

***EPILEPSY REVISITED AND REVERSED:
NONUNION EMPLOYEES LOSE THE RIGHT
TO REPRESENTATION***

BERNADETTE MARCZELY

Cleveland State University, Ohio

On November 2, 2001, the United States Court of Appeals for the District of Columbia upheld a National Labor Relations Board decision guaranteeing non-unionized employees the right to request co-worker representation at investigatory interviews likely to result in disciplinary action [1]. This decision, known as the *Epilepsy Foundation* ruling, represented a significant change in employment law, in that it extended the right to representation during disciplinary investigations, a right to this point enjoyed exclusively by members of a union, to nonunionized employees [1].

For more than two decades, unionized employees had been entitled to union representation at investigations that could lead to disciplinary action. In a pivotal 1975 Supreme Court decision, *NLRB v. J Weingarten, Inc.*, employers who denied an employee's request for union representation at an investigatory interview that might reasonably result in disciplinary action were found to violate Section 8(a)(1) of the National Labor Relations Act [2]. In *Weingarten*, the Court agreed with the National Labor Relations Board (NLRB) that an employee's right under the act to engage in concerted activity includes the right to have the employee's statutory representative present in the face of an inquiry that could result in discipline or dismissal. The Court reasoned that the union representative at such an interview is protecting not only the threatened employee's interests, but also the interests of the entire bargaining unit [2, at 261]. Representation at investigatory conferences was deemed necessary to ensure that employers do not initiate or continue practices of imposing punishment unjustly [2, at 261]. In *Epilepsy Foundation of Northeast Ohio v. NLRB*, the board decided 26 years later to extend this protection to nonunionized employees as well [3, at 15]. Nonunionized employees were

afforded the right to have a co-worker present at an investigatory interview, thereby having an opportunity to act in concert with another employee to prevent a practice of unjust punishment [3, at 15,16].

The court of appeals agreed with the NLRB's reasoning in *Epilepsy* that the presence of a co-worker gives the employee a potential witness, advisor, and advocate in an adversarial situation, as well as safeguarding against the imposition of unjust disciplinary action by the employer [1, at 14]. At the time, the court of appeals found the board's rationale for its decision in *Epilepsy* both clear and reasonable [1, at 20]. Thus, *Epilepsy* created a right for nonunionized employees to have co-worker witnesses present at investigatory meetings that could result in disciplinary action and made it unlawful to discipline nonunionized employees for choosing to exercise that right. That is, nonunionized employees who refused to participate in investigatory meetings without the presence of a colleague could not be punished for their unwillingness to cooperate in the investigatory meeting. Employers retained the option of proceeding with investigations without employee interviews; however, doing so became one of several controversial issues and concerns regarding the implementation of *Epilepsy* rights.

In an earlier issue of this *Journal*, the potential issues that might come to the fore in the wake of the *Epilepsy* ruling were discussed [4]. Employee awareness, witness credibility, the definition of an investigatory interview, confidentiality, and co-worker training were cited as potential pitfalls to the successful exercise of this new right by nonunionized employees [4, p. 294]. The *IBM* [5] case, which spurred the NLRB to officially revoke its ruling in *Epilepsy*, presents a worst-case scenario in which many of the potential problems discussed in this earlier article became reality. The end result was the NLRB's decision to overrule *Epilepsy* and to dismiss the complaint in *IBM*, finding that the charging parties were not entitled to the presence of a co-worker during the interviews conducted [5, p. 36].

IBM CORPORATION AND KENNETH PAUL SCHULT, ROBERT WILLIAM BANNON, AND STEVEN PARSLEY

To fully understand what prompted the NLRB's back-peddling on this vital issue, one must fast forward to June 9, 2004. Concern and controversy in the wake of the *Epilepsy* decision had grown in the four years it was in place and ultimately required the NLRB to take a second look at this troublesome area of employment law. The vehicle for this reassessment is *IBM Corporation and Kenneth Paul Schult, Robert William Bannon, and Steven Parsley* [5]. The sole issue in this case was whether IBM had violated employee rights accorded by *Epilepsy* in denying nonunion employee requests to have a co-worker present during investigatory interviews that ultimately led to dismissal [6]. The *IBM* case is important because it recognizes the board's right to change its collective mind and overrule its past decisions when circumstances warrant.

Lest the National Labor Relations Board be perceived as unlawfully vacillating, it should be noted that the board's prerogative to change its position was upheld by the Supreme Court in *Weingarten* [2, at 265-266]. In *Weingarten*, the board had overruled its earlier precedent by recognizing the right of an employee *in a union* to refuse to submit, without *union representation*, to an investigatory interview that the employee reasonably believes may result in disciplinary action [2]. The Supreme Court approved the board's action, finding that the board, as an administrative agency, was free to re-examine past constructions of the National Labor Relations Act as required by administrative decision making [2]. The Court stated:

“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 adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process [2, at 265-266, quoting *NLRB v. Seven-Up Co.*, 344 US. 344-349 (1953)].

Essentially, the Supreme Court has given official approval to an administrative agency's right to overturn its own precedents if circumstances require. Agency law should be adaptive rather than static in the face of changing circumstances, and no case illustrates this more than *IBM*, where problems anticipated in wake of *Epilepsy* came to fruition.

LACK OF AWARENESS

In *IBM*, nonunionized employees Bannon, Schult, and Parsley were interviewed on October 15, 2001, in response to a letter IBM received containing a former employee's allegations of harassment. None of them requested the presence of a witness during the October 15 interviews. On October 22, however, manager Nels Maine denied employee Bannon's request to have a co-worker or an attorney present at an interview scheduled for the next day. On October 23, Maine interviewed Bannon, Schult, and Parsley individually after denying each employee's request to have a co-worker present during the interview. All three employees were discharged approximately a month after the interviews [5, p. 4].

A reading of the original administrative law judge's decision reveals that although IBM's human resource professionals had been briefed regarding *Epilepsy* rights and procedures in a conference call held in August 2000, Maine was *unaware* of the decision at the time he conducted the investigation [6, p. 4]. The program manager for corporate internal appeals testified that, if an employee invoked the right to a witness, the company's policy was to advise the employee that, if the employee continued to assert that right, the investigation would proceed without that employee's input [6, pp. 4, 5]. Company guidelines on this point likewise provided that the interview would also end if the employee

insisted on recording the interview [6, p. 5]. Since Maine was unaware of his responsibilities under *Epilepsy*, credited testimony showed that he never informed Schult, Parsley, and Bannon of this policy. Instead, he repeatedly denied their request for the presence of a co-worker, and read a statement advising [them] that failure to cooperate could result in disciplinary action up to and including termination [6, pp. 14-16].

Schult, Parsley, and Bannon were all initially interviewed by Maine on October 15, 2001. The record shows that none of employees interviewed requested the presence of a witness at those interviews [6, p. 8] and were told by Maine that they were “prohibited from speaking with anyone other than himself [Maine] or a manager” [6, p. 7]. Their failure to ask for co-worker witnesses resulted from their *lack of awareness* of their rights under *Epilepsy*. Indeed, the administrative law judge who initially reviewed this case and found that *IBM* had violated the rights of the three employees, ordered the posting of his September 25, 2002, decision as affirmative action needed to effectuate the policies of the act [6, p. 25].

It was only when one of the disciplined employees, Parsley, spoke by phone with his current senior project manager, Kenneth Jones, on October 21, that he was told that “if someone believed [there] was going to be punitive charges against them, that they should ask for a co-worker to be present in investigations or be able to tape the conversations” [6, pp. 9, 10]. This telephone call took place *after* all three had already been suspended on October 19, 2001. Parsley shared Jones’ advice with Schult and Bannon, and from that point on, each testified that he asked to have a co-worker or attorney present when Maine conducted subsequent interviews on October 23. Each time Maine denied the request.

THE PROBLEM OF CREDIBILITY

Maine denied that any of the employees had requested a co-worker as a witness at any time, noting that he would have called his superior to get a ruling on how he should handle the situation [6, pp. 16, 17]. Thus, it was left to the administrative law judge to determine the *credibility* of the parties in this matter. The ALJ chose to credit the testimony of Bannon and Schult that Maine had denied their request for the presence of a co-worker or an attorney at the interview on October 23 [6, pp. 20, 21]. The board has an established policy not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces the board that it is incorrect [7].

Thus, triers of fact are given great discretion in determining credibility based on the demeanor and conduct of the witnesses; their candor or lack thereof; their apparent fairness, bias, or prejudice; their ability to know, comprehend, and understand the matters about which they testified; whether they had been contradicted or otherwise impeached; the interrelationship of the testimony of the witnesses and the written and/or documentary evidence presented; and the inherent probability and plausibility of the testimony [8]. In *IBM*, the ALJ based

his decision on the fact that Maine admitted that he did not “remember exactly” what Bannon said, but it was “something like” why he was there and how he was supposed to act [6, p. 14]. The ALJ concluded that when Maine responded to Bannon by telling him that he expected him to be open and honest and then read the statement that set out the consequences for failure to cooperate, that testimony established that Maine did not directly respond to Bannon’s questions or his request for representation [6, pp. 14, 15].

For similar reasons, the ALJ chose to find the testimony of Schult also more credible than that of Maine. Although Schult had written his director asking what his rights were, Maine denied that Schult had asked him that question [6, p. 15]. Schult testified that in his October 23 interview he told Maine that he really would like to have a co-worker present, but was denied that right [6, p. 15]. Likewise, Parsley testified that, when he was terminated, he had filed an internal appeal asserting that he too had asked for a co-worker witness on October 23. Parsley appealed his termination, but that appeal was denied based on Maine’s assertion that he “didn’t remember [Parsley] asking” for a co-worker and that there was no “concrete evidence to prove otherwise” [6, p. 16].

Credibility of testimony was central to the outcome of this case. On the basis of credited testimony, the administrative law judge in *IBM* found that Bannon, Schult, and Parsley had each asked to have a co-worker present during their October 23 interviews and that their requests had been denied [6, pp. 23, 24]. In light of this credited testimony, and applying *Epilepsy*, the judge concluded that IBM had violated Section 8(a)(1) of the NLRA by denying nonunionized employees’ requests to have a co-worker present during their October 23 interviews [6, p. 24].

CONFIDENTIALITY AND ADMINISTRATIVE PURSUIT OF JUSTICE

In response to the administrative law judge’s ruling of September 25, 2002, IBM filed exceptions and a supporting brief [5, p. 2, n. 1]. The board accepted this brief, as it later accepted others filed by the Labor Policy Association, Inc. (LPA), the Equal Employment Advisory Council, Associated Builders and Contractors, the Chamber of Commerce of the United States, the Society for Human Resource Management, the International Mass Retail Association, the National Association of Manufacturers, and the Council on Labor Law Equality. Wal-Mart Stores, Inc., also filed a response in support of briefs *amici curiae* and a request for oral argument, but its request was denied, since the board felt that the record, exceptions, and briefs adequately presented the issues and positions of the parties [5, p. 2, n. 1]. All urged the board to overrule *Epilepsy Foundation* and return to the principles of *E.I. DuPont*, in which the board refused to apply *Weingarten* in a nonunion context [9]. All urged that nonunionized employees *not* be given the right to have a co-worker present during investigatory meetings.

IBM's Arguments

IBM argued specifically that extending the *Weingarten* right to a nonunion setting may compromise the confidentiality of sensitive employment information obtained during an interview, as well as interfere with an employer's ability to conduct an effective factfinding investigation [5, p. 6]. The joint *amici curiae* maintained that the presence of a co-worker actually reduced the chance that the worker being interviewed would tell the truth [5, p. 6]. In fact, there is nothing to preclude a representative co-worker from being a participant or "co-conspirator" in the incident being investigated [5, p. 23, n. 7]. In *IBM*, Schult, Bannon, and Parsley testified that after finding out that they had a right to have a co-worker present during an investigatory interview, they agreed that each would ask to have one of the others of them present at any interview if Maine would permit them to do so [6, p. 13]. Their plan illustrates how the right to co-worker presence at an investigatory interview, particularly where both the employee being interviewed and the co-worker present are parties to the improper behavior being investigated, can subvert an employer's efforts to get to the truth.

The company argued further that even when co-workers are not directly involved in the matter under investigation, they lack the training, power, and fiduciary interest of a union representative. While co-workers may provide moral and emotional support, they cannot redress the imbalance of power between employers and employees. They have no authority derived by contract and representative numbers. In addition, they are untrained in the administration of contracts and the "law of the shop," which provide the framework for disciplinary action [5, pp. 22-23].

I note that Schult, Bannon, and Parsley did not know they were entitled to have a co-worker present, nor were they familiar with IBM's guidelines for conducting an investigation, which stated that:

Individuals interviewed should be instructed . . . to keep any information disclosed to them by the investigator confidential. It is inappropriate, however, to order an employee who is suspected of wrongdoing not to discuss the matter with others (emphasis added) [6, p. 4].

As a result, they did nothing to stop Maine from flagrantly ignoring IBM's own policy for conducting investigations by prohibiting each of them from speaking with anyone other than himself [Maine] or a manager about the matter, and threatening them with discipline if they did so. A union representative would have been familiar with these rights and internal procedures, and a union representative would have had the power to ensure that they were enforced.

A CONFLICT OF RIGHTS AND RESPONSIBILITIES

The board's ruling in *Epilepsy* created a conflict between the employer's responsibility for confidentiality, safety, and justice in the workplace, and the

nonunionized employee's right to co-worker presence at disciplinary investigations. Employers have the legal obligation, pursuant to a variety of federal, state, and local laws; administrative requirements; and court decisions, to provide their workers with safe and secure workplace environments [5, p. 25]. This mandate for safety has spawned investigations dealing with harassment, substance abuse, improper computer and Internet usage, theft, violence, sabotage, and embezzlement, all requiring a high degree of confidentiality. These investigations must be conducted with professionalism and confidentiality to be effective.

While unions and employers are keenly aware of their obligation to conduct investigations that are both thorough and confidential, untrained representative co-workers are not. Loose lips sink ships, and a breach in confidentiality by a co-worker representative can expose employees to gossip and slander, and the employer to litigation. Although employers retain the right to conduct investigations without interviewing employees suspected of behaving improperly, this, too, can lead to litigation. The employer does so at the risk of being legally liable to a claim of unfairly disciplining the accused employee based on incomplete or inaccurate information. Thus, the rights accorded by *Epilepsy* have become a virtual Catch 22 for employers.

POLICY CONSIDERATIONS FAVOR OVERRULING EPILEPSY

After considering the entire record in this proceeding, including IBM's brief and the various *amici curiae*, the National Labor Relations Board decided to overrule its *Epilepsy Foundation* decision, and return to its earlier position that *Weingarten* does not apply to employees who are not members of bargaining units [5, pp. 6, 7]. This decision is significant because it represents an administrative choice between two equally permissible interpretations of the National Labor Relations Act. This case illustrates the role an administrative agency like the NLRB must play in not only defining, but also adapting, the National Labor Relations Act to changing circumstances.

The National Labor Relations Board has no easy task before it. The act has many permissible constructions, and the cumulative effect of Section 7, Section 8(a)(5), and Section 9(a) in addressing the rights of nonunionized employees is an example of just how complex the task of interpreting the act can become in today's workplace.

ENDNOTES

1. *Epilepsy Foundation of Northeast Ohio v. National Labor Relations Board*, 2001 U.S. App. LEXIS 23722, November 2, 2001.
2. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).
3. 2000 NLRB LEXIS 428, July 10, 2000.

4. Bernadette Marczely, "Issues Emerging in the Wake of the Epilepsy Foundation Ruling," *Journal of Individual Employment Rights*, Vol. 9, No. 4, 2000-2001, pp. 287-295.
5. *IBM Corporation and Kenneth Paul Schult, Robert William Bannon, and Steven Parsley*, 2004 NLRB LEXIS 301, June 9, 2004.
6. *IBM Corporation and Kenneth Paul Schult, Robert William Bannon, and Steven Parsley*, 2002 NLRB LEXIS 442, September 25, 2002.
7. *Standard Drywall Products*, 91 NLRB 544 (1950), enfd, 188 F.2d 362 (3rd Cir. 1951).
8. *Young Broadcasting of Los Angeles*, 331 NLRB No. 46 (2000).
9. *E.I. DuPont & Co.*, 289 NLRB 627 (1988).

Direct reprint requests to:

Professor Bernadette Marczely
9873 Tamarack Trail
Brecksville, OH 44141
e-mail: b.marczely@popmail.csuohio.edu