the absence of the Board's factual findings and in light of the university's substantiation, the Court could not support the Board.\(^{29}\)

Thus, as demonstrated in the *Yeshiva* case, while the Board has great latitude, it is still held to standards and criteria that must be met. As in *Yeshiva*, the Board must also substantiate its opinions as well as simply interpret and apply them.

The circuits have been quick to pick up and illuminate the Supreme Court's method of weighing Board decisions. In a 1981 case,\(^{30}\) the Tenth Circuit indicated: "The role of the judiciary is narrow; a Board order is reviewed for consistency with the Act and for rationality, but if it satisfies these criteria, the Board's application of the rule, if supported by substantial evidence on the record as a whole, is to be enforced."\(^{31}\) A 1983 Third Circuit concurring opinion pointed out that it is mandated to enforce any order which is permissible under the Act, even if an alternate reading is possible.\(^{32}\)

---

26. Id. at 678 (citing Yeshiva University, 221 N.L.R.B. 1053, 1054 (1975)).
27. NLRB v. Yeshiva University, 444 U.S. 672, 678 (1980).
28. Id. at 691.
29. The Court did drop an interesting footnote which illuminates the thinking of the Court:
It is plain, for example, that professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research. There thus may be institutions of higher learning unlike Yeshiva where the faculty are entirely or predominantly non-managerial. There also may be faculty members at Yeshiva and like universities who properly could be included in a bargaining unit. It may be that a rational line could be drawn between tenured and untenured faculty members, depending upon how a faculty is structured and operates. But we express no opinion on these questions for it is clear that the unit approved by the Board was far too broad.
444 U.S. at 690 n.31 (emphasis added).
31. Id. at 752-53 (emphasis added).
The First Circuit neatly capsulized the judicial review relationship to Board actions in its 1983 case, *Friendly Ice Cream Corp. v. NLRB.* 33 The court noted:

We, as the reviewing court, are given the power to "enter a decree enforcing, modifying,...or setting aside in whole or in part" any order of the Board....Our role is not " 'to stand aside and rubber stamp' Board determinations that run contrary to the language or tenor of the Act." Rather, we must assure that the Board's unit determinations are not unreasonable, made arbitrarily or capriciously, or unsupported by substantial evidence. 34

The court then examined that judicial review essentially guards against arbitrary decisionmaking by the Board. At the same time, the court gives great deference to the particular expertise of the Board. 35 As the Supreme Court has explained, "the decision of the Board, if not final, is rarely to be disturbed." 36

Thus, with the threshold question of the standard of judicial review fairly well entrenched, the substantive questions stated in the introduction of this article will be explored.

### III. Substantive Questions Raised by *Weingarten*

#### A. The Definition of "Reasonably Believes"

*Weingarten* rights can only attach if an employee "reasonably believes" that disciplinary action is forthcoming or "reasonably believes the investigation will result in disciplinary action...." 37 The Court adopted the view that "reasonableness" must be measured by objective standards and no inquiry into the subjective motivations of the employee would be permitted. 38 This position seems to fly in the face of logic. What an "employee believes" is clearly subjective. Even though it may be based on objective criteria, it nonetheless remains subject to the individual formulating the belief.

At least one post-*Weingarten* court has interpreted the Supreme Court's test as emanating from the character of the "investigatory interview." 39

---

33. 705 F.2d 570 (1st Cir. 1983).
34. *Id.* at 575 (citing Packard Motor Car Co. v. NLRB, 330 U.S. 485, 491 (1947). *See also* Pacific Southwest Airlines v. NLRB, 587 F.2d 1032, 1037 (9th Cir. 1978); NLRB v. Chicago Health & Tennis Clubs, Inc., 567 F.2d 331, 335 (7th Cir. 1977); Ochsner Clinic v. NLRB, 474 F.2d 206, 209 (5th Cir. 1973).
35. *Friendly Ice Cream Corp.*, 705 F.2d at 575.
38. *Id.* at 257 n.5.
The Fifth Circuit interpretation changes “what an employee believes” to “what may be reasonable for an employee to believe in light of the circumstances.” The corollary inference is that the emphasis is not on what an employee actually believes but on what that employee is justified in believing.

Indeed, courts have couched their conclusions in terminology that points to this new, revised definition. In reviewing a Weingarten-like situation with an IRS employee, the D.C. Circuit concluded that the employee “could have reasonably feared” that disciplinary action would result from what the employee actually believed was not relevant, and was beyond the scope of the court’s inquiry according to the Weingarten test. Indeed, the Weingarten test precludes any other approach. The dilemma is that the test really does not fit the requirement. What an employee “reasonably believes” requires some subjective inquiry. Such inquiry, however, is explicitly rejected.

B. WHAT CONSTITUTES “CONCERTED ACTIVITY” FOR MUTUAL AID OR PROTECTION

NLRB v. City Disposal Systems is a recent case which brings greater certainty to the type of individual employee action protected by the NLRA. A review of NLRB and appellate court decisions reveals three major approaches to the protection of individual activity as “concerted activity” within the meaning of section 7 of the NLRA: 1) the approach that implies concert of action in certain circumstances; 2) the approach that protects individual action looking forward to group action; and 3) the literal approach.

In City Disposal Systems the controversy involved a truck driver who was fired because he refused to drive equipment he perceived as unsafe. The Supreme Court, reversing the Sixth Circuit and upholding the NLRB, held that although undertaken individually the safety complaint was based in a labor contract right and constituted

40. Internal Revenue Serv. etc. v. Federal Labor Relations Authority, 671 F.2d 560, 564 (D.C. Cir. 1982).
41. The rationale for the test, though, is solid. The Weingarten Court noted that “a probe of an employee’s subjective motivations...would cause...endless and unreliable inquiry...” Weingarten, 420 U.S. at 257 n.5 (citing NLRB v. Gissel Packing Co., 395 U.S. 575 (1969)).
44. Id. (citing Kellogg Co. v. NLRB, 457 F.2d 519, 522-23 (6th Cir. 1972)).
45. Eastex, 437 U.S. at 567 n.17 (citing NLRB v. Leslie Metal Arts Co., 509 F.2d 811 (6th Cir. 1975); Shelly & Anderson Mfg. Co. v. NLRB, 497 F.2d 1200 (9th Cir. 1974)).
46. City Disposal, 104 S. Ct. at 1505.
concerted activity protected under section 7 of the NLRA. Unlike the majority of the circuits, the Court does not view the reference to "concerted activities" under section 7 as limiting language. Further, the decision rejects the plain language argument by noting that all the circuits have recognized that some individual activity falls within section 7, such as when an employee acts as a representative for other employees or attempts to induce employees to collective action.

The Weingarten Court only delves into a cursory discussion of the requirement of "concerted activity for mutual aid or protection." Moreover, that discussion pertains only to the particular facts of that case. The Court notes:

The Board’s holding is a permissible construction of "concerted activities for...mutual aid or protection".... The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of § 7 that “[e]mployees shall have the right...to engage in...concerted activities for the purpose of...mutual aid or protection." 48

However, the Court was forced to consider this specific issue just three years later in Eastex, Inc. v. NLRB. In this case Eastex, Inc.’s union employees sought to distribute a union newsletter to employees in any of the company’s “non-working” areas. The company refused, claiming that the union had other means by which to communicate with employees. The union then filed an unfair practice charge with the NLRB. The union asserted that the company was denying the employees’ right to act in concert for mutual aid or protection, a right conferred by section 7 of the National Labor Relations Act. “Because of apparent differences among the Courts of Appeals as to the scope of rights protected by the ‘mutual aid or protection’ clause of § 7...,” the Supreme Court granted certiorari. 50

In disputing the NLRB order, Eastex claimed that since the newsletter dealt primarily with general political-labor issues and not a "specific dispute between employees and their own employer," 51 then the language of section 7 would not apply. Moreover, Eastex claimed “that employees lose their protection under the ‘mutual aid or protection’ clause when they seek to improve terms and condi-
tions of employment or otherwise improve their lot as employees through channels outside [i.e. in this case, the public, political area] the immediate employee-employer relationship.\textsuperscript{52}

However, in enforcing the NLRB order, the Court disposed of both of the contentions. Citing to a long line of cases, the court noted,

\textquote[It has been held that the “mutual aid or protection” clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums, and that employees’ appeals to legislators to protect their interests as employees are within the scope of this clause.\textsuperscript{53} (footnotes omitted).]

Yet the Court held back and refused to commit itself to the question of what specific activities may constitute “concerted” activities in the instant context.\textsuperscript{54} The Court would only go so far as to characterize the distributing of a union newsletter as “concerted activity.”

Nevertheless, the Court did admit that while “some concerted activity bears a less immediate relationship” to the immediate employee-employer relationship than other concerted activity, there is some point where this “relationship becomes so attenuated so that it does not fall within the ‘mutual aid or protection’ clause.”\textsuperscript{55} But, in denying Eastex’s arguments, the Court refused to note when that point of attenuation does or would occur. Instead, the Court ruled that this determination rests, not with the Court, but better yet with the NLRB.\textsuperscript{56}

\textsuperscript{52. Id. at 564-65.}
\textsuperscript{53. Id. at 565-66 (footnotes omitted).}
\textsuperscript{54. Id. at 566 n.15.}
\textsuperscript{55. Id. at 567-68.}
\textsuperscript{56. Id. at 568 (citing to Republic Aviation Corp. v. NLRB, 324 U.S. at 793; Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941)). Moreover, the Court dropped an extensive, somewhat clarifying footnote: See Ford Motor Co., 221 N.L.R.B. 663, 666 (1975), enforced, 546 F.2d 418 (CA3 1976) (holding distribution on employer’s premises of a “purely political tract” unprotected even though “the election of any political candidate may have an ultimate effect on employment conditions”); cf. Ford Motor Co. (Rouge Complex), 233 N.L.R.B. 698, 703 (1977) (decision of Administrative Law Judge) (concession of General Counsel that distributions on employer’s premises of literature urging participation in Revolutionary Communist Party celebration, and of Party’s newspaper, were unprotected). The Board has not yet made clear whether it considers distributions like those in the above-cited cases to be unprotected altogether, or only on employer premises.

In addition, even when concerted activity comes within the scope of the “mutual aid or protection” clause, the forms such activity may permis-
Despite the Supreme Court's clarification, albeit somewhat limited, of the "concerted activity for mutual aid or protection" clause in *Eastex, Inc.*, considerable confusion remains. The Third and Ninth Circuits found themselves at odds over the application of this language in two recent cases concerning the same petitioners. In *E.I. du Pont de Numours and Co., Inc. v. NLRB*, the Ninth Circuit denied enforcement of an NLRB order which found that an employee's *Weingarten* rights had been violated when that employee refused to sign a monthly performance evaluation with a co-employee present as a witness. The Ninth Circuit reasoned that "the request of the single employee is not 'concerted activity'; it is the backdrop of other group activity that transforms it into concerted action." The court noted that the employee admitted "that he did not seek a co-employee's advice, but wanted someone around only to document du Pont's position...

The Third Circuit had a case almost on point with this Ninth Circuit case. In *E.J. du Pont de Numours and Co. (Chestnut Run) v. NLRB*, the court of appeals held that a single employee's request for a witness was indeed "concerted activity." In alluding to the Ninth Circuit's decision the court noted:

sibly take may well depend on the object of the activity. "The argument that the employer's lack of interest or control affords a legitimate basis for holding that a subject does not come within 'mutual aid or protection' is unconvincing. The argument that economic pressure should be unprotected in such cases is more convincing." Getman, *The protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. Rev. 1195, 1221 (1967). *Eastex*, 437 U.S. at 556 n.18.
57. 707 F.2d 1076 (9th Cir. 1983).
58. Id. at 1079.
59. Id.
60. 724 F.2d 1061 (3rd Cir. 1983).
61. In determining "concerted activity" the court found:
In finding the Board's construction to be inconsistent with the Act, the Court in *Weingarten* identified five justifications for the Board's decision. First, the Court noted that although the employee alone has an immediate stake in the outcome of the investigatory interview, nevertheless the union representation whose participation is sought would help safeguard the interests of the entire bargaining unit by exercising vigilance over the fairness and uniformity of the employer's disciplinary practices. Second, the Court suggested that the representative's presence provides an assurance to other workers that they, too, can obtain such aid and protection if and when they need it. Third, the Court stated that the presence of a representative serves the most fundamental purposes of the Act in helping to eliminate and redress the perceived imbalance of economic as well as of bargaining power between labor and management. Fourth, the presence of a representative could,
We believe the Ninth Circuit's interpretation of *Weingarten* to be foreclosed by the Supreme Court's expansive interpretation of Section 7 in the *Weingarten* opinion itself. In particular, the Court's citation, apparently with approval, of *Mobil Oil Corp. v. NLRB*, 482 F.2d 842, 847 (7th Cir. 1973), cited at 420 U.S. at 260, 95 S. Ct. at 965, suggests 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.62

There was, however, one major factual difference between the two cases. The Ninth Circuit's case was a "non-union" setting while the Third Circuit's case was a "union" setting (i.e. requesting any co-worker vis-a-vis a "union" representative). However, this is not a crucial difference. As the Third Circuit noted:

Nowhere in the *Weingarten* opinion is its holding expressly grounded on the existence of a union. Nor can it be suggested that the *Weingarten* Court was unaware of the possible application of its holding to a non-union context, for Justice Powell noted this potential extension of the majority's analysis in his dissent. 420 U.S. at 270 n.1, 95 S. Ct. at 969 n.1. Had the *Weingarten* majority wished to limit its holding to the union setting, it could have done so explicitly.63

Nonetheless, this impasse between the circuits has become moot, at least for now, since the Third Circuit's decision has been vacated and remanded for other reasons at the request of the NLRB.64 The court, though, in remanding did take note of the potential conflict with the Ninth Circuit. The court observed in a footnote:

It is noteworthy that a remand may very well lessen the ultimate expenditure of judicial resources necessary to resolve the § 7 issue in this case. Since our previous opinion enforcing the Board arguably

the Court found, assist a "fearful and inarticulate" employee to relate accurately the incident being investigated. This may prove particularly beneficial to the employer, since by helping the parties to get to the bottom of the incident more efficiently, valuable production time may be saved. Finally, the Court recognized that the representative may be able, through informal discussion and persuasion conducted at the threshold, to serve as the catalyst in the amicable resolution of disputes, and, in the union context, be able to discourage unjustified grievances. (citations omitted)

*E.I. Dupont*, 724 F.2d at 1065.


63. *Id.* at 1065.

64. *Id.*

conflicted with the Ninth Circuit’s decision in *E.I. Du Pont de Nemours & Co. v. NLRB*, 707 F.2d 1076 (9th Cir. 1983), the Supreme Court might have been impelled to grant certiorari in order to announce uniform law on the subject. By remanding, we provide the Board an opportunity to articulate an approach that could avoid intercircuit conflict and obviate the need for Supreme Court review.65

Absent a definitive ruling from the Supreme Court, the circuits remain, at best, hesitant in setting forth a definite standard on “concerted activity for mutual aid or protection.” The result is a hodgepodge of circuit standards most of which, though, eventually rely on the Board’s discretion, which may indeed be the ultimate standard.66

C. ROLE OF THE REQUESTED REPRESENTATIVE

The *Weingarten* Court specifically adopted the Board’s rationale that first, “[t]he employer has no obligation to justify his refusal to allow union representation, and despite refusal, the employer is free to carry on his inquiry without interviewing the employee...,”67 and second, “the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview.”68 Thus, the question becomes “what can the representative do other than serve as a witness?” The Court suggested that a union representative could elicit favorable facts, thus saving the employer production time.69

However, there is no delineation between these two positions (i.e. no duty to bargain with representative; representative as an assist to investigatory process) as to what is suggested and what is required. The Fifth Circuit recognized this possible contradiction by commenting that

>[t]he court outlined the “contours and limits” of the right to union representation...noting among them that [t]he employer has no duty to bargain with the union representative at an investigatory interview.” In its very next breath, however, the Court defined the role of the union representative by quoting from the Board’s brief:

68. Id. at 259.
69. Id. at 263.
"The representative is present to assist the employee, and may attempt to clarify facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation."

The fact situations confronting the Fifth Circuit were all Weingarten situations wherein the company refused the union representative any role in the investigatory interview other than as silent witness, despite the representatives' attempts to assist and participate at the employees' requests. The court precludes this kind of company action by holding that "put simply, the union representative is there to help the employee in his effort to vindicate himself...[the company cannot have reasonably read Weingarten]...to leave open the possibility that the employer might foreclose the union representative from any participation...." In a footnote the court stated that "a silent observer offers little in the way of 'aid and protection.'"

In citing to NLRB v. Texaco, Inc., a Ninth Circuit case, the Fifth Circuit reasoned that Texaco simply recognized that interpreting Weingarten to preclude representative participation is contrary to other language in Weingarten where the court speaks of an active role to be taken by the representative.

However, many times the role of the union representative or any co-employee is simply to be a "silent witness," particularly in the context of disciplinary action. In those cases, Weingarten applicability hinges on whether the interview is investigatory or purely disciplinary.

D. WHAT CONSTITUTES AN INVESTIGATORY INTERVIEW

The Weingarten Court did not go beyond the plain language of "an investigatory interview which he the employee reasonably believes may result in the imposition of discipline...." However, the NLRB did differentiate between an investigatory hearing (i.e. a meeting to elicit facts or information) and a disciplinary hearing (i.e. a hearing designed to reprimand, suspend, or terminate an employee). In Baton Rouge Water Works Co., the employee was reaching the end of

70. NLRB v. Southwestern Bell Telephone Co., 730 F.2d 166, 168-69 (5th Cir. 1984).
71. Id. at 172.
72. Id. at 172 n.6.
73. 659 F.2d 124 (9th Cir. 1981).
74. 730 F.2d at 172 (citing NLRB v. Texaco, 659 F.2d 124, 126 (9th Cir. 1981)).
75. Weingarten, 420 U.S. at 262.
her probationary employment period. Her supervisors believed that she was not "working out" and decided to terminate her at the conclusion of the probationary period. At the meeting in which the supervisor informed the employee of her termination, the employee requested a union representative. The request was denied and as a result the employee filed a grievance which resulted in the NLRB hearing. 77

The employee maintained that her Weingarten rights had been violated. In response, the Board found that a union representative only serves a legitimate purpose when information is being elicited from the employee. However, in a meeting that only informs the employee of action upon a previous disciplinary decision Weingarten was held not to apply. 78 Nevertheless, the Board did issue the following caveat:

> We stress that we are not holding today that there is no right to the presence of a union representative at any "disciplinary" interview. Indeed, if the employer engages in any conduct beyond merely informing the employee of a previously made disciplinary decision, the full panoply of protections accorded the employee under Weingarten may be applicable. Thus, for example, were the employer to inform the employee of a disciplinary action and then seek facts or evidence in support of that action, or to attempt to have the employee admit his alleged wrongdoing or to sign a statement to that effect, or to sign statements relating to such matters as workmen's compensation, such conduct would remove the meeting from the narrow holding of the instant case, and the employee's right to union representation would attach. In contrast, the fact that the employer and employee thereafter engaged in a conversation at the employee's behest or instigation concerning the reasons for the previously determined discipline will not, alone, convert the meeting to an interview at which the Weingarten protects apply. 79

The Fifth Circuit picked up this NLRB decision, referred to as the Baton Rouge Water Works exception, but put it in a slightly different perspective. In Anchortank, Inc. v. NLRB, 80 the Fifth Circuit adopted the Baton Rouge Water Works exception, but instead of treating it as a separate Weingarten requirement, ruled that concerted activity for mutual aid or protection is not implicated when the interview does nothing except inform the employee of a previous disciplinary decision. 81 The Fifth Circuit went on to say that it is crucial for the

77. Id. at 997.
78. Id.
79. Id.
80. 618 F.2d 1153 (5th Cir. 1980).
81. Id. at 1168.
Board and Court to know exactly what went on at "the meeting." Without such knowledge, it is impossible to "characterize the interview as 'disciplinary' or 'investigatory.'" 82

Although the courts have addressed the four immediate questions posed by Weingarten, they have done so only rudimentarily and with some confusion and hesitancy. Amidst this confusion, two 1983 cases have shown the rigor which courts must use in applying the Weingarten standards.

IV. APPLICATION OF WEINGARTEN

The Fifth Circuit was presented with what it described as "a close case" and one in which "we might reach a different conclusion if we were deciding the question in the first instance..." in Gulf State Manufacturing, Inc. v. NLRB. 83 The Weingarten issue developed when Vincent Scott, a Gulf States employee, left work early without notifying his supervisor. Scott maintained that the early departure was necessitated by his need for back medication that he had forgotten at home. Scott had been disciplined once before for refusing a work assignment due to dizziness caused by the back medication.

The next day, Scott was summoned by the production manager. On route to the meeting, Scott asked his supervisor if the union president, a co-worker, could be present at the meeting with the production manager. Scott was told that this was not possible since the company was not bargaining with the union. 84

At the meeting, the production manager, with Scott's supervisor also present, told Scott that he was being given a written disciplinary notice for his leaving early the day before. Scott protested, gave his reasons for leaving, and claimed that the company was anti-union. Scott was then given the disciplinary notice. The meeting ended. At no time during the meeting did Scott request union representation. 85

In the subsequent unfair labor practice proceeding, the administrative law judge found that Scott's request for union represen-

82. Id. at 1167-69.
83. 704 F.2d 1390, 1395 (5th Cir. 1983).
84. The Fifth Circuit noted this event with the following footnote: "The Company and the Union did not have any bargaining sessions between late 1977 and October 1980. (Scott's meeting with the production manager was Feb. 13, 1980.) We note, however, that Eaves' (the supervisor's) response was inappropriate: contract bargaining and Weingarten representation are not related functions...." 704 F.2d at 1392 n.1.
85. Id. at 1392-93.
tation fell within the *Baton Rouge Water Works Co.* exception since Scott’s meeting with the production manager “was solely for the purpose of imposing previously-determined discipline.” Thus *Weingarten* rights did not attach.

In the proceedings before the NLRB and eventually the Fifth Circuit, Gulf States also argued that since Scott did not make his request known to the production manager himself, he did not invoke his *Weingarten* right for union representation. However, as the court noted, the facts were clear that Scott requested union representation from his supervisor and his supervisor was present at the meeting. The Fifth Circuit noted:

In *Lennox*, we held that an employee had sufficiently invoked his *Weingarten* right when the supervisor to whom the request was made was present at the interview, even though the company official who conducted the interview was unaware of the request and the supervisor to whom the request was made did not know what the full scope of the interview would be. Here the supervisor was present throughout Scott’s meeting with the production manager; thus, under *Lennox*, Scott’s request...was sufficient to give rise to a *Weingarten* right.\(^8\)

However, the company also argued that the *Baton Rouge Water Works Co.* exception should be applicable. In *Baton Rouge*, the NLRB held that no section 7 right to the presence of a union representative existed at a meeting held solely to inform the employee of a previously made disciplinary decision.\(^9\)

While Scott’s meeting with the production manager seems to fit into the NLRB’s *Weingarten* exception the NLRB has clearly indicated that this exception is to be narrowly construed. In fact, the NLRB pointed out further along in the *Baton Rouge Water Works Co.* case,

\[\text{[I]f the employer engages in *any conduct* beyond merely informing the employee of a previously made disciplinary decision...[then] *Weingarten* may be applicable...[W]here the employer to inform the employee of a disciplinary action and then seek facts or evidence in support of that action...such conduct would remove the meeting from the narrow holding of the instant case...}\]

Both the administrative law judge as well as the NLRB found

---

86. 246 N.L.R.B. 995 (1979), enforced in Anchortank, Inc. v. NLRB, 618 F.2d 1153, 1166-68 (5th Cir. 1980).
88. *Id.* at 1394.
89. *Id.* at 1394-95.
90. 246 N.L.R.B. at 997 (emphasis added).
that the production manager had asked Scott, during the course of the "disciplinary hearing," why he had left without informing a supervisor. This question, seemingly, is enough to invalidate the *Baton Rouge Water Works Co.* exception since the employer was seeking "facts or evidence in support of [the disciplinary] action...." 91 The NLRB agreed, reversing the administrative law judge; the Fifth Circuit affirmed, somewhat hesitantly, by holding

[while this is a close case, and we might reach a different conclusion if we were deciding the question in the first instance, the NLRB's] interpretation of the conversation [between Scott and the production manager] is clearly a permissible one.... Scott did instigate the conversation, but the resulting discussion was not confined to an explanation of the reasons for the decision to discipline him, rather, the Board could and did find that the [production manager] sought evidence to justify the discipline. 92

The Sixth Circuit was presented with a similar situation in *ITT Lighting Fixtures v. NLRB.* 93 *ITT Lighting Fixtures*, a Mississippi-based manufacturing plant, was opposed to an employee unionization campaign. However, in the resulting union election, the UAW won by just twenty-two votes out of approximately three-hundred and forty employees. The company contested the election and refused to bargain with the UAW. During the pendency of the election campaign, a pro-union employee, Terry Williams, left his shift one-half hour early in order to distribute leaflets at the main gate while the on-coming shift was reporting for work.

Williams was called before the personnel administrator and two other supervisors the next day and questioned about his unauthorized leave. Williams asked to have another employee present; he was denied this. Williams then refused to answer any questions and was given, at the conclusion of the meeting, 94 a three day suspension.

*ITT* contended that *Weingarten* was not applicable to Williams' situation. The company claimed that the decision to suspend Williams had been made *prior* to the meeting. The court, however, following the same line of logic as the Fifth Circuit in *Gulf States Manufacturing Inc.*, held that any attempt to elicit further information from the

91. *Id.*
92. *Gulf States*, 704 F.2d at 1395.
93. 719 F.2d 851 (6th Cir. 1983).
94. The court notes however that "there is conflicting testimony as to whether the managers notified Williams of his suspension at the meeting described above, possibly even before the questioning began, or at a second meeting later that morning." *Id.* at 853 n.1.
employee pertaining to an even pre-decided disciplinary action triggers a *Weingarten* situation. Citing the *NLRB v. Texaco, Inc.*, the court held that because the meeting was investigatory, the fact that the decision was previously made was of no consequence. 95 The court also clarified that

had the meeting with Williams included *only the notification of the suspension*, we would agree with the company that *Weingarten* does not apply here. However, even if we accept the Company's version of the sequence of events—that Williams was notified of the suspension prior to the questioning—we still find a *Weingarten* violation. It is clear from the record that the managers wished to elicit further information pertaining to the suspension. 96

It then seems irrelevant that Williams refused to answer or that the managers failed to get *any* further information concerning Williams' actions. The conclusion is that if *any questioning* of the employee occurs during a disciplinary meeting, regardless of its sequential relationship with the nature of discipline and regardless of the employee's answers or failure to answer, the meeting becomes an investigatory one and *Weingarten* rights can attach. 97

Nevertheless, ITT also maintained that *Weingarten* was not applicable to Williams' situation since there was no certified union to call upon for representation. The company claimed that *Weingarten* simply did not apply when there was no union involvement. 98

However, the court sidesteps this potential hurdle by pointing out Williams' union activities, the pendency of union certification, and the tentative approval of the union by the employees.

Finally, ITT maintained that *Weingarten* was not applicable to Williams' situation because Williams requested a fellow employee only as a potential corroborating witness, not as a "*representative*" to safeguard Williams' rights. ITT claimed that *Weingarten* "envisioned

---

95. *Id.* at 853 (citing *NLRB v. Texaco, Inc.*, 659 F.2d 124 (9th Cir. 1981)).
97. *Weingarten* rights are not self-executing. There must be a request by the employee. In *Weingarten*, the Supreme Court adopted the NLRB's rationale in *Mobil Oil Corp.*, 196 N.L.R.B. 1052 (1972): "*[T]he right to representation arises only in situations where the employee requests representation...*" *Weingarten*, 420 U.S. at 257 (emphasis added).
98. While the courts may hesitate on this issue, the NLRB has not. In *Materials Research Corp.*, 262 N.L.R.B. 1010 (1982), the Board held that nonunion employees have the right to representation at an investigatory interview. See *Stickler, Limitations on an Employer's Rights to Discipline and Discharge Employees, 9 EMPL. REL. L.J. 70 (1983).* See also *Herron, Investigation of Employee Misconduct—Must the Union Be There?, 3 EMPL. REL. L.J. 255 (1977).*
active participation by the union representative in aid of the employee...,” not merely “a witness to corroborate his version of what happened in a later grievance procedure.”

The court agreed that Williams’ sole interest may have been in having a corroborating witness. However, there is nothing at all improper with this motive. The court indicated that “the Supreme Court implied in Weingarten that one advantage of allowing the employee to be represented at an investigatory confrontation was to assure that the employee would enjoy ‘recourse to the safeguards of the Act.’” The court then summarily dismissed ITT’s contention by concluding that Williams did indeed have a valid concern in requesting the union representative. The court recognized that Williams sought to protect himself from any negative consequences of his pro-union activity.

Ironically, though, the court made no mention of the seemingly legitimate concern that ITT had with Williams’ leaving without authorization, the reason for the meeting in the first place. It does not appear to be contested that Williams indeed left work early without authority. Yet, it seems that this valid concern is put aside in light of the company’s failure to afford Williams his Weingarten rights. It is not noted, however, what final determination the NLRB took in regard to Williams’ suspension. The NLRB ruling was simply enforced.

V. Remedies

An open question remains, concerning what remedy(ies) is appropriate in light of a Weingarten violation.

Clearly, if an employer conducts investigatory hearings without affording Weingarten rights to the employees, the Board may issue

99. ITT Lighting Fixtures, 719 F.2d at 854 (emphasis added). The court, apparently bothered by the Company’s contention, further supports its “concerted activity” finding by citing a number of similar circumstances: NLRB v. Columbia University, 541 F.2d 922 (2d Cir. 1976), where the Second Circuit decided that a request for a non-union employee representative to be present was protected under Weingarten. A crucial fact in that case was that the employees involved in Columbia University had a history of group activity protesting various workplace rules, although they were not formally organized as a union. See also Anchortank, Inc. v. NLRB, 618 F.2d 1153 (5th Cir. 1980), where the court held that an employee’s request for another employee’s presence is, in itself, “concerted activity” and thus satisfying of that particular Weingarten requirement. Id. at 854-56.

100. ITT Lighting Fixtures, 719 F.2d at 853.

101. Id. (citing Weingarten, 420 U.S. at 262).

102. ITT Lighting Fixtures, 719 F.2d at 856.
and a court enforce a "cease and desist" order. However, if an employee is indeed disciplined as a result of the investigatory hearing, what status should the Board and subsequently the court afford the discipline? The fact in Weingarten did not at all address this issue. However, the Supreme Court did address a comparable issue in International Ladies' Garment Workers Union v. Quality Manufacturing Co. The Court ruled that the firing of two employees was directly related to those employees' insisting upon their statutory rights under the NLRA. Thus, reinstatement and back pay was the appropriate remedy. This ruling is the natural corollary to the pre-Weingarten decision in Fibreboard Paper Products Corp. v. NLRB in which the Court noted that "[t]he legislative history of the NLRA was designed to preclude the Board from reinstating an individual who had been discharged because of misconduct."

This rationale has been adopted and summarized as this general rule: "While the Board had broad authority to restore the status quo and make whole any losses suffered by the employees because of unfair labor practice,...it does not have the power to order reinstatement or back pay for employees discharged for obvious personal misconduct...."

103. The employee was not disciplined due to the confusion of company policy; company policy was subsequently changed and clarified.
106. Id. at 217. The Court supported this conclusion by footnoting the following: The House Report states that the provision was "intended to put an end to the belief, now widely held and certainly justified by the Board's decision, that engaging in union activities carries with it a license to loaf, wander about the plants, refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct." H.R. Rep. No. 245, 80th Cong., 1st Sess., 42 (1947). The Conference Report notes that under 10(c) 'employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activities, or for other cause [interfering with war production]...will not be entitled to reinstatement.' H.R. Conf. Ref. No. 510, 80th Cong., 1st Sess., 55 (1947).
107. NLRB v. Potter Electric Signal Co., 600 F.2d 120, 124 (8th Cir. 1979) (citing Hinson v. NLRB, 428 F.2d 133, 136 (8th Cir. 1970)). In Potter Electric Signal, the court in denying the Board's enforcement of employee reinstatement and back pay, found that "[t]he record is clear that the employees were not discharged for requesting union assistance...the employees were discharged for a fight that resulted in shutting down the production line...." Id. at 123 (emphasis added).
In Montgomery Ward and Co. v. NLRB the Eighth Circuit reviewed a Board order to reinstate two Wards employees who had been discharged for admittedly stealing goods from Wards. Wards had failed to provide requested union representation to the two when Ward supervisors interviewed them at the investigatory meeting. Upon review, the Board issued a "cease and desist" order as well as an order to reinstate and issue back pay to the two employees. The court agreed with the Board at least in regard to the "cease and desist" order. The court held that the board was correct in finding that the employees were improperly denied union representation at the investigatory interviews. However, the court refused to enforce the reinstatement and back pay order since "the employees affected their own discharge by stealing not by asking for union representation."

A further elaboration on this rule was developed by the Seventh Circuit in NLRB v. Illinois Bell Telephone Co., a case in which an employee was discharged for alleged dishonest toll-call billings. However, it was unclear where the company received its information concerning the dishonesty. There were allusions in the record that the employee's "discharge was not based solely upon her written statement which was obtained during the unlawful interview." However, during that investigatory meeting, the employee rightfully asked for a union representative and was denied. Thus, this court implied that if the discharge was indeed premised upon a written statement obtained at an unfair investigatory meeting, then the discharge itself would be illegal. Therefore, in this case, the court remanded the case back to the Board to determine whether evidence gathered outside the investigatory meeting existed to support the discharge.

This approach is consistent with the Board's own 1980 ruling in Kraft Foods, Inc. which held that once an investigatory interview is held contrary to Weingarten rights, then the employer must show that "its decision to discipline the employee in question was not based on information obtained at the unlawful interview." Yet, the Ninth Circuit, without elaboration, has held that the Board's interpretation in Kraft Foods, Inc. is incorrect and unen-

108. 664 F.2d 1095 (8th Cir. 1981).
109. Id. at 1096.
110. Id. at 1096-97.
111. Id.
112. 674 F.2d 618 (7th Cir. 1982).
113. Id. at 623.
114. 251 N.L.R.B. 598 (1980).
115. Id. at 598.
forceable. The Ninth Circuit found that the NLRA does not permit such a construction. Thus, the standards imposed by the Seventh Circuit in Illinois Bell seem to conflict with the Ninth Circuit's standards. Again, the circuits have no guidance and must construct criteria in a makeshift manner.

The Weingarten tests, standards and criteria have been created by the Supreme Court. However, actual interpretation and application have been left to the circuits. Until the Supreme Court resolves these differences or until the circuits accept the Board's ruling carte blanche, an unlikely event, then these makeshift standards will continue to create inconsistent rulings within the circuits in applying and interpreting Weingarten rights.

116. Pacific Telephone and Telegraph Co. v. NLRB, 711 F.2d 134, 137-38 (9th Cir. 1983).