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ISSUES EMERGING IN THE WAKE OF THE EPILEPSY FOUNDATION RULING

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ABSTRACT

On November 2, 2001, the United States Court of Appeals for the District of Columbia upheld the National Labor Relations Board's decision to extend the right to engage in concerted activities for the purpose of mutual aid or protection in the workplace to nonunionized employees. This right, until now enjoyed only by unionized employees, guarantees that employees may request union or coworker representation at investigatory interviews likely to result in disciplinary action. However, as the theory on which this decision rests finds translation into practice, several significant issues have come to the fore for timely discussion.

The right to representation at an investigatory interview emanates from Sections 7 and 8(a)(1) of the National Labor Relations Act [1]. Section 8(a)(1) makes it an unfair labor practice for employers to interfere with, restrain, or coerce employees in the exercise of their rights to organize and collectively bargain, while Section 7 guarantees employees the right to engage in concerted activities for the purpose of mutual aid or protection. In a 1975 case, *NLRB v. J Weingarten, Inc.,* the Supreme Court held that an employer violated Section 8(a)(1) by denying an employee's request that a union representative be present at an investigatory interview that the employee reasonably believed might result in disciplinary action [2]. The Court agreed with the National Labor Relations Board (NLRB) that an employee's right to engage in concerted activity includes an employee's right to seek assistance from the employee's statutory representative in the face of an inquiry that could lead to discipline or dismissal. In *Weingarten,* the Court reasoned that the union representative participating in an investigatory conference that could result in

discipline or dismissal is safeguarding not only the threatened employee's interest, but also the interests of the entire bargaining unit [2, at 261]. The Court concluded that representation at investigatory conferences is required to make certain the employer does not initiate or continue a practice of imposing punishment unjustly [2, at 261]. Twenty-six years later, in *Epilepsy Foundation of Northeast Ohio,* the board ruled that the act clearly protects the right of employees—whether unionized or not—to act in concert for mutual aid or protection [3, at 15]. The right to have a co-worker present at the investigatory interview affords unrepresented employees the opportunity to act in concert to prevent a practice of unjust punishment [3, at 15, 16].

The court of appeals agreed with the NLRB that the presence of a co-worker gives an employee a potential witness, advisor, and advocate in an adversarial situation, and, ideally, militates against the imposition of unjust discipline by the employer [4, at 14]. Although the board was inconsistent in applying this right in past cases, the court found the board's rationale in *Epilepsy* both clear and reasonable, and noted that this is all that is necessary to garner deference from the court [4, at 20].

The importance of the *Epilepsy* decision is twofold. It creates a right for a nonunionized employee to have a co-worker witness at investigatory meetings that could result in disciplinary action, and it recognizes an unlawful reason for disciplining a nonunionized employee who chooses to exercise that right. Nonunionized employees who refuse to participate in investigatory meetings without the presence of a colleague cannot be punished for their unwillingness to cooperate in the investigatory meeting. Invocation of the right to concerted action, furthermore, cannot be misconstrued as insubordination, a lawful reason for disciplinary action. Employers, however, do have the option of proceeding without employee participation in the investigatory meeting and may take disciplinary action without employee input for whatever offense gave rise to the meeting. This latter scenario presents one of several controversial issues that have arisen in the wake of the court of appeals ruling in *Epilepsy.* This article focuses on these issues.

THE TIMING OF DENIAL

While the court of appeals in *Epilepsy* affirmed the NLRB's position that nonunionized employees have the right to co-worker representation at investigatory meetings that may result in disciplinary action, neither of the dismissed Epilepsy Foundation employees actually benefitted from this decision. For very different reasons, neither was reinstated as the result of the court of appeals ruling. The two employees were Arnis Borgs and Ashrafal Hasan, who wrote memos seeking to have their supervisor removed from their project. Borgs was directed to meet with the supervisor, and he sought the presence of Hasan at the meeting.

In light of the NLRB position, it would at first appear that Borgs should not have been fired for refusing to meet unaccompanied with his supervisors. However, as the court of appeals pointed out, at the time of Borgs' request, the NLRB had not yet changed its interpretation of the act's Section 7 protections. At the time of Borgs' request and his subsequent firing for refusing to participate in the employer's investigative meeting, nonunionized employees were not entitled to have such requests honored. The board had retroactively applied its ruling in *Epilepsy* to Borgs' situation, but the court of appeals overruled the board's retroactive application of its new interpretation of the act because at the time of Borgs' scheduled interview, employees in nonunion workplaces possessed NO right to have a coworker present. Borgs had no right to have Hasan, his colleague in trouble, present at the proposed meeting. Essentially, the Epilepsy Foundation's decision to fire Borgs for refusing to meet alone with his supervisors was not unlawful under the NLRA [4, at 5] at the time it occurred. The court reasoned that employers and employees must be able to rely on existing law and legal precedent to guide their actions, and the board's existing interpretation of the act did not, at the time of this incident, extend the *Weingarten* privilege to nonunionized employees.

Timing, therefore, is the first emerging issue in determining *Epilepsy's* impact on the rights of nonunionized employees. Only nonunionized employees who requested co-worker representation after the board's July 10, 2000, change of policy will reap the benefits of the board's change of heart. As the court of appeals pointed out in its review of the board's decision, Borgs' request for co-worker representation had triggered the board's new ruling, but the Epilepsy Foundation, as any employer, can only be required to follow existing law and legal precedent.

Gallup v. Steelworkers

In a decision rendered after July 10, 2000, but before the court of appeals ruled against retroactive application of *Epilepsy,* an administrative law judge raised the question of timing and how it affected a nonunionized employee's right to requested representation [5]. In this case, at the height of the union's organizing campaign, the employer fired four employees who were members of the union's in-plant organizing committee. Janice Rinehart, one of these employees, had worked for Gallup as a telephone interviewer until she was fired in a meeting with her supervisors on June 24, 1999, for allegedly falsifying the hours she worked [5, at 220]. The administrative law judge (ALJ) ruled that once Gallup investigated and found what reasonably appeared to the supervisors to be major falsifications of hours worked, it lawfully was permitted to discharge Rinehart. However, the judge was troubled by testimony from both sides acknowledging the fact that Rinehart had made "numerous" unsuccessful requests for a witness to accompany her to the meeting at which she was fired [5, at 354].

In his discussion of this element of the case, the ALJ noted that from 1985 until the board's July 10, 2000, decision in *Epilepsy,* Rinehart's request for a witness would have had no effect. However, he called the attention of both the general counsel and Gallup to the fact that *Epilepsy* had changed the effect of such a request. Although the general counsel did not raise this issue in its principal brief, the ALJ asked that the parties submit supplemental briefs stating and arguing their positions on the questions the ALJ raised in light of *Epilepsy* [5, at 354].

In its supplemental brief, the government argued that *Epilepsy did* apply retroactively to Rinehart's request for a witness and that the general counsel did not waive the application, that Section 10(b) of the act did not bar consideration of the issue, that the June 24, 1999, interview of Rinehart by Gallup was investigatory, and that there should be a full remedial order. Gallup opposed each point, either expressly or implicitly, and both parties expressed a preference that the record not be reopened to address this concern [5, at 355].

Although the U.S. Court of Appeals' November 2, 2001, ruling settled the issue of whether the board's decision in *Epilepsy* could be retroactively applied, the ALJ's comments and conclusions, which preceded that ruling, highlight the significance of both parties' awareness and timing in determining when *Epilepsy* will be applicable:

> Aside from some reasonable time to become aware of *Epilepsy,* neither the Union nor the General Counsel ever raised the case as applicable to Janice Rinehart's situation. Feeling compelled to "at least solicit" their positions, as I faxed counsel on February 2 of this year [2001], I raised the matter and asked for the positions of the parties. The parties earlier had filed their principal briefs in this case on September 23, 2000—over two months after *Epilepsy* and over four months before my taxed memo of February 2 of this year. If this were a limitations matter under Section 10(b) of the Act, then the 6-month limitations period expired on January 10, 2001. . . . In short, I find that any *Epilepsy* rights have been waived [5, at 358].

Implications of *Gallup*

The ALJ's comments illustrate two emerging issues in the application of the *Epilepsy* decision. First and foremost, parties must be aware of the decision and what it means for nonunionized employees, and secondly, they must understand the court of appeals' reasons for prohibiting retroactive application of the rights accorded by the NLRB in *Epilepsy.* The date on which a nonunionized employee is denied a request to have a co-worker present at an investigatory meeting that may result in discipline will be significant. If that date is before the NLRB's change of heart and policy in *Epilepsy* on July 10, 2000, the nonunionized employee will have had no right to have a co-worker present. Employers complying with existing law and agency precedent were not obligated to honor such requests. However, if the denial occurred after the NLRB's decision in *Epilepsy* on July 10, 2000, the employer was obligated to honor the nonunionized employee's request, and denial

could indeed become the basis for rescinding disciplinary action taken as a result of the investigatory meeting with its resultant back-pay implications.

In the case in point, Rinehart was interviewed and fired on June 24, 1999. The NLRB rendered its decision in *Epilepsy* more than one year later. Thus, even before the court of appeals overruled retroactive application of that decision, the ALJ, acting on the NLRB's change of policy, brought his concerns about the applicability of the *Epilepsy* ruling to the parties' attention. The ALJ ultimately rejected applicability in this case because *Epilepsy* rights were waived by the untimely fashion in which the general counsel asserted those rights. This case and the ALJ's comments regarding time considerations illustrate how important it is that parties know about and act in accordance with the time considerations discussed by the court of appeals and required by Section 10(b) of the act.

What Is an Investigatory Meeting Triggering *Epilepsy* Rights?

In this same case, the ALJ addresses another emerging issue arising out of *Epilepsy:* the *nature* of the meeting that would trigger *Epilepsy* rights for the nonunionized employee. *Epilepsy* rights ensue when the meeting is investigatory. In *Gallup,* the ALJ found the meeting to be confrontational, explanatory, and implemental, but not investigatory because Rinehart's supervisor proceeded directly into his explanation and there was no effort made to obtain an admission at the meeting [5, at 359]. The ALJ relied on the board's own earlier explication of what does and does not entail an *investigatory* meeting in *Baton Rouge Water and Works Company and Office and Professional Employees International Union, Local 428,* a 1979 case in which unionized employees were invoking their right to union representation under *Weingarten* [6]. In that case, the board said:

> . . . if the employer engages in any conduct beyond merely informing the employee of a previously made disciplinary decision, the full panoply of protections accorded the employee. . . . may be applicable . . . for example, were the employer to inform the employee of a disciplinary action and then seek facts or evidence in support of that action, or to attempt to have the employee admit his alleged wrongdoing or to sign a statement to that effect, or to sign statements relating to such matters as workmen's compensation, . . . the employee's right to union representation would attach. In contrast, the fact that the employer and employee thereafter engaged in a conversation at the employee's behest or instigation concerning the reasons for the previously determined discipline will not, alone, convert the meeting to an interview at which the *Weingarten* [*Epilepsy*] protections apply [6, at 12].

It was the board's position in *Baton Rouge* that if an employer had reached a final and binding decision to discipline an employee before the interview, based

on facts and evidence obtained prior to the interview, the interview was not investigatory, and the employee had no right to have a co-worker present at the meeting [6, at 13]. It was the ALJ's position that Rinehart's meeting with her supervisors on June 24, 1999, was merely to confront, explain, and inform her that she was terminated. Therefore, despite her repeated requests for a co-worker witness, she had no inherent right to have her requests honored by her supervisors [5, at 360].

The issue of what constitutes an investigatory meeting within the meaning of *Weingarten* and *Epilepsy* is likely to arise again and again, simply because it is an issue defined by circumstance. Even at meetings where the clear intent is simply to mete out predetermined discipline, discussion is likely to ensue giving rise to the inference that the meeting became investigatory with all the rights and privileges that term implies.

THE ISSUE OF CREDIBILITY

In the final analysis, triers of fact in these cases emanating from rights under *Epilepsy* will be required to determine who is telling the truth. Employees seeking reinstatement and the revocation of disciplinary action will claim that they asked for and were denied their right to have a co-worker witness present or that they were forced to participate in what they perceived to be an investigatory meeting without colleague assistance. Employers will claim that no such request was made or that there was no attempt to question or uncover information during the disputed meeting. They will avow that the employee was fired for poor performance, insubordination, violation of work rules, but not in response to the employee's refusal to meet with the employer without a witness.

The board's established policy is not to overrule an Administrative Law Judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the board that it is incorrect [7]. Triers of fact are given great discretion in determining credibility. Credibility determinations may be based on a variety of considerations including, but not limited to, the demeanor and conduct of the witnesses; witness candor and lack thereof, their apparent fairness, bias, or prejudice; their ability to know, comprehend, and understand the matters about which they testified; whether they had been contradicted or otherwise impeached; the interrelationship of the testimony of the witnesses and the written and/or documentary evidence presented; and the inherent probability and plausibility of the testimony [8]. Two recent cases in the wake of the board's ruling in *Epilepsy* illustrate the pivotal role credibility will play in resolving *Epilepsy* claims.

Ronald Robinson, a union organizer, was asked to attend a meeting with his employer's environmental, health, and safety manager to investigate an incident in which Robinson suffered burns to his right hand when he removed a bulb from a

machine without wearing his protective gloves [9]. Robinson testified that he was aware of a new plant policy regarding the failure to wear safety equipment, and that workers sustaining workplace injuries due to unsafe practices would be subject to discipline for violating the company's safety rules [9, at 5], and that he had asked that an employee representative be allowed to attend the meeting with him. There were no witnesses when he made his request to his supervisor, and he testified that the supervisor denied his request saying that "paperwork will be witness enough." Robinson's supervisor testified that Robinson did not ask for permission to have a co-worker present at the meeting [9, at 5]. Robinson did not renew his request for a witness, nor did he complain that Miller had refused to honor his request [9, at 6]. Instead, he attended the meeting and, after responding to questions about his failure to wear required safety equipment, he received a disciplinary warning notice. Then, on November 8, 2000, Robinson filed charges with the board accusing his employer of committing an unfair labor practice in denying his requests, under threats of reprisals, to have a representative present at the investigatory meetings he was asked to attend [9, at 6]. As the ALJ so aptly pointed out, the case turned on the credibility of the employee, Robinson, and his supervisor [9].

In light of Robinson's role as a union organizer, the ALJ found it implausible that he would fail to pursue his right to a witness after only one request. While Robinson's failure to repeat his request for a witness to higher management did not vitiate his rights under *Epilepsy,* the ALJ found it out of character with Robinson's own testimony that he usually pursued his rights consistently and aggressively [9, at 10]. In the judgment of the ALJ, the supervisor made an honest effort to describe the relevant circumstances, while, in contrast, Robinson's testimony seemed well-rehearsed, but less plausible. The ALJ based his perception on the fact that Robinson waited several months before he decided to file charges with the board [9, at 11] and concluded that Robinson did not make a request for a co-worker at the investigatory meeting and that his employer did not violate the act [9, at 12].

Credibility was also central to an ALJ's decision in the case of Dawn Figman, an employee with a history of poor performance and insubordination who was fired, and later claimed that she was first suspended, and only fired after "repeatedly and incessantly," according to Figman, requesting representation [10, at 6]. Here the ALJ did not believe Figman's testimony, in light of the prior final warning she had received, that she was first suspended and only then fired after she had asked for representation [10, at 6]. He also found it interesting that the union's representative in this case testified that when filing her grievance she said that she had *not* asked for a union representative and that she seemed unaware of her *Weingarten* rights to representation [10, at 7]. As a result of this testimony, the ALJ concluded that Figman seized on what the union representative had told her and falsely testified that she had requested union representation [10, at 7-8].

IMPLICATIONS OF *EPILEPSY FOUNDATION*

Awareness, timing, credibility, and the definition of an investigatory meeting are just four issues emerging in the wake of the board's *Epilepsy* decision and the court of appeals' November 11, 2001, clarification of that decision. Management, labor and employment attorneys have all registered concerns about how the decision will ultimately play out in the workplace. If one were to arrange these emerging issues in order of importance, awareness would lead the array. Most nonunion employees do not know they have the right to bring a co-worker to a predisciplinary investigative interview [11]. There is no requirement that employers post a notice describing *Weingarten* rights or any other Section 7 right, although such a requirement for notice would help to educate employers as well as employees [11]. Employers, for their part, are going to have to do a much better job of training first-line supervisors to recognize when employees might be engaging in protected concerted activity [12].

In addition to the concerns cited in this article, labor and management attorneys have identified confidentiality as a prospective issue in the application of *Epilepsy* rights. Dan Yager, vice president and general counsel of LPA Inc., noted that *Weingarten* is tied to the notion of having a union representative who is familiar with an existing contract and grievance procedure [13]. But in the nonunion context, there is no identifiable representative, and that raises practical problems, including confidentiality concerns [13]. Essentially, co-workers are untrained representatives with no rules or precedents governing their participation in the investigative meeting or afterward.

The most obvious unintended consequence of *Epilepsy Foundation* is that some employers will simply forgo conducting an investigatory interview of employees who demand to exercise their rights and thus leave the employee without an opportunity to tell his/her side of the story [14]. When this happens, the only recourse for nonunion employees will be to file a charge with the NLRB, which may result in, at most, an order to cease and desist and post a notice in the workplace [14]. However, nonunionized employees, often employees at will in the private sector, may, in the final analysis, lose their right to explain and defend against employer perceptions that result in discipline or dismissal.

The final impact of *Epilepsy* remains to be seen, but employees who do not fully understand its initial implications are like virtual Davids facing the Goliaths of business and industry with empty slingshots. Education alone will give true substance to *Epilepsy's* intended effect.

ENDNOTES

1. 29 U.S.C.S. 157 (1935).
2. *NLRB v. J. Weingarten, Inc.,* 420 U.S. 251 (1975).
3. 2000 NLRB LEXIS 428, July 10, 2000.

4. *Epilepsy Foundation of Northeast Ohio v. National Labor Relations Board,* 2001 U.S. App. LEXIS 23722, November 2, 2001.
5. *Gallup, Inc. and United Steelworkers of America, AFL-CIO, CLC,* Cases 16-CA-19898, 16-CA-19898-2, 16-CA-19898-3, 16-CA-19898-4, 16-CA-20028, National Labor Relations Board, 2001 NLRB LEXIS 381, May 25, 2001.
6. *Baton Rouge Water and Works Co. and OPEIU,* Case 15-CA-6820, 246 N.L.R.B. 995, 1979 NLRB LEXIS 58, December 14, 1979.
7. *Standard Drywall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d. Cir. 1951).
8. *Young Broadcasting of Los Angeles,* 331 NLRB No. 46 (2000).
9. *G.E. Lighting, Inc. and Ronald Robinson, An Individual,* Case 9-CA-38063, 2001 NLRB LEXIS 489, July 16, 2001.
10. *Sprint Corporation and Dawn Figman, an Individual,* Case 5-CA-29136, 2001 NLRB LEXIS 358, May 17, 2001.
11. Susan J. McGolrick quoting Nancy Schiffer, AFL-CIO Associate General Counsel, in *Daily Labor Report,* "Management, Union Reactions Differ on D.C. Circuit Affirmance of Epilepsy," The Bureau of National Affairs, Inc., 215 DLR C-1 (2001), November 8, 2001, p. 2.
12. Susan J. McGolrick quoting J. Robert Brame, former NLRB member, in *Daily Labor Report,* "Management, Union Reactions Differ on D.C. Circuit Affirmance of Epilepsy," 215 DLR C-1 (2001), November 8, 2001, p. 2.
13. Susan J. McGolrick quoting Dan Yager, Vice-President and General Counsel of LPA Inc., in *Daily Labor Report,* "Management, Union Reactions Differ on D.C. Circuit Affirmance of Epilepsy," 215 DLR C-1 (2001), November 8, 2001, p. 3.
14. Susan J. McGolrick quoting Management Attorney M. Jefferson Starling, in *Daily Labor Report,* "Extension of Weingarten Rights Debated at ABA Meeting on Development of Act," 35 DLR C-1 (2001), February 21, 2001, p. 2.

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