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## Labor Relations - Unfair Labor Practices - Employee's Right to Mutual Aid or Protection - Employee's Right to Presence of Union Representative at an Investigatory Interview

Thomas A. Berret

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# Recent Decisions

LABOR RELATIONS—UNFAIR LABOR PRACTICES—EMPLOYEE'S RIGHT TO MUTUAL AID OR PROTECTION—EMPLOYEE'S RIGHT TO PRESENCE OF UNION REPRESENTATIVE AT AN INVESTIGATORY INTERVIEW—The Supreme Court of the United States has upheld a finding by the National Labor Relations Board that an employer's denial of an employee's request for the presence of a union representative at an investigatory interview which the employee reasonably believes might result in disciplinary action is an unfair labor practice.

*NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

In June, 1972, Leura Collins was interviewed by the manager and a member of the security department of the J. Weingarten, Inc. store where she worked dispensing food at a lobby operation. The interview concerned a report that Collins had not paid in full for an item she had purchased. During her questioning Collins made several requests for the presence of a union representative, but each request was denied.<sup>1</sup> After she was cleared of the original charge, Collins spontaneously remarked that all she ever took from the store was her free lunch. As a result, the interview was reopened; free lunches were not provided at the lobby food operation where Collins worked, although they were provided at the retail lunch counter operation where Collins had formerly been assigned.<sup>2</sup> Collins again requested and was again denied the presence of a union steward during this phase of the interview. After questioning Collins, Loss Prevention Specialist Hardy prepared a statement including an estimated bill for past lunches, which Collins refused to sign.<sup>3</sup>

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1. The administrative law judge found that while Collins may have been inarticulate, she had effectively expressed her request for a union representative's presence; she had legitimately understood an answer that such representation was not necessary as a denial of her request. *J. Weingarten, Inc.*, 202 N.L.R.B. 446, 448 (1973).

2. There was some confusion on company policy regarding free lunches. *J. Weingarten, Inc.* operated a chain of some 100 stores. The older stores had retail lunch counters, but in the newer stores counters had been replaced by lobby food operations. Collins had been informed that she was entitled to a free lunch when she was hired at a store which had a retail lunch counter operation; according to her own uncontradicted testimony, she had never been informed that the policy was different when she was transferred to a newer store which had a lobby food operation. Indeed, most if not all of the employees where she worked, including the lobby department manager, took free lunches. *Id.* at 446-47.

3. It does not appear that Collins was ever disciplined or compelled to make restitution

After Collins told her union steward of these events, the union<sup>4</sup> filed an unfair labor practice charge based on the denial of her requests for union representation.<sup>5</sup> The issue before the National Labor Relations Board<sup>6</sup> was whether an employer's denial of an employee's request for representation at an investigatory interview<sup>7</sup> was an unfair labor practice under section 8(a)(1) of the National Labor Relations Act<sup>8</sup> because this denial interfered with, restrained, or coerced the right of an employee, guaranteed by section 7 of the Act, "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."<sup>9</sup> The Board affirmed the administrative law judge's conclusion that denial of union representation constituted an unfair labor practice.<sup>10</sup> The Court of Appeals for the Fifth Circuit, however, denied enforcement of the Board's cease and desist order directing the company to grant employee requests for representation at investigatory interviews.<sup>11</sup>

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for the lunches she received. She was instructed by the store manager, however, not to discuss the interview with anyone because it was a private matter between her and the company. *Id.* at 448.

4. The Union involved was Retail Clerks Local 455.

5. The union also alleged an unfair labor practice had been committed because the company had unilaterally changed the policy regarding free lunches after Collins' interview, thereby violating § 8(a)(5) of the National Labor Relations Act. *See* note 44 *infra*. The National Labor Relations Board dismissed this charge because the issue could be determined through the grievance procedure established in the parties' collective bargaining contract; there was no evidence that arbitration of the dispute would not result in a decision compatible with the purposes of the Act. The Board retained jurisdiction in order to consider possible future charges that the dispute had not been settled or promptly submitted to arbitration, that the proceedings had not been fair or that they had reached a result repugnant to the National Labor Relations Act. 202 N.L.R.B. at 449-50.

6. Hereinafter referred to as the Board.

7. This issue has not been extensively litigated in the context of investigatory interviews. *Lafayette Radio Electronics Corp.*, 194 N.L.R.B. 491, 492 (1971).

8. National Labor Relations Act §§ 1-18, 29 U.S.C. §§ 151-68 (1970) [hereinafter referred to as the Act].

9. Section 8(a)(1) provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 . . . ." *Id.* § 158(a)(1). Section 7 provides that employees shall have the right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." *Id.* § 157.

10. 202 N.L.R.B. at 446. Member Kennedy dissented on grounds discussed at note 17 *infra*. Member Penello dissented because it was clear from the record that the employer was conducting an investigatory, rather than a disciplinary, interview. 202 N.L.R.B. at 446 n.2.

11. *NLRB v. J. Weingarten, Inc.*, 485 F.2d 1135 (5th Cir. 1973). The Board had ordered the company to cease and desist from requiring any employee to participate in an interview without representation if the employee had requested his union representative's presence and had reasonable grounds to believe that the matters to be discussed might result in discipli-

The United States Supreme Court granted certiorari of the Board's appeal<sup>12</sup> and reversed the circuit court's decision.<sup>13</sup>

### THE DECISION OF THE COURT

The Court found the Board's interpretation of section 7 of the Act was a permissible construction of the language by the agency charged with enforcing the Act.<sup>14</sup> The Court held that when an employee seeks assistance in an investigatory encounter with his employer, he engages in a protected concerted activity within the literal wording of section 7.<sup>15</sup> The Court discussed the nature and extent of the right to union representation at investigatory interviews as recently developed by the Board in *Quality Manufacturing Co.*<sup>16</sup> and *Mobil Oil Corp.*<sup>17</sup> According to these decisions, the right

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nary action against him. 202 N.L.R.B. at 450. The court agreed that a basic purpose of § 7 was to allow employees to engage in concerted activities for their mutual aid or protection. It found, however, that there was no need for protection at an investigatory interview, and an extension of the Act to such preliminary encounters between the employer and the employee was an overbroad interpretation of § 7. 485 F.2d at 1138. The court's position was consistent with its earlier decision in *Texaco, Inc. v. NLRB*, 408 F.2d 142 (5th Cir. 1969), where it held that an employer's denial of an employee's request for representation at an interview which dealt only with eliciting facts and imposed no consequences as the facts were revealed did not violate §§ 8(a)(1) or 8(a)(5) of the Act. *Id.* at 145. The court rejected the Board's attempt to distinguish this case from *Weingarten* on the basis that *Texaco* was essentially a refusal to bargain case which did not put in issue any other § 7 rights. The court adopted in full the language of the Fourth Circuit in *NLRB v. Quality Mfg. Co.*, 481 F.2d 1018 (4th Cir. 1973), which stated that by necessary implication § 7 rights were involved in cases concerning the denial of representation at employer-employee interviews. 485 F.2d at 1137.

12. *NLRB v. J. Weingarten, Inc.*, 416 U.S. 969 (1974). The Court set this case for argument with *ILGWU v. Quality Mfg. Co.*, 416 U.S. 968 (1974), which dealt with the same issue. In *Quality*, an employee was discharged for refusing to attend an interview without representation. Two union stewards were suspended and one of them was ultimately dismissed for seeking to represent the employee.

13. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). On the basis of its decision in *Weingarten*, the Court also reversed the Fourth Circuit's contrary determination in *Quality*. *ILGWU v. Quality Mfg. Co.*, 420 U.S. 276 (1975).

14. 420 U.S. at 260.

15. *Id.* See notes 23-26 and accompanying text *infra*.

16. 195 N.L.R.B. 197 (1972), *enforcement denied*, 481 F.2d 1018 (4th Cir. 1973). See note 12 *supra*. Member Kennedy had dissented because the § 8(a)(1) violation had been found on the basis of the employee's subjective state of mind, which was contrary to the sound interpretation and administration of the Act. 195 N.L.R.B. at 201. He also felt that provisions for union representation at investigatory interviews should be the product of the collective bargaining process. *Id.*

17. 196 N.L.R.B. 1052 (1972), *enforcement denied*, 482 F.2d 842 (7th Cir. 1973). In *Mobil Oil*, the employer interviewed nine employees suspected of theft. Of the four who subse-

arises only where the employee requests representation; the employee may waive the right and face the interview alone.<sup>18</sup> The right exists only if the employee reasonably believes the investigation will result in disciplinary action against him;<sup>19</sup> the reasonableness of his belief is to be measured by objective standards taking into account all of the circumstances.<sup>20</sup> According to the Court, the employer has several alternatives if the employee asserts his right to union representation in an appropriate situation. First, he may inform the employee that there will be no interview unless the employee participates without representation. If the employee refuses, the employer is free to pursue his investigation without the interview and act upon the information he obtains from other sources.<sup>21</sup> Second, once a union representative is admitted to the interview the employer may restrict his participation. The employer has no obligation to bargain with the union at an investigatory interview, and he may insist upon hearing only the employee's version of the facts.<sup>22</sup>

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quently filed a charge, two had requested representation at the interviews. 196 N.L.R.B. at 1052 & n.2. The trial examiner dismissed the charges because there had been no decision to discipline the employees prior to the interviews. In addition, disciplinary action was not probable and those who conducted the interview had no authority to discuss discipline with the employees. *Id.* at 1060. The Board reversed and found an unfair labor practice because the employee was entitled to the protection of a representative due to his reasonable fear that the interview would result in disciplinary action. *Id.* at 1052. Member Kennedy dissented on the basis that the employee had no statutory right to such representation and that any such right had to be based on contract. *Id.* at 1053. He felt the Board's decision was contrary to a long line of cases in which similar denials had not been considered violations of the Act. *Id.* He argued that the Board's new construction would protect employees actually guilty of misconduct while excluding the innocent, since the former was the only group which could reasonably fear discipline or discharge. *Id.* at 1055. He concluded that, as there was no evidence that the employer had an anti-union motivation or any other statutorily proscribed objective, the Board's new restrictions did not carry out the objectives of the Act. *Id.* at 1056. The court of appeals denied enforcement on the grounds that such representation was not concerted activity within the meaning of the Act. *Mobil Oil Corp. v. NLRB*, 482 F.2d 842, 847 (7th Cir. 1973). It also felt that many activities which can be described by the language of § 7 are not in fact protected. *Id.* at 846.

18. 420 U.S. at 257. If the employee should waive the right of union representation, the employer must determine whether the waiver was voluntary and informed. If it was not, continuing the interview without a representative would violate § 8(a)(1). See Comment, *Union Presence in Disciplinary Meetings*, 41 U. CHI. L. REV. 329, 350 (1974).

19. 420 U.S. at 257.

20. *Id.* at 257-58 n.5. The Court felt the key objective fact in this case was that had the employer been convinced Collins was guilty of theft, the collective bargaining agreement would have permitted her discharge without further notice.

21. *Id.* at 258-59. This may be of little value if the employee whom the employer wished to interview is the only individual who has the necessary information.

22. *Id.* at 259-60. Thus, the right to representation is qualified and does not eliminate management's prerogatives in conducting investigatory interviews.

The Court concluded the Board's interpretation was a permissible and beneficial reading of the language of section 7<sup>23</sup> because the right effectuated the basic purposes of the Act to protect employees' rights of free association and self-organization by eliminating the imbalance of economic power created when an employee confronts his employer without assistance.<sup>24</sup> Not only would the presence of a union steward shield an employee from a perceived threat to his continued employment, but it would also safeguard the interests of the entire bargaining unit<sup>25</sup> at the time most beneficial to both employer and employee.<sup>26</sup> The Court agreed that the Board's prior decisions which appeared to preclude the right to representation at investigatory interviews<sup>27</sup> were not controlling, and approved the Board's evolutionary approach to the interpretation of the Act, which reflected changing patterns in industrial life—in this case, the increased use of sophisticated security techniques to detect employee theft.<sup>28</sup> The Court criticized the court of appeals for its independent determination that representation at an investigatory encounter is unnecessary, because the question of when an employee needs assistance is within the province of the Board's cumulative expertise.<sup>29</sup>

The primary dissent,<sup>30</sup> written by Justice Powell and joined by Justice Stewart,<sup>31</sup> noted the right to representation would probably

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23. *Id.* at 262.

24. *Id.* at 261-62.

25. *Id.* at 260-61. The bargaining unit would be protected because representation would insure the employer did not initiate or continue a practice of imposing discipline unjustly. *Id.* The Court felt this was concerted activity comparable to situations where workmen supported the grievance of a fellow worker by going out on strike. *Id.* at 261.

26. The Court suggested that a single employee might be too fearful or inarticulate to accurately relate the incident being investigated, or too ignorant to raise extenuating circumstances. A union representative could assist the employer by eliciting favorable factors, thereby saving valuable production time. *Id.* at 262-63.

27. See notes 44-45 *infra*. The Court specifically reversed the decision in *Texaco, Inc., v. NLRB*, 408 F.2d 142 (5th Cir. 1969) insofar as it held that no § 8 (a)(1) violation occurred when union representation was denied at investigatory interviews. 420 U.S. at 264. See note 11 *supra*.

28. 420 U.S. at 265. Undercover agents, lie detector tests and closed circuit television are now being used by employers to detect employee thefts. *Id.* n.10.

29. *Id.* at 266-67.

30. In an opinion written for both *Weingarten* and *Quality*, Chief Justice Burger stated he would remand the cases to allow the Board to fully explain why the new rule had been established. He felt this was necessary to protect the integrity of the administrative process, since the Board had not justified the "brief but spectacular evolution of the right." *Id.* at 268-69 (Burger, C.J., dissenting).

31. *Id.* at 269-75.

also extend to non-unionized employees<sup>32</sup> and contended that an investigatory interview was not concerted activity within the meaning of the Act.<sup>33</sup> While section 7 protected rights essential to employee self-organization and the exercise of economic pressures in bargaining with the employer, it did not define those rights.<sup>34</sup> The dissenters considered the wide range of purposes served by investigatory interviews, along with the fact that the right to representation at such interviews is frequently an important term in collective bargaining negotiations, and concluded that Congress intended the subject should be left to the bargaining process.<sup>35</sup>

The dissenters also challenged the Court's view that recognition of this right was the result of a logical evolutionary approach by the Board.<sup>36</sup> Justice Powell observed that in *Dobbs Houses, Inc.*,<sup>37</sup> the Board had adopted the trial examiner's analysis that nothing in the Act obliged an employer to permit the presence of a union representative when the employer disciplined or admonished an employee, especially where the employee's conduct was unrelated to legitimate union or concerted activity.<sup>38</sup> He argued that although the Board had modified its position in *Texaco, Inc.*<sup>39</sup> to the extent that it had recognized the union's right to be present at a disciplinary hearing,<sup>40</sup> it was not until *Quality Manufacturing Co.*,<sup>41</sup> decided one year before *Weingarten*, that the Board recognized the right at investigatory interviews.<sup>42</sup> This history of past Board policy did not indicate to the dissenters that the Board's change of position had resulted from a logical evolutionary approach.<sup>43</sup>

#### PRIOR BOARD POLICY

The extension of the right to representation and the conclusion that employees may be engaged in protected concerted activities at

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32. *Id.* at 270 n.1.

33. *Id.* at 270.

34. *Id.* at 273.

35. *Id.* at 273-75.

36. *Id.* at 270-72.

37. 145 N.L.R.B. 1565 (1964).

38. 420 U.S. at 270-71.

39. 168 N.L.R.B. 361 (1967). See note 11 *supra*.

40. 420 U.S. at 271.

41. 195 N.L.R.B. 197 (1972).

42. 420 U.S. at 272.

43. *Id.* at 270-72.

purely investigatory interviews represent a departure from the implications of certain prior Board decisions. Although the Board attempted to distinguish its past decisions on the basis that they involved only section 8(a)(5) violations,<sup>44</sup> the earlier cases nonetheless established that not all interview encounters came within section 7 protected concerted activity. The Board had distinguished fact-finding or investigatory interviews from disciplinary interviews, and had found protected concerted activity only in the latter.<sup>45</sup> In *Lafayette Electronics Corp.*,<sup>46</sup> a decision which preceded *Quality* by only six weeks, the Board had reaffirmed its policy that the union had no right to be present if the interview was investigatory or fact-finding.<sup>47</sup> This standard had been adopted by the courts of appeals which considered the issue.<sup>48</sup>

In order to bring disciplinary interviews which were unrelated to

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44. Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . ." 29 U.S.C. § 158(a)(5) (1970). Collective bargaining is defined as the "performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . ." *Id.* § 158(d).

In *Quality Mfg. Co.*, 195 N.L.R.B. 197 (1972), the Board had argued that the earlier cases had determined the issue only in terms of the employer's duty to bargain with the union, and had not decided the issue as it related to the employee's right to request representation. *Id.* at 198. The circuit courts had rejected this contention in enforcement proceedings. See note 11 *supra*.

45. See, e.g., *Service Tech. Corp.*, 196 N.L.R.B. 845 (1972) (no violation where interview was conducted to find facts concerning threats against other employees); *Illinois Bell Tel. Co.*, 192 N.L.R.B. 834 (1971) (case law was clear that the Act imposed no obligation to grant the right to representation at an interview about the employee's alleged theft of money); *Texaco, Inc.*, 179 N.L.R.B. 976 (1969) (interview concerning employee's alleged refusal to perform assigned work was fact-finding and therefore denial of representation did not violate the Act); *Dayton Typo. Serv., Inc.*, 176 N.L.R.B. 357 (1969) (no violation because the interview was investigatory and the employer had made no decision to discipline); *Jacobe-Pearson Ford, Inc.*, 172 N.L.R.B. 594 (1968) (no violation because management had not reached any decision to discipline employee who had refused to perform assigned work and was only interested in hearing the employee's version of the incident); *Chevron Oil Co.*, 168 N.L.R.B. 574 (1967) (no violation when interview was intended to find facts behind allegations that employees had left work site early and no disciplinary action resulted); *Dobbs Houses, Inc.*, 145 N.L.R.B. 1565 (1964) (Act does not require the presence of a representative when the employer plans to admonish or otherwise discipline an employee).

46. 194 N.L.R.B. 491 (1971)(evidence clearly showed that interrogations had a fact-finding purpose).

47. *Id.* at 492.

48. See, e.g., *NLRB v. J. Weingarten, Inc.*, 485 F.2d 1135 (5th Cir. 1973); *Mobil Oil Corp. v. NLRB*, 482 F.2d 842 (7th Cir. 1973); *NLRB v. Quality Mfg. Co.*, 481 F.2d 1018 (4th Cir. 1973); *Texaco, Inc. v. NLRB*, 408 F.2d 142 (5th Cir. 1969).

union organization within the scope of section 7 protected concerted activity,<sup>49</sup> the Board had to determine that at such interviews employees were engaged in lawful activities<sup>50</sup> for the purpose of collective bargaining or other mutual aid or protection. It appears these terms were closely related; ordinarily, protected concerted activities had been limited to situations involving employee self-organization or collective bargaining,<sup>51</sup> as the Act had been primarily designed to protect those activities.<sup>52</sup> It was subsequently held, however, that the Board could rely solely on the right to engage in concerted activity for the purpose of mutual aid or protection in finding an employer had violated an employee's section 7 rights.<sup>53</sup> Accordingly, the Board found disciplinary action a violation of the Act where the employees' conduct was designed to influence the selection of a person for a position which directly affected their earnings;<sup>54</sup> where the employees circulated a petition as a preliminary step towards obtaining higher wages;<sup>55</sup> where they left their work site to seek legal assistance in obtaining a traditional bonus which had been withheld;<sup>56</sup> or where they acted in concert to obtain permission to work overtime.<sup>57</sup>

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49. The Board has found a § 8(a)(1) violation where the interview concerned the employees' union activities. *United Aircraft Corp.*, 179 N.L.R.B. 935 (1969).

50. Concerted activity is not protected if it is unlawful, even if it is related to self-organization or collective bargaining. *See, e.g., Elk Lumber Co.*, 91 N.L.R.B. 333 (1950) (employer did not violate Act when he discharged employees engaged in unlawful slowdown to obtain higher wages).

51. The two terms are contained in the language of § 7. 29 U.S.C. § 157 (1970). *See Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749 (4th Cir. 1949), where an employee was not protected when circulating a petition concerning a personal conflict with his supervisor; the court held that concerted activities related only to collective bargaining and self-organization.

52. *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975) (§ 7 rights protected not for their own sake but to implement policy of minimizing industrial strife by encouraging collective bargaining); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1964) (central purpose of the Act is to protect employee self-organization and the process of collective bargaining from the employer's interference); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952) (Act designed to promote industrial peace by encouraging voluntary agreements); *see Cox, The Right to Engage in Concerted Activities*, 26 IND. L.J. 319 (1951).

53. *NLRB v. Phoenix Mut. Life Ins. Co.*, 167 F.2d 983, 988 (7th Cir. 1948).

54. *Phoenix Mut. Life Ins. Co.*, 73 N.L.R.B. 1463 (1947), *enforced*, 167 F.2d 983 (7th Cir. 1948).

55. *Salt River Valley Water Users Ass'n*, 99 N.L.R.B. 849 (1952), *enforced*, 206 F.2d 325 (9th Cir. 1953).

56. *Modern Motors, Inc.*, 96 N.L.R.B. 964 (1951), *enforced in part*, 198 F.2d 925 (8th Cir. 1952) (activity involved no more than a work stoppage and the concerted presentation of a grievance in a reasonable attempt to have a problem resolved).

57. *NLRB v. Schwartz*, 146 F.2d 773 (5th Cir. 1945) (the right of employees outside a

When the Board found protected concerted activity in these situations, however, the employees' conduct was usually related to a dispute with their employer over the terms and conditions of their employment. The employees' actions in these disputes perhaps did not rise to the level of collective bargaining, but they were sufficiently serious to bear a close relationship to it. A dispute had to be meaningful, as a mere gripe was considered too inchoate to merit protection.<sup>58</sup>

However, the Board apparently did not rely on its development of the right to mutual aid or protection when considering whether an employer's denial of an employee's request for representation at an interview violated the Act.<sup>59</sup> Instead, the Board based its determinations on the employee's right to engage in collective bargaining. The right to engage in collective bargaining includes within its ambit the discussion of discipline,<sup>60</sup> and accordingly the Board relied on the disciplinary nature of the interview to trigger the employees' right to representation. Thus, in determining whether representation should have been permitted, the Board considered important the employer's plans to discuss with the employee the consequences of his alleged misconduct;<sup>61</sup> the employer's commitment to disciplinary action;<sup>62</sup> the potential for disciplinary action as a result of the interview;<sup>63</sup> and whether those who conducted the interview had any authority to make a decision concerning discipline.<sup>64</sup>

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union to engage in lawful activities for the purpose of mutual aid or protection is specified by the Act). See also *NLRB v. J.I. Case Co.*, 198 F.2d 919 (8th Cir. 1952) (employees protected when they attempted to instigate a walkout in protest of the discharge of another employee); *Carter Carburetor Corp. v. NLRB*, 140 F.2d 714 (8th Cir. 1944) (mutual aid or protection and concerted activities include the right to join other workers quitting work in protest over treatment of a fellow employee).

58. *NLRB v. Office Towel Supply Co.*, 201 F.2d 838 (2d Cir. 1953).

59. It is not clear that the Board's ultimate conclusion on the issue prior to *Weingarten* would have differed had it relied on the right to mutual aid or protection, since it is arguable whether a meaningful dispute over the conditions and terms of employment exists at a purely investigatory interview.

60. *National Licorice Co. v. NLRB*, 309 U.S. 350, 360 (1940) (contracts between employer and individual employee illegally restrained employees' right to bargain collectively when it included term which provided there would be no mediation or arbitration over discharge).

61. *Texaco, Inc.*, 168 N.L.R.B. 361 (1967), *enforcement denied*, 408 F.2d 142 (5th Cir. 1969) (employee interviewed concerning alleged theft of kerosene).

62. *Chevron Oil Co.*, 168 N.L.R.B. 574, 578 (1967).

63. *Jacobe-Pearson Ford, Inc.*, 172 N.L.R.B. 594, 599-600 (1968).

64. *Illinois Bell Tel. Co.*, 192 N.L.R.B. 834, 836 (1971). See Brodie, *Union Representation and the Disciplinary Interview*, 15 B.C. IND. & COM. L. REV. 1, 43-44 (1973), for a discussion of some additional factors which may be considered relevant when determining whether the denial of representation was proper.

Since the disciplinary nature of the interview brought it within the scope of collective bargaining and thereby created the employee's right to representation, employees seeking representation at purely investigatory interviews were not protected and the employer's denial of this representation was not a violation of the Act.

### IMPACT OF *Weingarten*

As a result of *Weingarten*, the relationship between the interview and collective bargaining is no longer relevant in the context of investigatory interviews.<sup>65</sup> The Board's new standard replaces the question of whether the interview was investigatory or disciplinary in nature with the question of whether the employee could reasonably fear that the interview would result in disciplinary action.<sup>66</sup> The basis for this new test is the employee's right to the mutual aid or assistance of his fellow workers when his continued job security is jeopardized. The Board's analysis of disciplinary interviews apparently remains unaffected; it has, however, embarked on a new development of the "mutual aid or protection" language of section 7 by extending it to investigatory interviews.

The Board did not fully explain its rationale for abandoning what appeared to be the established rule governing union representation at interviews. Further, the Board did not extensively review its prior decisions except to assert that it had not previously decided this precise issue, arguing that those cases had essentially concerned the union's right to represent an employee rather than the employee's independent right to representation.<sup>67</sup> Its new interpretation seems based upon a literal reading of section 7 of the Act<sup>68</sup> and the argu-

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65. Of course, these factors are still relevant if the issue is whether the interview was disciplinary in nature. This question could arise in an investigatory context if the employee effectively waives his right to representation but the union claims its right to be present may not be waived because the interview is disciplinary rather than fact-finding.

66. The Board first applied this right in *Quality Mfg. Co.*, 195 N.L.R.B. 197 (1972), where both regular employees and union stewards were disciplined for insisting on the right to representation. The rule was later extended in *Mobil Oil Corp.*, 196 N.L.R.B. 1052 (1972), in which employees had been discharged for their alleged misconduct, and in *J. Weingarten, Inc.*, 202 N.L.R.B. 446 (1973), where it does not appear that the employee suffered any discipline.

67. See note 44 *supra*.

68. The Board argued that if the employee believes the interview may jeopardize his job security and requests union representation, he is seeking to act "in concert," as provided by § 7, to protect his continued employment. *Mobil Oil Corp.*, 196 N.L.R.B. 1052 (1972).

ment that recognition of the right was justified by changes in the patterns of industrial life.<sup>69</sup> The dissenting justices criticized what they felt was an abrupt, unexplained change of policy,<sup>70</sup> but the majority accepted both the new rule and the Board's superior competence in formulating it.<sup>71</sup>

### CONCLUSION

Since the right to representation at investigatory interviews is new, its effect on labor-management relations is not yet clear. The decision does, however, suggest several potential problems. It is apparent that management has lost a bargaining item for future contract negotiations now that the right to representation has been granted under the Act.<sup>72</sup> It has not been proven that the rule will in any way benefit management or that it will necessarily help the employee,<sup>73</sup> especially since the employer may significantly restrict

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69. The Board felt that employees' awareness of the increasingly sophisticated security techniques utilized by employers might increase their feelings of apprehension and decrease their ability to defend themselves adequately if they were accused of misconduct. Supplemental Brief for Petitioner at 6, *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). In light of this argument, it is interesting to note that Collins referred to Loss Prevention Specialist Hardy as a detective. 202 N.L.R.B. at 448 n.5.

70. Chief Justice Burger pointed out that the Court had suggested some good reasons for adopting the new rule, but these reasons could not be found in the Board's decision. 420 U.S. at 269 (Burger, C.J., dissenting).

71. *Id.* at 265-66.

72. As the Court noted, the right to representation has been a standard topic of collective bargaining. *Id.* at 267. Justice Powell observed that the employer in *Mobil Oil Corp.*, 196 N.L.R.B. 1052 (1972) had successfully prevailed in negotiations with the union in resisting their demands for a contract provision that the employer must meet with the union prior to taking disciplinary action. 420 U.S. at 275 n.8 (Powell, J., dissenting). Of course, bargaining can still occur as to the parameters and implementation of the right, but it is unclear whether the union can waive the right to representation at interviews. *Id.*

73. The Board asserted that the right to representation would reduce the chance that the employee would be coerced at an investigatory interview and would benefit other employees to the extent that it would promote fair hearings and discipline consistent with past practice. Supplemental Brief for Petitioner at 2. The Court stated that such representation could also aid the employer since it would help him obtain the facts and thereby save valuable production time. 420 U.S. at 262-63. That reasoning was rejected by the Weingarten Company, which argued it was speculation that union representation would insure the full and truthful version of the incident, the presentation of an understandable story, less serious disciplinary action, or the avoidance of coercion by the employer. It felt representation would have a detrimental effect on a genuine fact-finding process, especially where the employee was being questioned about a fellow employee's conduct. Brief for Respondent at 20, *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

the participation of the representative present at the interview.<sup>74</sup> In addition, while the disciplinary/investigatory distinction may have been inadequate because it did not provide clear guidelines to employers as to what was permissible conduct,<sup>75</sup> the new rule, which depends on the employer's determination of the objective reasonableness of the employee's fears for his continued job security, appears to be no clearer.<sup>76</sup> Both employee and employer may be unsure whether union representation is appropriate in a given situation.<sup>77</sup> It seems the new standard, like the old, will compel a case by case determination; indeed, this process has already begun.<sup>78</sup>

Despite its ambiguities, the rule does have a certain attractiveness; it parallels the prevailing philosophy concerning the rights of the accused in confrontations with those who may ultimately prosecute him, although the Board has specifically rejected this anal-

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74. 420 U.S. at 273-74 n.5 (Powell, J., dissenting). Perhaps more important is the possibility an employee may lose the benefit of an interview if he insists upon representation and the employer refuses to proceed in the union representative's presence. *Id.* at 258.

75. The determination of whether an employer's denial of representation was permissible necessarily involved an examination of the nature of the interview in each instance. In view of the variety of facts the Board considered in resolving the issue, the employer could not easily predict in advance whether denial of representation would be permissible. See notes 60-64 and accompanying text *supra*. For an extensive discussion by Trial Examiner Miller of the difficulties inherent in the investigatory/disciplinary distinction see *Texaco, Inc.*, 179 N.L.R.B. 976, 981-86 (1969).

76. For several examples of the difficulties which the employer may face under the new rule see Member Kennedy's dissent in *Mobil Oil Corp.*, 196 N.L.R.B. 1052, 1054-55 (1972). Although the Court stated the employee's fears would be judged objectively, 420 U.S. at 257-58 n.5, Member Kennedy argued in *Mobil* that the determination whether the employer was guilty of an unfair labor practice would ultimately depend on the state of mind of the employee; this was, in his opinion, a purely subjective test. 196 N.L.R.B. at 1054. This argument was also made by the United States Chamber of Commerce in its *Amicus Curiae* Brief at 13, *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). See note 20 *supra*.

77. The employee, of course, may assert the right only when he has reasonable grounds to fear that disciplinary action may result from the interview. If he asserts the right in an inappropriate situation, he could be subjecting himself to legitimate disciplinary action on grounds of insubordination for refusing to participate in the interview. If the employer misjudges the circumstances, however, he may later be required to reinstate a legitimately discharged employee or rescind other legitimate discipline because he committed an unfair labor practice by denying representation during the hearing.

78. The Board applied the new rule in two cases while *Weingarten* was pending. In *New York Tel. Co.*, 203 N.L.R.B. 1153 (1973), an employee was coerced into an interview without his representative; the Board found a violation even though there had been no discussion but the imposition of discipline. Member Kennedy, dissenting in part, felt this case confirmed his suspicions about the feasibility of the rule. In *Western Elec. Co.*, 205 N.L.R.B. 195 (1973), no violation of § 8(a)(1) was found because the employer terminated the interview when the employee refused to participate without representation.

ogy.<sup>79</sup> Nevertheless, by affording this greater protection to employees on statutory grounds, the Board is perhaps indicating that it intends to take a more expansive view of its responsibility to protect the process of employee self-organization and collective bargaining.<sup>80</sup> The Board may accomplish this result by developing the separation of "mutual aid or protection" from union organization and collective bargaining which it has begun in *Weingarten*.

Thomas A. Berret

CIVIL RIGHTS ACT OF 1964—TITLE VII—AFFIRMATIVE ACTION IN HIRING—PERSONS PROTECTED—The United States District Court for the District of New Jersey has held that a white male is not a member of any class protected by Title VII of the Civil Rights Act of 1964 and may not invoke the protection of the Equal Employment Opportunity Commission's guidelines which require that any standardized test which serves as a basis for hiring by an employer must be job-related.

*Mele v. United States Department of Justice*, 395 F. Supp. 592 (D.N.J. 1975).

The International Brotherhood of Electrical Workers (IBEW), Local 52, administered an affirmative action program<sup>1</sup> formulated

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79. In *Lafayette Radio Electronics Corp.*, 194 N.L.R.B. 491 (1971), the trial examiner found the general counsel's argument that employees were entitled to representation was based on the principles underlying the United States Supreme Court decision in *Escobedo v. Illinois*, 378 U.S. 478 (1964). He rejected this argument on the grounds that *Escobedo* turned on a constitutional guarantee of the right to counsel, while the right sought by the employees was a contract right. 194 N.L.R.B. at 494.

80. Cf. the Board's statement in *Weingarten* that

[it] could not and did not immediately articulate all the rights and duties inherent in Section 7. In its early years the Board was mainly concerned with more obvious violations of the Act, as many employers resisted the basic concepts of self-organization and collective bargaining. With the passage of time, acceptance of self-organization and collective bargaining has increased, and the Board has had to deal with new, and often more subtle practices which are nonetheless inimical to the purposes and policies of the Act.

Supplemental Brief for Petitioner at 5-6.

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1. Affirmative action plans assure positive steps will be taken to achieve equal employment opportunity for minority groups. The concept involves more than simply refraining from