

NO WEINGARTEN RIGHTS IN NONUNION SETTING

On June 15, 2004, the National Labor Relations Board (NLRB) overturned its own four year old decision by holding that nonunion employees do not have the right to have a coworker present at an interview that could result in disciplinary action. 341 NLRB No. 148. Although the NLRB has had a history of vacillating on the subject of these so-called *Weingarten* rights, prior to *I.B.M.*, the most recent opinion extended them to both union and nonunion settings. *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), *see also NLRB v. Weingarten*, 420 U.S.251 (1975). However, in response to policy considerations and societal trends, the NLRB has returned to its position that under Section 7 of the National Labor Relations Act (the Act), only unionized employees are guaranteed the right to have a union representative present at such an interview.

In the *I.B.M.* case, the three charging parties were terminated by I.B.M. after a set of interviews stemming from allegations of harassment by a former contract employee of the company. All three parties requested to have a coworker present at their second interview, and all three requests were denied by I.B.M. Citing a violation of the Act, the three employees filed unfair labor practice charges against the company. The trial judge found that by denying the employees' requests, I.B.M. had violated the Act.

On appeal, the NLRB decided to reverse its decision in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), which held that "Section 7 rights are enjoyed by all employees and are in no [way] dependent on union representation for their implementation." In overruling *Epilepsy*, the NLRB considered recent events necessitating changes in security, the resultant influx in the number of workplace investigations taking place, and the prospect that having a coworker present at an interview can do more harm than good.

The NLRB acknowledged that permitting *unionized* employees to have a *union representative* present at interviews is appropriate because it collectively protects the interests of the employees as a whole, levels the playing field between the employee and the employer, helps to clarify the facts and surrounding circumstances and facilitates the proposal of solutions. This

assistance can help "eliminate extraneous material" and save the employer "valuable production time."

In contrast, the NLRB found that having a general coworker (i.e., not a union rep) present is not as likely to facilitate the interview process. A coworker is presumably not trained in representing a group, may have an emotional stake in the employee's future, lacks the force of the bargaining unit and has no obligation to represent the workforce as a whole, all of which could actually frustrate the investigation. Moreover, the NLRB held that while a union representative has a fiduciary duty to keep all information from the interview confidential, a coworker is not under this same obligation. This lack of accountability can compromise the honesty of the employee and also threaten the security of the company. If information resulting from the interview is divulged by the attending coworker, "the employee involved could suffer serious embarrassment and damage to his reputation and/or personal relationships and the employer's investigation could be compromised by inability to get the truth about workplace incidents."

Based upon the analysis and balancing of these policy factors, the NLRB refused to extend the right of a non-union employee to have a coworker present at an interview that could lead to disciplinary action. The NLRB concluded, "the right of an employee to a coworker's presence in the absence of a union is outweighed by an employer's right to conduct prompt, efficient, thorough, and confidential workplace investigations."

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