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THIRD-PARTY REPRESENTATION FOR NONUNION EMPLOYEES—A QUESTION OF PRIVACY OR JUST EQUAL TREATMENT IN THE WORKPLACE

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ABSTRACT

The nonunion employee has a right to protect his/her privacy interests and employment status during investigatory and disciplinary interviews. In the nonunion workplace, the lack of collective bargaining and employee organization give rise to serious concerns about employee protection. The nonunion employee is often forced to confront and overcome the significant power imbalance inherent in the employer–employee relationship. This imbalance is more evident and threatening in the nonunion workplace where employers are not challenged by a union shop steward and have no reason to suspect an organized response by disgruntled employees. The nonunion employee must be allowed to employ the assistance of her coworker during exchanges with her employer. While the assistance of the coworker is not a substitute for a union representative or union organization, it would serve to increase equality and diminish the power imbalance. The presence of a coworker, known as the right to third-party representation, is available to union employees, however, nonunion employees are not able to seek the protection of third-party representation. The right to third-party representation must be made available to all employees—union and nonunion employees. The National Labor Relations Board has deprived nonunion employees of the opportunity, the right, to engage in concerted activity for mutual aid and protection. This right is afforded *all employees* under section seven of the National Labor Relations Act. The board and the courts initially held that this right did extend to nonunion, as well as, union employees. In 1988, however, the board reversed its position by ignoring the mandates of section seven and the needs of nonunion employees. The board relied on speculation in distinguishing the needs and necessarily the rights of union and nonunion employees. The policy supporting the right to third-party representation in the union workplace is met, if not overcome, in the nonunion workplace. The right to representation at investigatory interviews is a form of *fundamental* concerted activity for

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> mutual aid and protection. By depriving employees of this right, the board has stripped them of the opportunity to overcome the inherent power imbalance and to safeguard privacy and employment interests. The right to third-party representation must be made available to nonunion employees in the same way as it is current available to union employees.

THE NATIONAL LABOR RELATIONS ACT— SECTION SEVEN

The National Labor Relations Act (NLRA) is the only law that governs the relationship between labor and management [1-2]. Section seven of the act [3] provides significant employee protection and rights [4]. Most of the cases brought under section seven involve employees "engaged in the various union activities enumerated [therein] . . . and who therefore clearly come within the protection of the Act" [2, pp. 987, 992]. However, section seven also guarantees employees the right to engage in "concerted activities for the purpose of . . . mutual aid or protection" [4]. It is this language in section seven that serves as the basis for nonunion employee claims under the section. The National Labor Relations Board (NLRB) and the courts have wavered in their approach to section seven and the scope of the meaning of "concerted activity" [1, pp. 1673, 1686].

In *NLRB v. City Disposal Systems, Inc.,* [5] the United States Supreme Court reviewed the legislative history and the scope of section seven [5 at 835; 1, pp. 1686-87]. In *City Disposal Systems,* the court stated:

> [I]n enacting [section] 7 of the [act], Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment. There is no indication that Congress intended to limit this protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way [6].

The broad language of section seven grants employees the explicit right to engage in the activities mentioned therein. "The 'right' has clearly not been limited to organized workplaces" [1, p. 1687].

In *NLRB v. Phoenix Mutual Life Insurance Co.,* [7] the Seventh Circuit stated section seven was *not* intended to cover only union activity, labor disputes, or labor organization [8]. The courts and the NLRB haven generally given "concerted activity" and the notion of "concertedness" a very broad meaning [1, pp. 1689-700]. The second part of the section seven requirements is that the employees come together for *mutual aid and protection.* One form of concerted activity and mutual aid the courts and the board have recognized as critical to an employee's privacy interest is the right to third-party representation.

THIRD-PARTY REPRESENTATION

It is clear that "[t]he right to representation at investigatory interviews for union and nonunion employees is an important privacy concept" [9]. This right would give an employee the right to protect "workplace privacy interests" during an investigation and employer interview [9]. When an employee is confronted with an investigatory or disciplinary interview, the right to some form of third-party representation is essential. The right to representation, whether by a union representative or a coworker, insures that the employee's right to privacy will remain intact during the interview; "[i]t protects privacy interests present in speech, beliefs, information, association, and lifestyles" [9]. The representative would assist an employee in asserting his/her rights, as well as recognize instances where the employee's rights are being threatened. In an atmosphere where the employer generally has the upper hand, the representative is often the only vehicle to safeguard an employee's rights. Most importantly, "the right to representation at investigatory interviews is that it assures fairness" [10].

The right to third-party representation at investigatory interviews is an attempt to put the employer and the employee on an even playing field. The representative would serve to cure, or at least diminish, the "power imbalance" between the employer and the employee [10 (footnote omitted)]. This power imbalance, inherent in the workplace, results from the employer's position of power and control in the workplace environment. An employee is responsible to the employer, is told what to do by the employer, and is paid a salary by the employer—this is the type of control that gives rise to an unfair and inequitable balance of power at investigatory interviews. The employer–employee relationship renders employees unable to protect their workplace interest and privacy rights. Employees faced with this situation would either give in to the unequal power situation, thereby prejudicing their "case," or remaining silent or not participating in the interview. The right to third-party representation is *essential* to employees who are forced to confront their employers.

The Supreme Court has stated that a *union* representative would be able to safeguard "not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly" [11]. In addition, the court noted that the representative could also benefit the employer by eliciting favorable facts from the employee that would save the employer from having to pursue an investigation [12]. The right to third-party representation is also critical to the nonunion employee. For the same reasons as a union employee, the power imbalance, the nonunion employee needs assistance in preserving basic privacy rights and employment interests during an investigatory interview. The presence of a coworker in this case would serve the same function as does the union representative in the case of a union employee. As one authority pointed out:

> [t]he employee's request that a co-employee be his/her representative at an investigatory interview builds solidarity and vigilance among employees absent a union no differently than it does where a collective bargaining representative has been recognized. In the non-union context, it also helps to serve to eliminate the bargaining power inequality between employees and employers. The perception by employers of an imbalance in power may be heightened in the absence of a union, and the risks of improper or even unintentional employee intimidation by the employer may be accentuated. Similarly, the co-employee's presence may facilitate a more expeditious, efficient, and equitable disposition of disputes, and perhaps serve to settle them informally [13].

The need for third-party representation seems even stronger in the case of nonunion employees. While a collective bargaining agreement serves as a check in the union employer's actions, the nonunion employee stands unprotected. Therefore, the coemployee would serve as the check—s/he would prevent the employer from overpowering the nonunion employee [9].

In 1975, the Supreme Court recognized the significance of third-party representation. In *NLRB v. Weingarten, Inc.,* [14] the court held that an employee, in this case a union employee, could refuse to attend an interview with an employer or an employer's representative if she was not allowed to bring a union representative to the interview. In that case, the right to third-party representation would be available if the employee "reasonably believed" the interview would result in discipline [15].

THE "RIGHT" TO THIRD-PARTY REPRESENTATION: *NLRB V. WEINGARTEN*

In *Weingarten,* an employee was summoned to attend an employer's investigatory interview [16]. The interview was part of an investigation of employee theft. During the interview, the employee made several requests for the presence of a union representative; however, they were denied. Although no form of discipline was imposed as a result of the interview, the employee reported the "details of the interview to her shop steward and other union representatives" [10, p. 132].

As a result of the employee's complaints, the union field an unfair labor practice charge against the employer [10, p. 132]. The board concluded that the employer's representative and the employer had conducted themselves in a manner that amounted to a violation of the act and an unfair labor practice [17]. The United States Court of Appeals for the Fifth Circuit "refused to enforce the NLRB's decision" [18]. However, the Supreme Court reversed the court's decision [14]. The court held that an employee has a right to third-party representation under section seven of the act. The right consists of having a union representative present at an investigatory or disciplinary interview when the employee

"reasonably" believes that the interview will result in discipline [14, at 262; 10 p. 133; 15; 2, pp. 1000-01; 9, n.768]. The Supreme Court in *Weingarten* identified five reasons that supported its holding:

> (1) all employees would benefit by the "viligance" of a union representative "to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly," regardless of whether the employee alone has an immediate stake in the outcome of the investigatory interview; (2) the presence of the representative provides an assurance to fellow employees that they too can obtain aid and protection if they must fact an investigatory interview; (3) one of the most basic policies of the Act—the elimination of the inequality of bargaining power between employers and employees—would be served; (4) an employee who may be "too fearful or inarticulate" to accurately describe the alleged incident, or "too ignorant to raise extenuating factors," would receive needed support; and (5) the presence of a third party could assist the employer and expedite the resolution of the differences by "eliciting favorable facts" and focusing on the circumstances surrounding the incident in question [2, pp. 1001-02 (citations omitted)].

The right to third-party representation at investigatory and disciplinary interviews—the *Weingarten* rule—is not without its limitations.

The Supreme Court did place restrictions on the right to third-party representation. To enjoy the right, an employee must first request representation [19]. Also, the employee must reasonably believe the investigatory interview will result in discipline [14, at 257]. The employee's "reasonable belief" is to be tested objectively by examining the facts and circumstances of the particular interview at issue [15, pp. 1011-12]. The court and the board should not try to examine the employee's *subjective* perception at the time of the incident [20]. The right to third-party representation may not interfere with the employer's decision as to whether to continue the interview or to pursue the investigation without an employer–employee interview [14 at 258; 15, p. 1009; 9]. When the employee requests a union representative, the employer has two alternatives: 1) pursue the incident investigation without the interview; or 2) allow the employee to have the benefits of union representation during the interview [21]. If the employer decides to continue the interview, an employee's request for third-party representation must be respected. However, the employer is not bound to speak to, or negotiate with, the representative [22]. In fact, the employer "may insist upon hearing only the employee's version of the facts" [23]. The board and the courts have held the representative has no right to make the interview "purely adversarial" and may not "obstruct investigations" [24].

The representative is present to help the employee present his/her case effectively and to thoroughly announce all the facts surrounding the particular incident. As one authority pointed out: "This may be accomplished by the presence of a representative or co-employee who is more familiar with the policy, rules, and employer customs than an employee who is intimidated by both the predicament

and meeting the employer on unequal terms" [9]. Additionally, the right to third-party representation includes the right to confer with the representative before the disciplinary interview [25]. Without these protection—third-party representation and the right to confer with the representative before the interview—the employees' ability to provide mutual aid and protection as guaranteed by section seven cannot be fully realized.

Following the Supreme Court decision in *Weingarten,* many issues surrounding third-party representation cropped up. *Weingarten* dealt only with a union employee's right to third-party representation [2, pp. 1002-03 n.74]. The court did not consider whether the right to third-party representation, as the act provided for, extended to nonunion employees. In his dissent in *Weingarten,* Justice Powell "assumed that because nonunion employees have a section 7 right to 'act "in concert,"' the right must also belong to nonunion employees as well" [26].

THIRD-PARTY REPRESENTATION IN THE NONUNION WORKPLACE

In 1978, the board was first confronted with the question of whether the right to third-party representation, as guaranteed by section seven of the act, applied to nonunion employees. In *Anchortank, Inc.* [27] the board indicated as "intent to extend *Weingarten* to nonunion employees" [28]. The court of appeals, however, did not follow the board's lead. The court held that the request for third-party representation at investigatory interviews was only afforded by section seven *after* a workplace was unionized [29]. The court reasoned:

> [Only] after the union has won the election [can] the employee quite properly perceive his request [for third-party representation] to be one for concerted mutual aid and protection of his fellows, for the union then stands in for all the unit employees [29; 2, p. 1003 n.78].

The right to third-party representation remained a protection available only to the union employee. However, the board soon reconsidered the hardship and unique situation of the nonunion employee who is being subjected to an investigatory or disciplinary hearing.

In 1982, the board finally applied the *Weingarten* holding to a nonunion employee in an "unorganized workplace" [1, p. 1732]. In *Materials Research Corp.,* [30] the board held that the right to third-party representation was available for nonunion employees [30 at 1014]. The board concluded the right, identified in *Weingarten,* applied to nonunion employees because the Supreme Court found the right in section seven of the act, *not in any right explicitedly available to a union* [31]. The board stated that a request for the presence of a coworker "like the comparable request in *Weingarten* for the assistance of a union steward, is

'concerted activity—in its most basic and obvious form—since employees are seeking to act together . . . for mutual aid or protection'" [32].

The rationale behind the extension of third-party representation to nonunion employees seemed the same as the rationale behind the application of *Weingarten.* Representation by a coemployee at an investigatory or disciplinary interview "builds solidarity and vigilance among employees . . . [and it] serves to help eliminate the bargaining power inequality between employers and employees" [9]. In addition, the board concluded that representative would serve to safeguard other employees' rights, as well as the rights of the employee who is the subject of the interview [10, p. 133]. Also, the right would serve as "assurance to other employees . . . that they too can obtain the assistance of a representative" [33]. The coworker would, *at the very least,* guard against "unjust or arbitrary employer action" [34]. The *Materials Research* decision was a triumph for nonunion employees. For the first time, the board held that section seven's right to concerted activity for mutual aid or protection extended the right of third-party representation to nonunion employee. The board there realized that union and nonunion employees had the same, or similar, rights, concerns, and needs when summoned to *participate* in an investigatory or disciplinary interview. In addition, the board believed that the coworker could serve the same functions as did the union representative in *Weingarten.* In 1985, however, with a turnover in membership, the board [5, p. 1018] began its retreat from the *Materials Research* decision.

THE RETREAT FROM *MATERIALS RESEARCH*

In *Sears, Roebuck and Co.* [35], the board held the right to third-party representation, under section seven of the act, does *not* apply to nonunion employees [36]. Unfortunately, this is the view that has been adopted by the board and the courts—currently, nonunion employees are deprived of the right to third-party representations at investigatory and disciplinary interviews [9, § 7.29 (Supp. 1992)]. In 1988, the United States Court of Appeals for the Third Circuit upheld the board's construction of construction of section seven—"*Weingarten 'should not'* be extended to non-union employees" [37]. The history that preceded the Third Circuit's decision is critical to both an understanding of the status of the law regarding a nonunion employee's right to third-party representation and the board's subordination of the rights of the nonunion worker.

THE *DUPONT* CASES AND THEIR IMPACT ON A NONUNION EMPLOYEE'S RIGHT TO THIRD-PARTY REPRESENTATION

On November 17, 1978, Walter Slaughter posted a National Labor Relations Board poster that explained the act to employees [38]. Thomas Farley, Mr. Slaughter's supervisor, told him to take the poster down because it had not been

preapproved [38]. Mr. Slaughter refused to take the poster down, and he ignored all of his supervisor's attempts to speak to him about the incident [38]. Mr. Slaughter stated he would not discuss the incident without the representation of coemployee. The employer refused the requests to have a representative present. Mr. Slaughter was finally discharged. Mr. Slaughter was employed in a *nonunion* workplace.

In *DuPont I,* [39] a decision rendered before the *Sears* decision, the board concluded that Mr. Slaughter had a right to third-party representation by a coworker under section seven of the act [40]. This holding was not very surprising, as it followed the board's decision in *Materials Research.* The United States Court of Appeals for the Third Circuit upheld and enforced the board's interpretation of section seven [41]. The court stated, "the logic and reasoning of *Weingarten* carry equal force in the non-union context" [41]. "While a petition for rehearing was pending, the [c]ourt, at the request of the board, is sued a second opinion . . . [733 F.2d 296 (3d Cir. 1984),] vacating the earlier ruling and remanding the matter for further consideration" [15, p. 1019]. However, by the time the board reheard the case it had decided Sears [35] and its membership had changed [1, p. 1736]. On rehearing [*DuPont III*], the board decided Mr. Slaughter's "activity" did not rise to the level of "concerted activity" as envisioned by Congress in section seven [42]. The board upheld Mr. Slaughter's discharge and thereafter Mr. Slaughter appealed his case to the Third Circuit [43].

In *Slaughter,* the court of appeals rejected the board's decision in *DuPont II* [42], as well as the *Sears* holding. "The court rejected the Board's view that the Act 'compels the conclusion' that nonunion employees do not enjoy *Weingarten* rights, noting that it had previously indicated in its review of *DuPont I* that the contrary position in *Materials Research* represented a permissible interpretation of the Act" [44]. After concluding that the board's decision conflicted with the Third Circuit's earlier holding that *Materials Research* represented a permissible interpretation of section seven, the court remanded the *Slaughter* case to the board [45].

On remand, in 1988 [*DuPont III*], the board held:

> [A]n employee in a nonunionized workplace does not possess a right under section 7 to insist on the presence of a fellow employee in an investigatory interview with the employer's representative, even if the employee reasonably believes that the interview may lead to discipline [46].

The board stated an examination of employee rights should begin with a *literal* reading of section seven; however, the examination must include a balancing of interests [47]. The employees' right to engage in section seven activities must be balanced against the employer's desire to maintain discipline and order in the workplace. The board reviewed the nature of the right to third-party representation as announced by the Supreme Court in *Weingarten.* In addition, the board

examined the reasons supporting the Court's holding in *Weingarten.* As has been stated *supra,* the Court concluded that employees have right to third-party representation under section seven because: 1) the union representative safeguards the interests of the employer as well as the bargaining unit, "'by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly'" [47]; 2) the representative can "redress 'the perceived imbalance of economic power between labor and management'" [48]; 3) "a 'knowledgeable union representative could assist the employer by eliciting favorable facts' . . ." [49]; 4) union representative was "in full harmony with actual industrial practice." [50] After enumerating the reasons for the *Weingarten* holding, the board concluded "that many of the useful objectives listed by the Court either are much less likely to be achieved or are irrelevant" [47]. The board found that in a nonunion setting, there was no guarantee that the interests of the employers as a whole would be furthered and protected by third-party representation at an employee's investigatory interview. In addition, the coworker, unlike the union representative or the shop steward, "has no obligation to represent the interests of the entire bargaining unit" [47 (footnote omitted)]. The coworker would not have access to employee records to ensure that the employer was acting justly [47]. A union representative would have access to records from which s/he could compare employee treatment and safeguard against arbitrary punishment [47]. Also, because the coworker generally has no formal training in assisting employees, s/he will be less likely to be in a position to aid the employer and to save "production time" [47].

The board, however, did acknowledge that third-party representation may aid the nonunion employee who must attend an investigatory interview [47]. The board also concluded that employee interests are outweighed by the employer's interest in maintaining discipline and control in the workplace. The board stated:

> We believe this conclusion to be fully consistent with the Supreme Court's decision in *Weingarten.* It is not only that . . . the separate factors [of *Weingarten*] translate poorly into a case involving a nonunion workplace . . . . Thus, while nothing in *Weingarten* inexorably precludes us from extending the right, we are confident that in carrying out our responsibility here—defined by the Court as achieving a "fair and reasoned" balance between the conflicting interests of labor and management—we best effectuate the purposes of the Act by limiting the right of representation in investigatory interviews to employees in unorganized workplaces who request the presence of a union representative [47 (citations omitted)].

Additionally, the board feared the recognition of the right to third-party representation would cause nonunion employees not to include employee interviews in any investigations [47; 15, p. 1020]. This could hinder an employee's ability to represent her side of an incident. This would further the power imbalance between

employers and employees. Employers will be forced to make conclusions and conduct investigations without the opportunity to hear or see the employee.

On appeal, the Third Circuit stated that the scope of its review was "highly deferential" to the finder of fact, the board [37]. The board, not the court, is in the best position to evaluate employer–employee interviews and relationships and to determine a reasonable interpretation of section seven. While other interpretations were possible, the court held the board's interpretation was "a reasonable interpretation of the Act" and further that it "must defer to [the board's] judgment in that respect" [37 (footnote omitted).] Today, the court's 1989 decision is the law. Nonunion employees are not given the same treatment as union employees. Although the board and the courts have wavered, and even contradicted each other, the nonunion employee was not given the benefit of the doubt. It could be argued that the nonunion employees by virtue of their unorganized status should have greater protection than union employees. However, at least in the areas of third-party representation under section seven, nonunion employees are not only afforded *less* protection but are treated as "second class citizens" because of their status.

ANALYSIS

The right to third-party representation as guaranteed by section seven of the act should extend to nonunion employees [9, § 7.29 (Supp. 1992); 6, p. 622]. It appears that the language of section seven of the act [4] is broad enough to cover nonunion employees. In addition, the policies underlying the Supreme Court's decision in *Weingarten* are present in the unorganized, nonunion workplace, as well as the union workplace. In fact, it seems that the arguments and policies in favor of third-party representation are *stronger* in the nonunion workplace. In the nonunion workplace, employees do not have the benefit of collective bargaining or general union representation. The board's 1988 decision [*DuPont III*] and the court of appeals' ratification of the decision was incorrect [37]. The board has unduly limited the scope of section seven, thereby depriving nonunion employees the right to engage in "*concerted activities* for the purposes of . . . *mutual aid or protection* . . . ." [3; 4].

THE *DUPONT* ERROR

As Professor Charles Morris pointed out, "[t]he Board [in *DuPont III*] simply chose to decide the case on the basis of the Supreme Court's decision in *Weingarten* rather than on the basis of the requirements of section 7" [1, pp. 1737-38]. As has been stated, section seven is designed to protect "concerted activities" engaged in for "mutual aid." The legislative history behind section seven indicates it was directed in correcting imbalances in bargaining power between employers and employees [51]. The act, however, did not require employees to come

together in any particular way, i.e., as a union, in order to receive the benefits of the section [4]. The requirements that trigger section seven are "concertedness" and "mutual aid" [52]. The board in *DuPont III,* however, did not deal with these mandatory requirements. Instead, the board attempted to distinguish *Weingarten* and demonstrate that it was not intended to cover nonunion employees. The board set out the policies identified in *Weingarten* and then proceeded to *show* how these policies did not apply to the nonunion employee. The *DuPont III* board devoted its opinion to distinguishing *Weingarten.* Instead, the board should have determined:

> (1) whether Section 7 required the DuPont supervisor to deal with Slaughter in the presence of one of his co-workers who had previously agreed to join with him at the investigatory interview and (2) whether the supervisor could insist, as a condition of Slaughter's continued employment, that Slaughter abandon his effort to appear concertedly rather than individually to discuss the work-related problem for which he was to be interviewed [1, p. 1738].

Two types of "concerted activity" have been identified—"literally concerted" and "incipient concerted" activity [26, pp. 624-25]. Literally concerted activity occurs when "two or more employees unite[] toward a single goal" [26, pp. 624-25 (footnote omitted)]. On the other hand, incipient concerted activity occurs when an "employee seeks to form any kind of 'labor organization' whether or not it is a majority union, or seeks to engage in any other form of literally concerted activity" [26, pp. 624-25 (footnotes omitted)]. When the nonunion employee requests the presence of third-party representation at an investigatory interview, s/he is engaging in both forms of concerted activity. Regardless of whether employees are organized or unorganized, their requests for third-party representation are an indication of an effort to engage in concerted activity. In fact, once the employee requests a representative, s/he has already engaged in incipient concerted activity. If the board would have analyzed the case against the requirements of section seven, it would have been clear that the employee, Mr. Slaughter, engaged in the activity the act sought to protect. In fact, the *DuPont III* board found the employee, Mr. Slaughter, had in fact engaged in concerted activity [46]. Mr. Slaughter had solicited the assistance of two employees who agreed to serve as witnesses for him during the investigatory interview. Mr. Slaughter's activity was *admittedly* activity that section seven was designed to protect.

Further, the nonunion employee provides the same mutual aid and protection as does the union representative. The nonunion employee serves as a witness to the investigatory interview and also reassures the employee that the *workplace* is on his side. In this regard, the need for third-party representation in the nonunion workplace may be even stronger because there will be a greater power imbalance where the employee has no organized support whatsoever [26, pp. 624-28]. The

representative can report the ongoings of the interview so that other employees can insure they are treated similarly during their interview. Also, the representative can be sure that this employee is not being treated differently than the last employee who was the subject of an investigatory interview. The representative safeguards the rights of all employees by providing a window to investigatory interviews, assuring employees they will not face the employer–employee power imbalance on their own, and putting the employer on notice that s/he is not free to conduct interviews at the expense of employee rights—the workplace will be watching and comparing. Even if the particular representative does not want to provide other employees with support in the future, his/her presence will serve as enough assistance. Nonunion employees can and do engage in the activity contemplated by section seven. Once we find the employee's conduct was protected under section seven, the *Weingarten* rule—that third-party representation is activity governed by section seven—would protect Mr. Slaughter and all other nonunion employees. By ignoring the mandatory requirements of section seven, it appears the board is attempting to foreclose the availability of section seven for nonunion employees. The board's holding goes beyond the right to third-party representation and into the heart of section seven—the protection of employees who engage in concerted activities for mutual aid and protection. As has been pointed out, the board, the courts, and the legislative history of section seven all indicate that section seven covers nonunion employees. The board should have attacked Mr. Slaughter's ability to employ the protection of section seven by analyzing his case against the requirements of section seven and not by simply attempting to distinguish *Weingarten.* In addition, *Weingarten* did not mention nonunion employees because the facts of the case involved an organized workplace.

In *DuPont III,* the board referred to section seven, and its mandatory requirements, *only once* [1, p. 1744]. The board stated that a "'literal reading of Section 7 might indeed suggest that it bestows on nonunion employees the right [to third-party representation] . . .'" [53]. As Professor Morris pointed out, the board did not apply the "plain language" of the act and instead relied on a "balancing approach" employed in *Weingarten* [1, pp. 1744-45]. The Court in *Weingarten* was, however, balancing the interest of the employer against the union, *not against the individual employee* [1, p. 1745]. Section seven is concerned with the right of "employees," *not* just with union rights [1, p. 1745; 3; 4]. "When one employee agrees to stand by another employee when the latter is being interrogated about a matter that could lead to discipline, concerted activity for mutual aid or protection in its most basic form is being provided. That is what [the situation in] *DuPont* was all about" [1, p. 1750]. The *DuPont III* board should have applied the requirements of section seven rather than rely on its ability to distinguish the facts in *Weingarten.* Had the board simply (and correctly) applied the requirements, it would have necessarily concluded that Mr. Slaughter was guaranteed the right to third-party representation.

THE BOARD'S RATIONALE WAS FLAWED

Not only was the board's legal approach in *DuPont III* incorrect, as it should have compared the case to the section seven requirements, but its rationale, its *argument,* was not sound. The board's attempt to distinguish the policies behind *Weingarten* is flawed. The policies that support third-party representation for union employees also support that right for nonunion employees. Some argue the policies are even stronger in the nonunion situation.

The board first concluded "there is no guarantee that the interests of the employees as a group would be safeguarded by the presence of a fellow employee at an investigatory interview" [46]. There is no guarantee a union representative will safeguard the rights of a union employee, or at least there is no assurance that the representative will protect all employees' interest equally. The board assumed the employee and the coworker would be safeguarding their own interests. However, it would be nearly impossible to determine what an employee's true motive is when s/he requests third-party representation at an investigatory interview or what the coworker's motives are in serving as a representative. In addition, motive is not necessarily determinative in whether third-party representation serves to protect the interests of the nonunion workplace as whole. At the very least, the coworker would serve as a witness. As a witness, the coworker could report an employer's conduct to all the other employees. If the other employees are made aware of the employer's conduct, they could be aware of any unequal and arbitrary treatment [9]. Also, the ability to represent a coemployee "builds vigilance and solidarity among employees absent a union . . ." [9]. This "organization" is certainly an "interest" of all employees. It appears the board's first *justification* is weak, speculative, and does not appear to be grounded in the facts that surround the nonunion employee.

Secondly, the board stated a coemployee would be less able to ascertain whether employees were being treated equally and fairly at the investigatory interview. The board maintained that in the nonunion workplace and absence of records about the details of interviews and employee punishments, it would be impossible for the nonunion representative and the employees to protect other employees [46]. It would definitely be more difficult to uncover inconsistencies and arbitrary treatment in the nonunion workplace. However, at least the coemployee representative could advise the employees of how a particular employee and a particular situation were treated during an investigatory interview. The employees, or maybe the representative, would be able to compare the incidents to determine whether punishment was being administered arbitrarily or discriminatorily.

The board also claimed the nonunion representative, as opposed to a union shop steward, would not have the experience or training necessary to enable him/her to elicit facts from the employee in an effort to assist the employer. In its decision, the board did not even leave open the possibility that the coworker would be able

to serve such a function. Even without training, the coworker would provide security to an employee who is probably very nervous during the investigatory interview. However, if the coemployee representative could support the employee, it is quite possible that the employee would be able to produce facts that could help the employer. Also, an employee may be more apt to speak to "one of his own," a coemployee, someone who knows what s/he is going through and is on his/her side. In addition, as Professor Morris pointed out, if nonunion employees are prohibited from eliciting the assistance of a coemployee, the employees will *never* gain the experience necessary to help each other. In this case, it will be less likely that employees will solicit the assistance of a coemployee [1, p. 1747]. The board's holding will just worsen as the nonunion employees' opportunity to find coworkers who could adequately serve to preserve their rights during an investigatory interview, decreases. It seems obvious that the board's rationale was conclusory at best, and insufficient to support its rejection of the *Weingarten* rule in the nonunion workplace.

Nonunion employees are being denied the right to third-party representation solely because they have not engaged in one type of concerted activity—union organization. As has been pointed out, section seven does not discriminate in this manner; however, the board did in *DuPont III*. Nonunion employees need third-party representation at investigatory interviews for the same reasons as union employees. The nonunion employee may, in fact, be in greater need of representation by a coworker.

Unlike the union employee, the nonunion employee must look out for his/her own rights. After an investigatory interview, it will be the employee/s word, often disgruntled or displeased after the interview, against that of the employer. If, however, a coworker was present, s/he could report the details of the exchange to all employees. The employees as a group, the workplace, could then compare the employer's conduct and the punishment and treatment of employees. In the union workplace these interviews are better recorded and documented, but in the nonunion workplace word of mouth is the only way for employees to keep track of arbitrary and unjust employee treatment. It might be argued that this is the ideal workplace, that this informal reporting will not go on. While this may be true, it is mere speculation, as was the board's conclusion in *DuPont III*. If the option is available, employees may take it and begin an informal system of reporting and monitoring. At the very least, the employer will be aware the employees are watching his/her conduct and they may, if they choose, bring a witness to observe the interview and report its result and procedure to the workplace. The witness–reporter rationale is not the only support for the argument.

In addition, the coworker could assist the employer in eliciting facts from a nervous, overpowered employee. As the subject of an investigation, or a part of an investigation, the employee may be unable to respond to the employer's questions. In this case the employer's efforts would be frustrated and the employee would be subject to continued questioning as the employer strives to get to the bottom of an

incident. Also, an employee subjected to the employer–employee power imbalance may be unable to recognize an invasion of his/her privacy or afraid to raise an objection. The coworker would serve to relax the employee. The employee would realize there is someone present who is on his/her side, someone who is there to foster equality. The presence of a coworker at these interviews is essential to fairness in the workplace as well as for the maintenance of an employee's privacy rights.

The board has applied the section seven requirements differently [1, pp. 1712-50]. In this case, the board never confronted the different application as it choose not to apply the mandatory requirements of section seven. The next "third-party representation for nonunion employees" case must confront the issue and consider the amount of fairness due nonunion employees. Professor Morris added that section seven's more important focus is preorganizational activity [1, p. 1751]. If employees are not protected at this phase, how can they ever assemble in order to form a union? At the preorganizational stage employees are most susceptible to employer pressures. The well-informed and alert employer could use this pressure and the disregard of section seven's application in the nonunion workplace as a means of preventing union formation [1, pp. 1751-52]. Section seven is *admittedly* (even for the *DuPont III* board) the purpose of section seven.

CONCLUSION

Nonunion employees are entitled to the protections of section seven of the NLRA. They should not be deprived of the section's protection merely because they chose to engage in nonunion, yet *concerted* activity. In addition, the nonunion employee has a greater need for representation than the union employee. In the nonunion workplace, the power imbalance between employees and employers is greater than in the union workplace, where collective bargaining is in place and shop stewards police the workplace. The board's decision in *DuPont III* is not only flawed, legally and factually, but unfair. The board discriminated against the nonunion employee by depriving her of the right to request the presence of a coworker at an investigatory interview. Nonunion employees must be afforded the protection provided by section seven; they must be allowed to have third-party representation to the same extent as union employees.

The rights of nonunion employees should be the same as those of union employees, as identified in *Weingarten,* including the limitations imposed therein. However, the right to third-party representation for union, and nonunion employees must be expanded somewhat. Employers should advise and encourage union and/or coworker representation at investigatory interviews. In addition, the interview should not be scheduled until the representative has been notified, has briefly consulted with the employee, and has consented to be present at the interview. Without these additional requirements, the "right" to third-party

representation can be avoided by employers. Only after these extensions can the right be fully enjoyed without the fear of reprisal. Employees would realize the significance of the right and the employer's acceptance of the employees' right to mutual aid and protection.

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END NOTES

1. C. J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7,* 137 U. Pa. L. Rev, pp. 1673, 1675-76 (1989).
2. S. R. Thistle, *Labor Law—"Concerted Activities" under Section 7 of the National Labor Relations Act—A Nonunion Employee has a Right to the Presence of a Co-worker Witness at an Investigatory Interview Where the Employer Reasonably Believes that Discipline Will Result,* E. I. Du Pont de Nemours & Co. (Chestnut Run) v. National Labor Relations Board (1983), 29 Vill. L. Rev. pp. 987, 989-90 (1983-84).
3. 29 U.S.C. § 157 (1988).
4. Section seven provides: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representation of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent 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]
5. 465 U.S. 822 (1984).
6. *City Disposal Systems,* [5, at 835]. It has been stated that in *City Disposal Systems* the Court "interpreted 'concerted activity' as clearly embracing 'the activities of employees who have joined together in order to achieve common goals.'" Thistle [2, pp. 992-93] (quoting *City Disposal Systems,* [5, at 830], 104 S. Ct. at 1511).
7. 167 F.2d 983 (7th Cir.), *cert. denied,* 335 U.S. 845 (1948).

8. *Phoenix Mut. Life Ins., Co.,* 167 F.2d at 988. The court stated that "[a] proper construction [of section 7] is that employees shall have the right to engage in concerted activities for their mutual aid or protection even though no union activity be involved, or collective bargaining be contemplated." Morris [1, p. 1688 n.67] (alteration in original) (quoting *Phoenix Mut. Life Ins., Co.,* [8]).
9. K. H. Decker, Employee Privacy Law and Practice, § 7.29 (footnote omitted), John Wiley & Son, 1987.
10. K. H. Decker, *Representation Rights at Investigatory Interviews For Pennsylvania's Non - union Public Employees*, 89 Dick. L. Rev. 131, 139 (1984) (citing F. Elkouri and E. A. Elkouri, How Arbitration Works, 532-34 (3d ed. 1976); Comment, *Union Presence in Disciplinary Meetings*, 41 U. Chi. L. Rev. 329, 338 (1974)).
11. *NLRB v. Weingarten,* 420 U.S. 251, 260-61 (1975); *see* Decker [9]; Decker [10, p. 133].
12. E. I. DuPont de Nemours & Co., 289 N.L.R.B. 81 (1988) (citing *Weingarten,* 420 U.S. at 263). The court stated: Thus, [the *Weingarten* Court] observed that a "knowledgeable union representative could assist the employer by eliciting favorable facts" that an inarticulate employee might to [sic] be too fearful or otherwise unable to mention, thereby "sav[ing] the employer production time by getting to the bottom of the incident occasioning the interview."
    Id. The court pointed out that in the case of a nonunion employee this "assistance" would be invalid. Where a coworker represents an employee, it is unlikely that s/he would possess the same knowledge as a union representative and therefore not be very helpful in saving employer production time.
13. K. H. Decker, *The Individual Employment Rights Primer*, Baywood Publishing Co., Amityville, New York, pp. 152-153, 1991.
14. 420 U.S. 251 (1975).
15. *See* Neil N. Bernstein, Weingarten: *Time for Reconsideration?*, 6 Lab. Law. 1005 (1990).
16. An unless otherwise indicated, the fact of *Weingarten* are taken from the Supreme Court's opinion, NLRB v. Weingarten, [11, at 251].
17. NLRB v. J. Weingarten, Inc., 202 N.L.R.B. 446 (1973).
18. Decker [10, p. 133] (citing NLRB v. J. Weingarten, Inc., 485 F2d 1135 (5th Cir. 1973)).
19. *Weingarten,* 420 U.S. at 257; *see* Decker [9]. The board has held that requests from a union representative are not sufficient. Appalachian Power Co., 253 N.L.R.B. 931 (1980). Also, "the employer has no obligations to advise [the employee] of the right at any step in the proceeding." Bernstein [15, p. 1010] (citing Montgomery Ward & Co., 269 N.L.R.B. 904 (1984); Coca Cola Bottling Co. of Los Angeles, 227 N.L.R.B. 1276 (1977)).
20. Bernstein [15] (citing *Weingarten,* 420 U.S. at 257 n.5).
21. Decker [9] (citing *Weingarten,* 420 U.S. at 258-59); Decker [10, p. 132 (footnotes omitted)]; *see generally* Bernstein [15, pp. 1013-15 (discussing the nature of the "employer's prerogatives").
22. *Weingarten,* 420 U.S. at 259-60; Bernstein, *supra* note 16, at 1009; *see also* Bernstein, *supra* 16, at 1015-17 (discussing the employer's right to refrain from discussions and

negotiations with the representative); Morris, *supra* note 5 at 1731 (quoting *Weingarten,* 420 U.S. at 260) (stating that "'[t]he employer has no duty to bargain with the union representative at an investigatory interview,' because the representative is there only to assist the employee . . . 'to clarify facts or suggest other employees who may have knowledge of them.'").

23. Decker [10, p. 132] (citing *Weingarten,* 420 U.S. at 259-60).
24. Bernstein [15, p. 1016 (citing *NLRB v. Texaco, Inc.,* 659 F.2d 124, 126 (9th Cir. 1981); United States Postal Service, 288 N.L.R.B. No. 93 (1988)).
25. Decker [9] (citing Climax Molybdenum Co., 227 N.L.R.B. 1189 (1977)).
26. S. Carlin, *Extending* Weingarten Rights to Nonunion Employees, 86 Colum. L. Rev. 618, 620 (1986) (citing *Weingarten,* 420 U.S. at 270 n. 1 (Powell, J., dissenting).
27. 239 N.L.R.B. 430 (1978), *enforced in part,* 618 F.2d 1153 (5th Cir. 1980).
28. Thistle [2, pp. 1001-02 (footnote omitted). In *Anchortank,* the board stated: "[W]e are persuaded that, in *Weingarten,* the Court's primary concern was with the right of employees to have some measure of protection when faced with a confrontation with the employer which might result in adverse action against the employee. *These employee concerns remain whether or not the employees are represented by a union.*" [2, p. 1003 n. 77] (citing *Anchortank,* 239 N.L.R.B. at 431 (citations omitted) (emphasis added)).
29. Anchortank v. NLRB, 618 F.2d 1153, 1161-62 (5th Cir. 1980).
30. 262 N.L.R.B. 1010 (1982).
31. Morris [1, p. 1632]; *see Materials Research,* 262 N.L.R.B. at 1012.
32. Morris [1, p. 1732] (alteration in original) (quoting *Materials Research,* 262 N.L.R.B. at 1015 (1982)).
33. Decker [10, p. 133] (quoting *Materials Research,* 262 N.L.R.B. 1010 (1982)).
34. Decker [10, p. 133. Professor Bernstein stated: The Board majority concluded that the presence of another employee, even one who may not be skilled in conducting interviews as a properly trained union official, still afforded some means of protection to the employee under scrutiny and would not pose a greater threat of interruption of the production process than would occur in an organized facility.
    Bernstein [15, p. 1018] (quoting *Materials Research,* 262 N.L.R.B. at 1015).
35. 274 N.L.R.B. 230 (1985).
36. *Sears, Roebuck,* 274 N.L.R.B. at 231. Professor Morris pointed out that the *Sears, Roebuck* board incorrectly read section seven to exclude employees' rights at the "pre-organizational stage." The board did not recognize the importance and the function of section seven to the nonunion employee. *See* Morris [1, p. 1733].
37. Slaughter v. NLRB, 876 F.2d 11, 13 (3d Cir. 1989).
38. E. I. DuPont de Nemours, 289 N.L.R.B. 81 (1988); Morris [1, p. 1735].
39. E. I. DuPont de Nemours & Co., 262 N.L.R.B. 1028 (1982) [*DuPont I*].
40. *DuPont I,* 262 N.L.R.B. at 1029; Morris [1, p. 1736].
41. E. I. DuPont de Nemours & Co. v. NLRB, 724 F.2d 1061, 1065 (3d Cir. 1983).
42. E. I. DuPont de Nemours & Co., 274 N.L.R.B. 1104 (1985) [*DuPont II*].
43. Slaughter v. NLRB, 794 F.2d 120 (3d Cir. 1986).
44. Morris [1, pp. 1736-37] (quoting *Slaughter,* 794 F.2d at 122 (emphasis omitted)).
45. "The court noted that it would give 'considerable deference' to the Board's finding that the Act *should not* be interpreted as affording *Weingarten* rights to nonunion

employees but refrained from actually passing on the question." Bernstein [15, p. 1019].

46. E. I. DuPont de Nemours and Co., 289 N.L.R.B. 81 (1988) [*DuPont III*].
47. *DuPont III,* 289 N.L.R.B. 81 (citing *Weingarten,* 420 U.S. at 260-61).
48. *DuPont III,* 289 N.L.R.B. 81 (citing *Weingarten,* 420 U.S. at 262).
49. *DuPont III,* 289 N.L.R.B. 81 (citing *Weingarten,* 420 U.S. at 263).
50. *DuPont III,* 289 N.L.R.B. 81 (citing *Weingarten,* 420 U.S. at 267).
51. Morris, (citing 78 Cong. Rec. 3679 (1934), *reprinted in* Legislative History of the National Labor Relations Act, 1935, at 20 (1969)).
52. For an in depth discussion of the requirements of section seven, see Morris [1, pp. 1678-1711].
53. Morris [1, p. 1744] (quoting *DuPont III,* 289 N.L.R.B. 81 (1988).

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