

**THE NLRB AND WORKPLACE INVESTIGATIONS:
A MANAGERIAL PERSPECTIVE ON APPLYING
UNION RULES TO THE NONUNION WORKFORCE**

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ABSTRACT

This article examines the new legal landscape for nonunion employers who contemplate conducting investigations of alleged wrongdoing by their employees. The National Labor Relations Board recently ruled that a certain right (the "*Weingarten* right") previously guaranteed only to union members, applies equally to at-will employees in nonunion firms. As a result, all employees now possess the right to ask that a coworker be present during an investigatory interview. While the *Weingarten* right is sensible in a union environment, significant policy and practical problems arise when this right is extended to the nonunion environment. This article first examines the evolution of the *Weingarten* right. Next, we discuss the applicability of this right to the nonunion sector. Finally, we summarize the debate over the propriety of applying the *Weingarten* right to the nonunion workforce.

Employers today cannot afford to ignore the importance of conducting investigations into allegations of workplace wrongdoing. Failure to reasonably and competently investigate claims or suspicions of employee wrongdoing may have significant economic impacts on the firm. For employers to receive a heightened

degree of protection from liability, management must ensure that investigations be conducted promptly, thoroughly, and fairly [1].

A recent development, however, has created a new hurdle for managers conducting workplace investigations. For example, identify the legal and managerial implications of the firm's impending decision in this scenario: Debby's Donuts, Inc., employs a sizeable nonunion workforce. After receiving a complaint alleging illegal conduct, management decides to investigate one of its employees, Terry Adams. Management requests that Adams participate in an interview with appropriate company executives as part of the investigation. Fearing disciplinary consequences may arise from the meeting, Adams asks that a fellow employee be present. How should management respond?

Most managers will be surprised to learn that workers in a nonunion environment are now entitled to have a coworker present at an investigatory interview in which the employee reasonably believes disciplinary action might result. In July, 2000, the National Labor Relations Board (NLRB) reversed long-standing precedent in *Epilepsy Foundation of Northeast Ohio* by ruling that a right heretofore reserved exclusively for unionized employees (the so-called "*Weingarten* right") now applies to the nonunion workplace [2].

This article examines the managerial implications of the NLRB's recent venture into the nonunion workplace. We first describe the *Epilepsy Foundation* ruling and its antecedents. Next, this article discusses the practical considerations and questions arising from the NLRB's extension of the *Weingarten* right to nonunion employees. Finally, we explore the public policy arguments for and against providing this right to the approximately 87 percent of the American workforce not covered by collective bargaining agreements [3].

FROM WEINGARTEN TO EPILEPSY FOUNDATION

A key provision of the National Labor Relations Act (NLRA) [4], Section 7, contains the following statement of employee rights:

Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and to engage in *other concerted activities* for the purpose of collective bargaining or *other mutual aid or protection* . . . [4, at §157, emphasis added].

Employers may believe that if their workforce is not unionized, or if no union is attempting to organize, the NLRB does not apply to them. Because the NLRB encourages collective—not individual—bargaining as a means of diminishing labor-management conflict, it might appear that these employers are correct. But, this is not the case. According to NLRB rulings and court decisions, all employees—both union and nonunion—have the right to engage in concerted activities for mutual aid or protection [5].

The Evolving “Weingarten Right”

In the early 1970s, the NLRB expanded these Section 7 rights to include unionized employee requests to have a co-worker present during meetings with employers where disciplinary action might take place. While the courts did not enforce the initial NLRB decisions [6], in 1975 the U.S. Supreme Court decided otherwise in *NLRB v. J. Weingarten, Inc.* [7]. In *Weingarten*, the Court ruled that Section 7 of the NLRA grants workers covered under a collective bargaining agreement the right to have a union representative at an investigatory interview if disciplinary action is expected. This right is now known as the “*Weingarten* right.” The majority, however, did not address directly whether this right applied equally to nonunion workplaces [8].

In the 1982 *Materials Research Corporation* decision, a three-member Democratic majority of the NLRB extended the *Weingarten* right to nonunionized employees over the vigorous dissents of Chairman Van de Water and member Hunter [9]. The majority believed “the rationale enunciated in *Weingarten* compels the conclusion that unrepresented employees are entitled to the presence of a coworker at an investigatory interview” [9, at 1014]. In its reasoning, the majority found that an employee’s request to have a witness or representative at a meeting where disciplinary action is anticipated flows from the rights granted under Section 7 of the NLRA.

Chairman Van de Water’s dissent in *Material Research*, however, focused on Section 9(a) of the NLRA, which accords an NLRB-sanctioned union the exclusive right to represent employees. He contended that the obligation to deal with representatives flows directly from this right [9, at 1016-1021]. Chairman Van de Water argued that employers are under absolutely no obligation to recognize any individual (or group) as the representative of its employees unless the NLRB also has duly recognized them. Under this interpretation, an employer would not be required to honor an employee’s request to have a co-worker present during an investigatory interview.

By the mid-1980s, Reagan-era appointments had altered the composition of the NLRB. In 1985, the new Republican majority reversed course and adopted Chairman Van de Water’s view when it overruled *Materials Research* in the decision of *Sears, Roebuck and Co.* [10]. The *Sears* majority found that placing a *Weingarten* representative in a nonunion setting requires the employer to recognize and deal with the equivalent of a union representative. While agreeing that the *Weingarten* rule was entirely consistent with established principles of labor-management relations within the context of a collective bargaining agreement, in the eyes of the majority it wreaked havoc with a fundamental provision of the NLRA in nonunionized settings [10, at 231; 11].

The NLRB reconsidered the issue no fewer than three more times in a series of decisions involving E.I. DuPont de Nemours & Co. [12]. Initially, in what is commonly known as *DuPont I* [13], the NLRB in 1982 followed the *Materials*

Research decision. On appeal to the Third Circuit, the NLRB's decision was upheld [14]. Shortly thereafter, the new Republican majority asked the court to vacate its opinion and remand the case for reconsideration. In 1985, the NLRB followed the *Sears* rationale in *DuPont II* and held that *Weingarten* rights were not appropriate in a nonunion setting [15]. On appeal, the circuit court disagreed with the new NLRB majority that the NLRA "compels the conclusion" that nonunion employees are not entitled to *Weingarten* rights [16]. Ultimately, in 1988, the NLRB once again ruled that *Weingarten* rights do not belong in a nonunion setting (*DuPont III*) [17].

The Epilepsy Foundation Decision

The decision in *Epilepsy Foundation* involved a nonunion organization that provides services to persons affected by epilepsy. Two of Epilepsy Foundation's employees, Arnis Borgs and Ashraful Hasan, were involved in a research project concerning school-to-work transition for affected teenagers. In an attempt to remove their supervisor (Rick Berger) from the project, Borgs and Hasan wrote two memos to the executive director of Epilepsy Foundation, Christine Loehrke, stating that Berger was no longer needed on the project. After receiving the second memo, Loehrke directed Borgs to meet with both her and the supervisor (Berger). Borgs indicated he felt intimidated by the prospect of meeting with them due to a prior reprimand he had received. He asked to meet only with Loehrke and, upon being denied, Borgs asked whether his coworker, Hasan, could attend the meeting. Loehrke refused this request and, when Borgs declined to meet without Hasan, she sent Borgs home for the day. The next day Borgs met with Loehrke and the director of administration. At this meeting, Loehrke informed Borgs that he had committed gross insubordination by refusing to meet with her and the supervisor the previous day and, as a result, the foundation terminated Borgs' employment. Hasan was fired some weeks later for other alleged forms of insubordination.

In a 3-2 decision, the new Democratic majority of the NLRB (resulting from appointments made by President Clinton) in *Epilepsy Foundation* found that the employer had violated the NLRA and ordered reinstatement and back pay for Borgs and Hasan [2, at 7; 18]. In making its decision that the *Weingarten* right applies to the nonunionized sector, the majority decided that *Sears* and *DuPont III* misconstrued the language of *Weingarten* and erroneously limited the *Weingarten* right to unionized settings. With this ruling, the NLRB changed twelve years of precedent (for a chronological summary of these decisions, see Table 1).

WEINGARTEN IN THE NONUNION WORKPLACE: PRACTICAL CONSIDERATIONS AND QUESTIONS

In light of *Epilepsy Foundation*, nonunion employers should be aware not only of the event that activates the *Weingarten* right, but also of the role and identity of

Table 1. Key Decisions and Principal Rulings

Decision	Year	Principal ruling
<i>NLRB v. Weingarten, Inc.</i> 420 U.S. 251	1975	Section 7 of the National Labor Relations Act, which addresses “concerted activities,” protects the right to be accompanied by a co-worker at an investigatory meeting, but the right applies only to unionized workers.
<i>Materials Research Corp.</i> 262 NLRB 1010	1982	The right to be accompanied by a co-worker at an investigatory meeting applies to both unionized and nonunionized workers.
<i>Sears, Roebuck & Co.</i> 274 NLRB 230	1985	Overrules <i>Materials Research</i> . The <i>Weingarten</i> decision is reinstated. Section 7 applies only when there is an exclusive bargaining representative.
<i>E.I. DuPont de Nemours & Co.</i> 289 NLRB 627 (<i>DuPont III</i>)	1988	<i>Weingarten</i> right is not applicable in nonunion settings.
<i>Epilepsy Foundation of Northeast Ohio</i> 331 NLRB No. 92	2000	The principles of <i>Weingarten</i> are extended to employees in nonunion workplaces, and such employees should be afforded the right to have a co-worker present at an investigatory interview which the employee reasonably believes might result in disciplinary action.

the witness-representative. With this awareness, the employer undertaking a workplace investigation may more confidently exercise certain managerial prerogatives in charting a compliance strategy.

Activating the *Weingarten* Right

The *Weingarten* right attaches when: 1) an employee is requested to meet individually with a member of management, 2) the employee invited to the meeting is being investigated for possible wrongdoing connected with work, and 3) the employee *reasonably believes* that discipline or other formal adverse consequences may result from the meeting [7, at 256-260].

When the purpose of a meeting with an employee is solely to impose discipline (and not simply to determine whether discipline should be imposed), *Weingarten*

does *not* provide the employee with the right to a witness. If, however, the meeting is called for the purpose of imposing discipline and develops into a discussion regarding whether the employee committed a particular offense, the employee may ask for the presence of a co-employee [19].

Further, once the right is asserted, an employee is entitled to continued representation by a co-employee at subsequent meetings relating to a specific allegation of employee wrongdoing without reasserting such a request [20]. If the employee fails to assert the *Weingarten* right at the first investigatory interview, the employee may still invoke the right at any later investigatory meeting. Nothing in the nonunion environment supports altering these well-established rules flowing from the *Weingarten* decision.

The Role of the Witness-Representative

Who may serve as the witness-representative at the investigatory interview, and what is that person's role? In *Weingarten*, for example, the United States Supreme Court specified that the employee's union representative was the appropriate person to accompany the accused through the investigatory interview. In support of this selection, the court stated:

The union representative whose participation he seeks is, however, safeguarding 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. The representative's presence is an assurance to other employees in the bargaining unit that they, too, can obtain his aid and protection if called upon to attend a like interview [7, at 260-261].

Note, too, that in a unionized workplace the determination as to whether punishment is being imposed "unjustly" would necessarily require reference to the collective bargaining agreement.

In the union arena, therefore, the role of the representative is generally agreed upon. It is settled, for example, that the employee's representative (often a union steward) cannot provide answers for the employee or attempt to direct the proceedings. The union steward, however, can ask questions of clarification and consult with the employee at any time [21]. Following *Weingarten*, then, the representative serves as many as three important roles. First, the presence of a representative may help defuse highly emotional confrontations. Next, the witness provides another set of eyes and ears regarding the nature of the accusations proffered by management. But most significantly, the *Weingarten* representative in a union environment usually brings a detailed understanding of the grievance procedure and pertinent provisions of the labor contract. With this knowledge, the union representative assists both parties in following the appropriate procedure during the investigatory interview. In summary, the role in a unionized

environment appears to be one wherein the witness-representative aids both the employee and the employer.

In a nonunion setting, these rationales are far less powerful, and the role of the witness-representative is less certain. While having another person present may assist in defusing confrontational behavior, co-workers are less likely (than union representatives, for example) to be experienced in conflict resolution. In addition, in a nonunion atmosphere the person selected to accompany an employee to an interview may be inclined to contribute little for fear of retribution by the employer. In some cases, the person under investigation may even intimidate the co-worker. Also, while the employee may garner some emotional support through the presence of the co-worker, very few individuals chosen for this role could be expected to have much understanding of the disciplinary process or the particular elements needed to support an accusation of employee misconduct. A union representative, on the other hand, would be quite conversant with this information. Moreover, in most nonunion enterprises, the disciplinary procedure is either not formalized or, if it is, the system does not rise to the level of sophistication associated with a collective bargaining agreement. In other words, a person with only some understanding of the employer's disciplinary procedure would probably add little.

Who May Be the Representative?

In a nonunion environment—where a union representative is unavailable—questions naturally arise regarding who can serve as the employee's witness-representative. For example, could the employee's attorney serve in this capacity? In the unionized workplace, an attorney is prohibited from assuming this role [22]. The purpose of the co-worker is to *aid* both the employer and employee in proceeding through a just process—and not to *advocate* on behalf of a client. Arguably, this rationale is probably applicable to the nonunion environment.

Alternatively, an intriguing, unresolved question is whether a supervisor may serve as the witness-representative. The workplace controlled by a collective bargaining agreement is bifurcated into labor and management sectors. Functioning within this structure, the authority of the union remains intact, and supervisors are generally prevented from serving as representatives. But in a nonunion environment, such a severe institutional division may not exist. In fact, the employee's supervisor (or another management representative who possesses an understanding of the disciplinary process) might be able to serve effectively in this role *if the supervisor's presence is desired by the employee*. Another view, perhaps equally viable, argues against an employee selecting a management representative because of the potential for bias toward the employer. The *Epilepsy Foundation* decision is not instructive on this point.

Usually, the co-worker selected will be a person who works within the same area as the individual accused of wrongdoing. Yet even this apparently innocuous

choice raises two serious concerns. First, is it possible to select a co-employee who also may be under investigation for the same wrongdoing? Evidently, the answer is a “qualified yes.” This is exactly the situation that occurred in *Epilepsy Foundation*. The majority of members on the NLRB in *Epilepsy Foundation* apparently found no fault with such an arrangement.

Similarly, could the employee choose an individual who is not currently available to attend the interview? In a unionized setting, the employer need not postpone the interview just because the chosen co-worker is unavailable—usually because another union representative is on site. It is *union* representation that is critical and, therefore, no harm to the employee’s *Weingarten* rights arises as long as s/he has such representation. But without a union, can the employee effectively postpone the investigative interview until it is convenient for the selected co-worker to participate? Until this point is clarified, such a tactic, if employed, would undoubtedly create a dilemma for an employer when the investigation must be concluded within a reasonable period of time (e.g., in allegations of sexual harassment).

The Employer’s Prerogatives

The presence or absence of a union in the workplace should not alter the three strategic options available to an employer when an employee asserts the *Weingarten* right. The first option is for the employer to simply grant the employee’s request. While criticism has arisen from employer representatives that the presence of a co-worker diminishes significantly the effectiveness of the investigatory interview [23], it is possible that an employer may view the participation of a co-worker as beneficial in conducting an effective examination of an employee accused of wrongdoing.

The second alternative is to conclude the investigation without direct oral contributions from the employee being investigated. Depending on the type of offense and the amount of independent evidence available, there may be no need to ask specific questions of the person under investigation. Yet, in sensitive investigations where two diametrically opposing views are anticipated (e.g., most incidents of alleged sexual harassment), the failure to interview the accused may leave management without the information necessary to make a proper judgment.

For an employer predisposed to deny the presence of a co-worker, the final option is for the employer to present the employee with a Hobson’s choice. If the person being investigated requests a co-worker be present, then the employer may simply refuse to interview the employee. Or, the employee can change his/her mind regarding the presence of a witness, and the employer will proceed with the interview. This tactic forces the employee to weigh the strategic advantages associated with agreeing to the interview. The employer using this option, however, must take caution: The employee asserting the *Weingarten* right subsequently may be able to argue a lack of “reasonableness” on the part of management in conducting the investigation if management does not conduct the interview.

DEBATING THE EXTENSION OF *WEINGARTEN*

The NLRB's vacillation over whether the *Weingarten* right should be extended to the nonunion workplace is more than just a function of the shifting political persuasion of the majority of the NLRB [24]. On a more fundamental level, the debate over the extension of the right also reflects shifting perspectives on the evolving nature of the employment relationship itself.

Arguments for Extending the *Weingarten* Right

Section 1 of the NLRA signals Congress's intent to eliminate the "inequality of bargaining power between employees . . . and employers" [4, at §151]. During the last several decades, a number of other protections have been afforded employees through various pieces of subsequent antidiscrimination legislation (e.g., the Civil Rights Act of 1964). Moreover, during this same period, the development of common law exceptions to the employment-at-will doctrine have eroded the employer's ability to be capricious, arbitrary, malicious, or unfair in dealings with vulnerable employees [25]. The decision to bestow the *Weingarten* right on nonunion workers could be viewed as a logical extension of these efforts to level the workplace playing field. In the *Weingarten* decision itself, the United States Supreme Court declared that it was the NLRB's responsibility "to adapt the Act to changing patterns of industrial life" [7, at 266]. Thus, it can be argued that the extension of the *Weingarten* right is consistent with decades of legislation and evolving common law principles seeking to further adjust the balance of bargaining power in the workplace.

At least three additional arguments support the extension of the *Weingarten* right to nonunion employees. First, nonunion employees do not have an effective check on the employer's ability to act arbitrarily, unjustly, or recklessly. Evolving public policy suggests that this vulnerability should be remedied as a matter of fundamental fairness. Second, because no collective bargaining agreement exists, normally there are no effective grievance procedures that would enable the policing of the employment relationship. Third, in a nonunion environment, employees can rely *only* on each other for mutual aid and protection from capricious employment practices. As the NLRB noted in *Materials Research*, "when confronted with the prospect of an investigatory interview which might result in discipline, the only assistance readily available to an unrepresented employee lies in fellow employees" [9, at 1014].

Arguments Against Extending the *Weingarten* Right

In his dissent from the *Epilepsy Foundation* decision, NLRB member Hurtgen lamented:

By grafting the representational rights of the unionized setting onto the nonunion workplace, employers who are legitimately pursuing investigations

of employee conduct will face an unknown *trip-wire* placed there by the Board. . . . The workplace has become a *garden of litigation* and the Board is adding another cause of action to flower therein, but hiding in the weeds [2, at 9, emphasis added].

By his eloquence, Hurtgen highlights the potential significance of the *Epilepsy Foundation* decision and also signals the possible criticisms that may be leveled at the NLRB majority.

The most obvious criticism is that it inappropriately skews the historical and long-standing delicate balance between the legitimate rights and privileges of both employers and employees. According to this view, the decision takes away from the nonunion employer the previously unfettered right of such an employer to deal with its employees as individuals rather than as members of a group. The granting of rights heretofore reserved to employees in the collective bargaining context creates an additional exception to long-standing, employment-at-will principles.

While the provisions of Section 7 of the NLRA may protect an employee's right to seek the assistance of a co-worker in an investigatory interview, arguably the employer should not be obligated to comply with that request, and thus should be allowed to discipline the employee for insubordination if the employee refuses to be interviewed without a co-worker being present [26]. (Curiously, current law does not mandate that employers inform employees—unionized or not—of their *Weingarten* right.) To effectively balance the conflicting interests of management and labor, and in the absence of a collective bargaining agreement, this criticism posits that the employer must retain the prerogative to make judgments about whether or not a legitimate investigation would be assisted or hindered by the presence of a third party.

Similarly, it might be argued that the extension of the *Weingarten* right to nonunion settings confers a specific “right to representation” in a particular situation (i.e., investigations reasonably believed to result in disciplinary action) despite the fact that these same employees have declined to elect a union to represent them in any other relationships with management. Under the traditions of employment-at-will principle, however, the employer's freedom to deal individually with employees extends to all of the terms and conditions of employment, including decisions about whether to mete out discipline.

A number of other arguments can be made in opposition to the extension of the *Weingarten* right. For example, while shop stewards are charged with protecting the interests of the group under a collective bargaining agreement, there is no guarantee that an invited co-worker in a nonunion setting will safeguard the interests of the employees as a group; indeed, it is assumed that the co-worker invited to attend an investigatory interview as a witness-representative has been invited by the interviewee precisely to assist the employee's individual interests. The invited co-worker would be under no obligation to act on behalf of the interests of any group.

It can be further argued that, in contrast to a union steward, a co-worker in a nonunion setting would be less able to exercise vigilant oversight regarding any potential unjust imposition of sanctions by an employer. In a nonunion environment, there may be no established framework for due process (as there would be in a collective bargaining agreement), and access to reliable information regarding how the employer under similar circumstances has treated other employees in the past would not exist. An invited co-worker probably would not have the knowledge, skills, and experience of union stewards. Additionally, it is highly likely that the invited co-worker may have some emotional connection with the interviewee (or, worse, some involvement in the alleged wrongdoing). In a union setting, a union representative in an investigatory interview may serve a useful purpose by making contributions that would head off formal grievances; in the nonunion workplace, however, enforceable formal grievance procedures typically do not exist.

Finally, the extension of the *Weingarten* right to the nonunion workplace actually may work to the disadvantage of the very employees such an extension was designed to assist. If the employer chooses to forgo an investigatory interview with an employee rather than conduct it with the interviewee's co-worker in attendance, the prospective interviewee will lose a chance to provide the employer with his/her side of the story.

CONCLUSION

Twenty-five years ago, the United States Supreme Court established a new workplace right for unionized workers. The *Weingarten* right allows the presence of a witness-representative at interviews of an employee accused of wrongdoing. Now, with the recent extension of this right by the NLRB in the *Epilepsy Foundation* decision to the overwhelming majority of the workforce not covered by collective bargaining agreements, the employer-employee relationship has changed considerably.

Employers and employees both deserve a legal landscape that is stable and unambiguous and that enumerates a set of "due process" rights applicable to the workplace. With the growing importance of workplace investigations, no place within that landscape is more emotionally charged or critical to effectively dealing with potential legal liability than the investigatory interview of a person accused of wrongdoing. Philosophical disagreements may exist as to the appropriateness of the *Epilepsy Foundation* ruling, and some lingering uncertainties remain concerning the ruling's practical application. Until it is modified or overturned, however, employers conducting investigations must comply with the *Epilepsy Foundation* decision; to do otherwise places the employer in unnecessary jeopardy [27].

ENDNOTES

1. See, e.g., James F. Morgan, Glenn M. Gomes, and James M. Owens, Outsourcing Investigations of Sexual Harassment: The Unexpected Consequences of Good Intentions, 27 *Employment Relations Today* (Winter 2001), pp. 65-78; and Brian Hershizer and Michael Owendorff, Sexual Harassment in the Workplace: A Legal Review of Recent Statutory, Administrative, and Case Law, 7 *Journal of Individual Employment Rights* (1998-99), pp. 199-213.
2. *Epilepsy Foundation of Northeast Ohio*, 331 NLRB, No. 92 (July 10, 2000).
3. Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey: Union Members Summary, January 18, 2001, found at <http://stats.bls.gov/news.release/union2.nr0.htm> (accessed May 29, 2001).
4. National Labor Relations Act, 29 U.S.C. §§151-169.
5. E.g., *NLRB v. Washington Aluminum Company, Inc.*, 370 U.S. 9 (1962) (extending Section 7 rights to unorganized employees who walked off the job to protest the lack of adequate heat in their plant); *Fairmont Hotel Company*, 230 NLRB 874 (1977) (protecting employees' inquiries and complaints about tip policy).
6. See, e.g., *Quality Manufacturing Co.*, 195 NLRB 197 (1972), enforcement denied, 481 F.2d 1018 (1973); and *Mobil Oil Corp.*, 196 NLRB 1052 (1972), enforcement denied, 482 F.2d 842 (1973).
7. *National Labor Relations Board v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).
8. In his dissent, Justice Powell, with Justice Stewart concurring, foresaw the extension of Weingarten to nonunion settings when he wrote: "While the Court speaks only of the right to insist on the presence of a union representative, it must be assumed that the §7 right today recognized, affording employees the right to act 'in concert' in employer interviews, also exists in the absence of a recognized union" [7, at 270, footnote 1].
9. *Materials Research Corporation*, 262 NLRB 1010 (1982).
10. *Sears, Roebuck and Co. and International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC*, 274 NLRB 230 (1985).
11. For a detailed discussion, see Jill D. Flack, Note: Limiting the Weingarten Right in the Nonunion Setting: The Implications of *Sears, Roebuck and Co.*, 35 *Catholic University Law Review* (Summer 1986), pp. 1033-1059.
12. See Charles J. Morris, NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct, 137 *University of Pennsylvania Law Review* (May 1989), pp. 1673-1754.
13. *E.I. DuPont de Nemours & Co.*, 262 NLRB 1028 (1982) [*DuPont I*].
14. *E.I. DuPont de Nemours & Co. v. NLRB*, 724 F.2d 1061, vacated, 733 F.2d 296 (3d Cir. 1984).
15. *E.I. DuPont de Nemours & Co.*, 274 NLRB 1104 (1985) [*DuPont II*]; cf. Steve Carlin, Note: Extending Weingarten Rights to Nonunion Employees, 86 *Columbia Law Review* (April 1986), pp. 618-630.
16. *Slaughter v. NLRB*, 794 F.2d 120 (3d Cir. 1986).
17. *E.I. DuPont de Nemours & Co.*, 289 NLRB 627 (1988) [*DuPont III*].
18. The NLRB ruled that the employer had committed an unfair labor practice under Section 8(a)(1) of the NLRA. Section 8(a)(1) prohibits employers from interfering with the exercise of an employee's Section 7 rights.
19. *Baton Rouge Water Works*, 246 NLRB 995 (1979).
20. See *Lennox Industries*, 244 NLRB 607 (1979), enforced 637 F.2d 340 (5th Cir. 1981).

21. The union representative may be more than a mere witness. "A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by *eliciting* favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. Certainly his presence need not transform the interview into an adversary contest" [7, pp. 262-263, emphasis added].
22. *McLean Hospital*, 264 NLRB 459 (1982).
23. Mary Williams Walsh, Ruling for Nonunion Ranks Is Derided by Management, *New York Times* (July 15, 2000), p. C2.
24. For an historical overview of the NLRB appointment process, see Joan Flynn, A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000, 61 *Ohio State Law Journal* (2000), pp. 1361-1455.
25. See, e.g., Glenn M. Gomes and James F. Morgan, Managerial Prerogatives, Employee Expectations, and Property Rights in Job Security: Institutionalizing the 'New Equity,' 4 *International Journal of Value-Based Management* (1991), pp. 25-43.
26. Dissenting in *Materials Research*, NLRB Chairman Van de Water argued: "[S]imply because an employee is making a request for the purpose of securing mutual aid and protection, an employer is not precluded from denying the request and continuing to operate its business in the manner it would choose to abide by in the absence of the request" [9, at 1020]. Additionally, he wrote: "[I]n the absence of a recognized or certified union an employer is free to deal with its employees individually in matters concerning terms and conditions of employment; and, in this situation, it cannot be compelled to recognize any individual, group, or organization as a representative of its employees in such matters" [9, at 1019]. In essence, Van de Water is arguing that while an employee may request a co-worker be a representative during the interview under Section 7 of the NLRA, the employer is not required to comply with the request under Section 9(a) because no union exists.
27. As this article was going to press, the District of Columbia Circuit Court affirmed the NLRB's decision, ruling that the NLRB's most recent interpretation of Section 7 was reasonable under the Act. *Epilepsy Foundation of Northeast Ohio v. National Labor Relations Board*, No. 00-1332, November 2, 2001, 2001 U.S. App. LEXIS 23722 (DC Cir. 2001).

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