

THE WEINGARTEN RIGHTS OF NON-UNION EMPLOYEES: AN ADVOCATE'S PERSPECTIVE

CHARLES S. STRICKLER, JR.

Philadelphia Office of the National Labor Relations Board

ABSTRACT

In 1978, Walter Slaughter filed a charge with the National Labor Relations Board, asserting that his discharge by the E.I. DuPont Company for insisting on the presence of a co-worker at an investigatory interview violated the National Labor Relations Act. Slaughter's case was one of a series of cases, culminating in the *Epilepsy Foundation* case discussed in the previous article, that has established the right of a non-union employee to choose to have a co-worker present at an interview that could result in discipline. I was counsel for the General Counsel of the NLRB in the *DuPont* case and this article is my view of the history of that case and the legal issue it raised.

The official case citation is *E.I. DuPont de Nemours & Co.* [1], but it could more appropriately be referred to as Walter Slaughter's case. Walter Slaughter filed the original unfair labor practice charge with the National Labor Relations Board (NLRB or Board) and pursued it with determination and perseverance. Through his actions, Slaughter helped change the law of the American workplace and expand the rights of the seven out of eight workers who lack union representation. Slaughter's case involves the scope of the U.S. Supreme Court's decision in *NLRB v. J. Weingarten Inc.* [2].

WEINGARTEN AND THE RIGHT TO REPRESENTATION

In the *Weingarten* case, the Court affirmed the NLRB's holding that the National Labor Relations Act (NLRA or the Act) gives employees the right to have a union representative present at an investigatory interview which the employee

reasonably believes may result in disciplinary action. Writing for the majority in the case, Justice Brennan stated that the an employee request to have the assistance of his union representative at a confrontation with his employer was protected under Section 7 of the NLRA, which provides employees with the right to engage in concerted activities for the purpose of mutual aid or protection.

Justice Brennan went on to note that one of the goals of our national labor policy is to eliminate the inequality of bargaining power between employers and their employees. He believed that requiring a lone employee to attend an investigatory interview where the imposition of discipline was reasonably anticipated perpetuates the inequality the Act was supposed to eliminate and bars recourse to the safeguards the Act provided to redress the perceived imbalance of economic power between labor and management.

Justice Brennan placed some important limitations on the right established in *Weingarten*. First, the right to the presence of a union representative exists only when the employee requests representation. Second, the right to request representation exists only when the employee reasonably believes that the investigation could result in disciplinary action. The right does not apply to every conversation in the workplace. Third, when an employee requests representation at an investigatory interview, the employer is free to relinquish the right to interview the employee if the employer does not wish to conduct the interview in the presence of a co-worker.

The right to have a union representative or other co-worker present at an investigatory interview is important in any workplace—union or non-union. Being called into an investigatory interview by your employer is like being stopped by a state trooper on the highway. Either you have no idea what the problem is and are anxious to find out, or you know exactly what you did and know you are in trouble. In either case you are in a high state of anxiety. An employee called into an investigatory interview, furthermore, may not be his or her own best witness. A co-worker whose livelihood is not on the line may have the presence of mind to point out exculpatory facts that the employee might forget, for example: “Joe, you weren’t at work last Tuesday. You were taking your daughter to camp. Sam was at your machine the whole day.” In addition, a co-worker might be able to prevent the employee from making statements that would be used against him in a subsequent formal proceeding.

The *Weingarten* decision clearly established the right to the presence of a co-worker for all employees represented by a collective bargaining representative. Walter Slaughter raised the issue whether the right should be extended to the more than 80 percent of the workforce who lack union representation.

THE INCIDENT

Walter Slaughter was employed by the E.I. DuPont de Nemours company as a laboratory technician at one of its Delaware facilities. In the fall of 1978, the

United Steelworkers of America was engaged in an organizing campaign in this facility [3]. On November 15, 1978, Slaughter arrived at work early, went to the canteen, and placed an NLRB notice on the bulletin board in the employee canteen as he went to work. The notice had come from the NLRB Regional Office. It was one that is routinely forwarded to an employer whose employees have filed a petition with the Board seeking a representation election. The notice states that a petition has been filed and it suggests that the notice be posted to inform employees of their basic organizing rights under the NLRA.

Thomas Farley, the facility's supervisor of operations, was in the canteen when Slaughter posted the notice. Farley told him to remove it, stating that employer approval was required before notices could be posted. Slaughter told Farley that he was interfering with his right to organize and went to his work station without removing the notice. A few hours later, Farley telephoned Slaughter and asked him to come to Farley's office for a meeting. Slaughter, who had been placed on probation the previous month for excessive absenteeism, replied that he did not have to discuss Union business on company time unless he was allowed to have a third party present as a witness. About an hour later, Farley went to Slaughter's work location and offered either of two supervisors as a witness to their proposed meeting. Slaughter rejected Farley's offer and suggested a co-worker named Fields, who was an official in the National Association for the Advancement of Colored People (NAACP). Farley rejected Fields and asked Slaughter to return to work. About a half-hour later, Farley, accompanied by another supervisor, returned to Slaughter's work station, told him that he had been insubordinate, and removed him from his assignment. Slaughter then went with the other supervisor to an office near Farley's.

It was almost lunch time. Farley had the supervisor tell Slaughter that he could go to lunch but was to return to the office immediately thereafter. As Farley left his office for lunch, Slaughter stepped into the hallway and announced loudly that he would not discuss union business without a third party present. After lunch, Farley offered Slaughter another opportunity to meet with him, but Slaughter repeated his previous refusal. Farley told him that his actions were jeopardizing his job, but Slaughter continued to ask for a witness of his own choosing. Slaughter was then escorted from the plant and terminated ten days later.

THE FIRST DECISION

Slaughter filed an unfair labor practice charge with the Philadelphia Regional Office of the NLRB several weeks later. The charge alleged that his termination violated Section 8(a) (1) of the NLRA. This section prohibits an employer from interfering with, restraining, or coercing employees in the exercise to their right to engage in concerted activities for the purpose of mutual aid or protection, as specified in Section 7 of the Act. Section 7 of the NLRA was the basis of Justice Brennan's majority opinion in the *Weingarten* decision referred to above.

The Philadelphia Regional Office of the NLRB investigated Slaughter's charge and dismissed it, but it did not analyze the case in terms of *Weingarten*. It apparently never occurred to the Board investigator that *Weingarten* might have some application in a non-union setting. The Regional Office, instead, relied on a 1974 Board decision where an employee had been terminated for refusing to participate in an interview about her protected conduct. The employee lost that case because her refusal was found to constitute insubordination, thereby providing a non-discriminatory basis for the discharge.

SLAUGHTER'S APPEAL

Slaughter filed an appeal with the NLRB's Office of Appeals, which is contained organizationally within the Office of the NLRB's General Counsel. This Office held the case for almost a year before sustaining the appeal on January 9, 1980 and remanding the case to the Regional Director for the issuance of an appropriate complaint. The Office of Appeals relied heavily on the Board's decision in *Glomac Plastics* [4].

In *Glomac*, the Board had certified the union but the employer had refused to recognize it. When an employee requested union representation in an investigatory interview, the employer denied the request, and the Board later concluded that the employer had violated the employee's Section 8(a)(1) rights. In reaching its conclusion, the board stated that the rights granted by Section 7 of the NLRA are enjoyed by all employees and are not dependent on union representation for their implementation. Quoting the dissenting opinion of Justices Powell and Stewart in the *Weingarten* decision, the *Glomac* Board noted that: "While the Court speaks only of the right to insist on the presence of a union representative," it must be assumed that the rights that have been granted employees under Section 7 of the NLRA, to act "in concert in employer interviews, also exists in the absence of recognized union" [2, at 270, fn. 1]. Justices Powell and Stewart cited the Supreme Court decision in *NLRB v. Washington Aluminum Co.* [5] for the principle that *Weingarten* rights would apply in a non-union situation. In that case, the Court held that a group of seven unorganized employees were engaged in protected concerted activity when they walked out of a machine shop where they worked to protest the bitter cold conditions in the shop. The NLRB and the Supreme Court concluded that Section 7 of the NLRA guarantees that employees shall have the right to engage in concerted activities for the purpose of mutual aid or protection even though they are *not* represented by a union.

THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The Philadelphia Office of the NLRB issued its complaint in the *DuPont* case on January 31, 1980. A trial before an administrative law judge (ALJ) of the NLRB was set for July 7, 1980. I was assigned to try the case. There were only two

witnesses: Walter Slaughter for the General Counsel and Thomas Farley for the employer, and the hearing took little more than an hour.

Slaughter was not a good witness. ALJ Benjamin Schlesinger concluded that his testimony was overly expansive and that he was inclined to answer his own question rather than the one asked of him. Consequently, the ALJ's decision relied largely on Mr. Farley's statement of the facts. The ALJ's decision adopted the General Counsel's arguments in their entirety and significantly strengthened the arguments in one respect. Judge Schlesinger pointed out that in a post-*Weingarten* case, the Board had specifically held that the union representative in an investigatory interview "is not permitted to use the powers conferred upon the union by its designation as collective bargaining agent and, in essence may do no more during the interview than could a fellow employee" [6]. The ALJ went on to say that because a union representative is granted no powers other than those requested by Slaughter (to sit with him, listen and, perhaps advise), he concluded that Slaughter's request fell within the scope of activity protected by Section 7.

THE APPEALS

DuPont filed exceptions to the ALJ's decision with the five member Board in Washington. I filed a brief in support of the decision in October 1980. A few weeks later, Ronald Reagan was elected President of the United States. In the end, the 1980 election would prove to be the most critical event in the long history of Slaughter's case.

The Board held the case for eighteen months. On July 20, 1982, a three member panel of Carter appointees issued a decision affirming the ALJ's decision. The Board issued a second decision that day on the same issue that came to a similar result, *Materials Research Corporation* [7]. The two cases clearly established that an unrepresented employee engaged in interstate commerce may insist on the presence of a co-worker in an investigatory interview.

DuPont persisted in its refusal to reinstate Slaughter and filed an appeal with the Third Circuit Court of Appeals. The argument was uneventful and the court issued its opinion on December 29, 1983. The majority enforced the Board's decision with one dissent. I was ecstatic. We had won. Sadly, the roof was about to come crashing in.

THE BOARD CHANGES POSITION

After the appellate decision, DuPont filed a motion for a rehearing before the panel or the entire court. Before ruling, however, the court asked the Board to determine whether the position it took in *Meyers Industries* required a different result [8]. The NLRB responded by moving to have the opinion of the court vacated and the case remanded to the Board for further consideration. The Board had won, but it now wanted to reconsider its decision. What had changed was the

composition of the Board itself. By this time, a majority of the Board had been appointed by President Reagan [9].

The issue concerning whether the case should be remanded to the Board was set for argument before a three-member panel of the Court of Appeals. Professor Clyde Summers of the University of Pennsylvania Law School agreed to argue the case for Slaughter. On May 14, 1984, the Court of Appeals remanded the case to the Board, with one dissent. The case was now back before the Board, and I was again representing Mr. Slaughter. We had a new General Counsel but I was authorized to make the same arguments. The result was inevitable. On March 22, 1985, the Board issued a Supplemental Decision and Order reversing the ALJ, and finding that Slaughter's termination did not violate Section 8(a) (1) of the NLRA [10]. In reversing its earlier decision, the Board relied exclusively on its decision in *Sears Roebuck and Co.* [11], in which it held that unrepresented employees are *not* entitled to the presence of a co-employee during an investigatory interview. In *Sears*, the Board stated:

When no union is present, however, the imposition of *Weingarten* rights upon employee interviews wreaks havoc with fundamental provisions of the Act. This is so because the converse of the rule that forbids individual dealing when a union is present is the rule that, when no union is present, an employer is entirely free to deal with its employees on an individual, group, or wholesale basis [11, at 231].

The *Sears* decision was based on the premise that unionized employees have rights, but unorganized employees have no rights. In its decision, the Board never referred to the principles of *NLRB v. Washington Aluminum* [5], which clearly conflict with the statement above. The newly constituted Board was not going to permit any expansion of the rights of unrepresented employees; the rationale was unimportant. My role in representing Slaughter was over.

SLAUGHTER'S APPEAL

Through privately secured counsel, Joseph Lurie, who represented the United States workers, Slaughter filed an appeal of the Board's newest decision with the Third Circuit Court of Appeals. Professor Summers again argued the case for Slaughter. The court granted Slaughter's petition for review and remanded the case to the Board in an opinion by Judge Leon Higginbotham that posed an interesting issue. The Board's decision in *Sears & Roebuck* (that unrepresented employees had no right to representation under *Weingarten*) was inconsistent with Third Circuit's holding in the original *DuPont* (Slaughter) case. The case was, therefore, remanded to the Board to modify its decision in a manner consistent with the decision of the Court of Appeals [12].

After eight years, Slaughter was back before the Board. On June 30, 1988, the Board issued a Second Supplemental Decision and Order [13]. After reviewing the

principles of the *Weingarten* decision, the Board expressly adopted the Court of Appeals finding that *Materials Research* and the original *DuPont* decision represented a permissible construction of the Act. The Board then distinguished between 1) situations where unionized employees are represented by a shop steward or other union representative; and 2) situations involving unrepresented workers who are represented by a co-worker who is not experienced in this activity and does not speak for the bargaining unit as a whole. Citing the dissenting opinion in *Materials Research*, where Board member Hunter said that the “employer in the non-union situation is likely to find itself confronted by a representative who has few . . . of the skills or responsibilities that one would expect from a union steward” [7, at 1021] the Board concluded that:

. . . the interests in assuring such representation under Section 7 are less numerous and less weighty than the interests apparent in the union setting. Taking into account the more questionable value of such a right in the non-union setting, we find that the interests of both labor and management are better served by declining to extend this right into that forum [13, at 630].

The Board dismissed the complaint. Walter Slaughter’s case was over. The Board’s rationale in the Second Supplemental Decision was a vast improvement on *Sears*, but it did not close the door entirely on the issue raised by Slaughter.

EIGHT YEARS LATER

The issue lay dormant for more than eight years but it did not die. Sadly, however, Mr. Slaughter did pass away. I received a telephone call from his mother in December 1996 informing me that Walter had “passed.”

In late 1996, four distinguished law professors—Charles J. Morris, Joseph R. Grodin, Clyde W. Summers, and Ellen J. Dannin—filed a formal request that the Board issue a rule establishing *Weingarten* rights in the non-union setting. The professors argued that the rule was needed because the law as expressed in *Sears Roebuck* and *DuPont* represented an erroneous construction of the Act. Unknown to the professors, six months earlier the NLRB General Counsel, Fred Feinstein, a Clinton appointee, had issued instructions to the regional offices that cases involving *Weingarten* rights for unrepresented employees should not be dismissed but should be submitted to the Division of Advice in Washington. His instruction indicated that: “his office was considering whether to present this issue to the Board for re-examination.”

On July 10, 2000, almost precisely eighteen years after the Board’s original decision in the *DuPont* case, the NLRB issued its decision in *Epilepsy Foundation of Northeast Ohio* [14]. The majority opinion, supported by Chairman Truesdale and Members Fox and Liebman, noted that the right unionized employees had to have a representative present at an investigatory interview, had not been extended to non-represented employees. The majority then found that precedent to be

inconsistent with the rationale articulated in the Supreme Court's *Weingarten* decision and with the purposes of the Act. The Board majority held that the rule established in *Weingarten* applies to non-represented employees as well as to represented ones, as it overrode the Board's second decision in the *DuPont* rehearing and returned to the standard set in *Materials Research* and the original *DuPont* decision.

Two members of the Board dissented, arguing that by granting a non-unionized employee the right to have a co-worker present in an investigatory interview, the employer is forced to deal with the equivalent of a labor organization, in conflict with the exclusivity principle embodied in Section 9(a) of the Act. The majority concluded that this contention was squarely addressed and rejected by the Third Circuit Court of Appeals in *Slaughter v. NLRB*, 794 F.2d 120 (1986).

CONCLUSION

Today the right of an unrepresented employee to have a co-worker present at an investigatory interview is once again the law of the land. What are the lessons to be learned from the *Slaughter* decision and its aftermath? I think that one lesson is that legal analysis does matter. In my view, one reason why Walter Slaughter's position has prevailed is because the Board's rationale in *Materials Research* and ALJ Schlesinger's opinion linking the facts of the *DuPont* case to the fundamental purpose and language of the Act were vastly superior, in analytic terms, to the opinion in *Sears* and in the *DuPont* rehearing.

As Justice Brennan stated in the original *Weingarten* decision,

the Act is designed to eliminate the "inequality of bargaining power between employees . . . employers." Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate. What could more clearly reflect the inequality of bargaining power between employees and employers than Walter Slaughter being summoned to an investigatory interview by officials of the E. J. DuPont Company inside the state of Delaware? The NLRA should be interpreted to redress this imbalance. The *DuPont* decision was a logical and entirely appropriate extension of the *Weingarten* decision. Because of its analytic superiority, the decision took on a life of its own in the labor law community and ultimately prevailed. Sadly, my conclusion is only tentative. If some future Board reverts to the holding in *Sears*, I would have to conclude that the law has more to do with politics than with legal analysis [2, at 261].

I am proud to have played a small part in the story of *Weingarten* rights for unrepresented employees. For those of us who love labor law, Walter Slaughter did not live in vain. The views expressed in this article are mine and mine alone. They do not reflect the views of the NLRB's General Counsel, the NLRB, or any of its members or any one else associated with the NLRB.

ENDNOTES

1. *E.I. DuPont de Nemours & Co.*, 262 NLRB 1028 (1982).
2. *NLRB v. J. Weingarten Inc.*, 420 U.S. 251 (1975).
3. This organizing campaign was ultimately unsuccessful.
4. *Glomac Plastics*, 234 NLRB 1309 (1978).
5. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).
6. *Anchortank*, 239 NLRB 430, at 430-431 (1979).
7. *Materials Research Corporation*, 262 NLRB 1010 (1982). This decision appeared immediately before the Slaughter decision in the same volume of NLRB Proceedings. Because it appeared first, the principle of law established in the two decisions is generally referred to as the *Materials Research* issue.
8. *Meyers Industries*, 268 NLRB 493 (1983).
9. Clearly, the board was about to change position. I told Mr. Slaughter that he needed to retain separate counsel for the court action, and he took the steps to do so.
10. *E.I. DuPont*, 275 NLRB 1104 (1985).
11. *Sears & Roebuck and Co.*, 274 NLRB 230 (1984).
12. *Slaughter v. NLRB*, 794 F. 2d 120 (1986).
13. 289 NLRB 627 (1988).
14. *Epilepsy Foundation of Northeast Ohio*, 331 NLRB No. 92 (July 10, 2000).

Direct reprint requests to:

Charles S. Strickler, Jr.
140 Stockton Road
Bryn Mawr, PA 19010

AN AFTERWORD FROM THE EDITOR

The two preceding articles addressed the right of unorganized employees to have a co-worker present at an investigatory interview that could result in discipline. The topic is contemporary, significant, and, above all, controversial. Readers will be able to understand the nature of the controversy much more deeply if they read two outstanding articles in Volume 17, Number 1 of *The Labor Lawyer*. This journal is a publication of the Section of Labor and Employment Law of the American Bar Association, edited by Robert J. Rabin of the Syracuse University College of Law. The two articles are *Epilepsy Foundation of Northeast Ohio and the Recognition of Weingarten Rights in the Non-Organized Workplace: A Manifestly Correct Decision and a Seed for Further Progress*, by Sam Heldman, Hilary E. Ball, and Frederick T. Kuykendall III (at p. 201), and *Epilepsy Foundation of Northeast Ohio: A Case of Questionable Reasoning and Consequences*, by M. Jefferson Starling III (at p. 221).

I also call your attention to the decision in *Epilepsy Foundation of Northeast Ohio v. NLRB* rendered on November 2, 2001 by the United States Court of Appeals for the District of Columbia Circuit [No. 00-1332]. Writing for the court, Judge Harry Edwards, concluded that the Board's decision was a reasonable reading of §7 of the NLRA. "It is a fact of life in NLRA lore that certain substantive provisions of the NLRA invariably fluctuate with the changing composition of the Board. Because the Board's new interpretation is reasonable under the Act, it is entitled to deference."