
KNOWING WHEN TO KEEP QUIET: WEINGARTEN AND THE LIMITATIONS ON REPRESENTATIVE PARTICIPATION

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INTRODUCTION

The rules regulating investigatory interviews¹ in the labor context require a delicate balance between the employee's need for assistance and council and the employer's need to maintain safety and control in the workplace. The system for maintaining this balance was first established by the National Labor Relations Board ("Board") in *Quality Manufacturing Co.*² and later adopted by the Supreme Court in *NLRB v. J. Weingarten, Inc.*³ In *Weingarten*, the Court held that while section 7 of the National Labor Relations Act⁴ ("NLRA") entitles an employee to union representation during an investigatory interview, such representation is limited by the employer's right to conduct the interview.⁵ The Court's analytical framework, which requires the union

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1. "[U]nder the Supreme Court's decision in *Weingarten*, an employee has no [section] 7 right to the presence of his union representative at a meeting with his employer held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision." *Baton Rouge Water Works*, 246 N.L.R.B. 995, 997 (1979). Thus, for the purpose of determining whether *Weingarten* rights attach, an investigatory interview must be distinguished from a disciplinary meeting. *See id.* An investigatory interview provides an employee who is suspected of wrongdoing with the opportunity to tell his or her side of the story before a disciplinary decision is made. *Storer Comm'n of Jefferson County, Inc.*, 292 N.L.R.B. 894, 897 (1989). In contrast, a disciplinary meeting consists of the employer confronting the employee to inform him or her of a previously made disciplinary decision. *Baton Rouge Water Works, Co.*, 246 N.L.R.B. at 997.

2. 195 N.L.R.B. 197, 198-200 (1972).

3. 420 U.S. 251, 262-63 (1975).

4. 29 U.S.C. § 157 (2000) (protecting the right of employees "to engage in other concerted activities for the purpose of . . . mutual aid or protection").

5. "[T]he employer is free to carry on his inquiry without interviewing the employee, and

to protect the employee's rights without interfering with legitimate employer prerogatives or turning the interview into an adversary contest, has resulted in over thirty years of conflicting case law as the Board, arbitrators, and courts have attempted to address the specific questions raised by the *Weingarten* decision.⁶ However, one issue remains curiously unresolved: to what *extent* may a union representative participate in a *Weingarten* interview?⁷

In the absence of further guidance by the Supreme Court, the Board's current interpretation of *Weingarten* indicates that the "[p]ermissible extent of participation of representatives in interviews . . . is seen to lie somewhere between mandatory silence and adversarial confrontation."⁸ This vague standard poses serious problems for employers, unions, and employees because they all must await a judge's or arbitrator's subsequent ruling in order to know whether their actions during an interview crossed the invisible *Weingarten* line that separates lawful conduct from unlawful conduct. Thus, the consequences of the Board's ad hoc standard are two-fold. First, the employers' inability to set appropriate guidelines for supervisors and security personnel places them at increased risk of subsequent adverse rulings by the Board and arbitrators. Second, the threat that a union steward may inadvertently lose section 7 protection and become subject to personal discipline during the course of the representation may chill the zealotry of his or her advocacy and compromise the protection that the Supreme Court intended to provide employees.

This Article begins by tracing the evolution of the relevant jurisprudence from the pre-*Weingarten* Board to the Supreme Court's

thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and forgoing any benefits that might be derived from one." *Weingarten*, 420 U.S. at 258.

6. See, e.g., Daniel J. Herron, *Ten Years After Weingarten: Are the Standards Really Clear?*, 6 N. ILL. U. L. REV. 81, 81 (1986) ("The [*Weingarten*] ruling poses four immediate questions that courts have been struggling with for the past nine years: 1) the definition of 'reasonably believes'; 2) what constitutes 'concerted activities for mutual aid or protection'; 3) the role of the requested representative; and 4) the definition of an 'investigatory interview.'"); Michael D. Moberly & Andrea G. Lisenbee, *Honing Our Kraft?: Reconciling Variations in the Remedial Treatment of Weingarten Violations*, 21 HOFSTRA LAB. & EMP. L. J. 523, 525 (2004) ("Among the issues that remain unresolved is the proper remedy for an employer's violation of an employee's right to representation at an investigatory interview.").

7. U.S. Postal Serv., 351 N.L.R.B. No. 82, slip op. at 7 (Dec. 28, 2007) ("While the Board's decisions indicate that the employer cannot lawfully preclude the union representative's participation in the interview, there are a limited number of cases dealing with the issue of participation and none that precisely define the boundaries of a representative's participation.").

8. U.S. Postal Serv., 288 N.L.R.B. 864, 867 (1988).

decision in *Weingarten*. The Article continues by exploring several nuisances of the current ad hoc standard under which potential *Weingarten* violations are assessed, including the limits on the right of representatives to speak and to object during investigatory interviews. The Article then surveys the specific dangers associated with the ad hoc standard as it applies to employers, union representatives, and employees. Finally, the Article concludes by suggesting alternative standards that may alleviate the uncertainty associated with the Board's current approach.

PRE-WEINGARTEN CASES

The Supreme Court's decision in *Weingarten* was the culmination of a series of cases in which the Board considered whether the denial of union representation at an employer-employee interview constituted an unfair labor practice ("ULP") under section 8(a)(1) of the NLRA.⁹ Initially, the Board answered this question in the negative, holding that such a denial of union representation did not violate section 8(a)(1).¹⁰ These early cases stressed the right of employers to maintain safety and discipline within the workplace by investigating possible employee wrongdoing.¹¹

However, in *Quality Manufacturing Co.*, the Board abruptly changed course by extending section 7 rights to employees undergoing investigatory interviews.¹² In *Quality Manufacturing*, an employee was discharged after refusing to attend an interview without her union representative.¹³ In assessing the legality of the employer's actions, the Board attempted to balance the rights of employers and employees, holding that an employer may not force an employee to participate in an investigatory interview without the assistance of his or her requested

9. 29 U.S.C. § 158(a)(1) (2000) (stating that "[i]t shall be an unfair labor practice for an employer – to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§] 157").

10. *Dobbs Houses, Inc.*, 145 N.L.R.B. 1565, 1571 (1964); *Ill. Bell Tel. Co.*, 192 N.L.R.B. 834, 834, 836 (1971).

11. *See Dobbs Houses, Inc.*, 145 N.L.R.B. at 1571 (adopting the Administrative Law Judge's finding that nothing in the NLRA "obliges an employer to permit the presence of a representative of the bargaining agent in every situation where an employer is compelled to admonish or to otherwise take disciplinary action against an employee, particularly in those situations where the employee's conduct is unrelated to any legitimate union or concerted activity"); *Chevron Oil Co.*, 168 N.L.R.B. 574, 579, 581 (1967) (noting that union protection of employees is inappropriate in the context of an employee-employer meeting to ascertain whether plant discipline has been breached).

12. *Quality Mfg. Co.*, 195 N.L.R.B. 197, 198-200 (1972).

13. *Id.* at 197-98.

union representative.¹⁴ The Board reasoned that such a compromise was the only way to effectuate all parts of the NLRA:

[i]t permits the employer to reject a collective course in situations such as investigative interviews where a collective course is not required but protects the employee's right to protection by his chosen agents. Participation in the interview is then voluntary, and, if the employee has reasonable ground to fear that the interview will adversely affect his continued employment, or even his working conditions, he may choose to forego it unless he is afforded the safeguard of his representative's presence. He would then also forego whatever benefit might come from the interview. And, in that event, the employer would, of course, be free to act on the basis of whatever information he had and without such additional facts as might have been gleaned through the interview.¹⁵

As this passage illustrates, an employee is able to claim section 7 protection only when three conditions are met. First, an employee must have a reasonable, objective belief that the investigation could result in disciplinary action. Second, an employee must independently invoke the right by requesting union representation. Finally, even where these two requirements are satisfied, an employer may still refuse the request for representation, without any justification or explanation, as long as it does not insist that the employee attend the meeting without representation. Thus, the Board's extension of section 7 protection to investigatory interviews remained largely subjugated to the employer's right to conduct such interviews, with employer liability under section 8(a)(1) arising only in a narrow set of circumstances.

NLRB v. WEINGARTEN

Two years after the Board's decision in *Quality Manufacturing*, the Supreme Court addressed the issue of whether section 7 prohibited an employer from denying an employee union representation during an investigatory interview. In *Weingarten*, an employee claimed that her employer had committed a ULP by denying her repeated requests for

14. *Id.* at 198-99; see also *Mobil Oil Corp.*, 196 N.L.R.B. 1052, 1052 (1972), *enforcement denied*, *Mobil Oil Corp. v. NLRB*, 482 F.2d 842, 845 n.7 (7th Cir. 1973) (“[I]t is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy.”).

15. *Quality Mfg. Co.*, 195 N.L.R.B. at 198-99 (footnote omitted).

union representation during an investigation by a store loss-prevention specialist.¹⁶ The employee, Ms. Leura Collins, was accused of “purchas[ing] a box of chicken that sold for \$2.98, but [placing] only \$1 in the cash register.”¹⁷

In a 6-3 decision, the Court held that the employer’s denial of Ms. Collins’ request for union representation had violated section 8(a)(1).¹⁸ The Court reasoned that an employee’s desire for representation “at a confrontation with his employer clearly falls within the literal wording of [section] 7 that ‘[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.’”¹⁹

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.²⁰

The Court found that an employee’s need for experienced representation was especially important in light of the adoption of “sophisticated techniques—such as closed circuit television, undercover security agents, and lie detectors—to monitor and investigate the employees’ conduct at their place of work.”²¹ Thus, the majority concluded that extending section 7 protection to investigatory interviews was appropriate in light of NLRA’s stated purpose of eliminating the “inequality of bargaining power between employees . . . and employers . . .”²²

16. NLRB v. J. Weingarten, Inc., 420 U.S. 251, 251, 254, 256 (1975).

17. *Id.* at 254. The investigation revealed that Ms. Collins, along with “most, if not all,” of the employees in her department, were under the impression that the store provided them with free lunch. *Id.* at 255. A subsequent investigation revealed that the employees regularly took lunch from the store lunch counter without paying for it. *Id.* The day after the interview was conducted, the store officially discontinued the practice of providing employees with free lunches. *Id.* at 256 n.4. An 8(a)(5) charge was also filed regarding the discontinuation of the free lunches. *Id.*

18. *Id.* at 252, 264.

19. *Id.* at 260 (quoting *Mobil Oil Corp. v. NLRB*, 482 F.2d 842, 847 (7th Cir. 1973)).

20. *Id.* at 262-63.

21. *Id.* at 265 n.10.

22. 29 U.S.C. § 151; *Weingarten*, 420 U.S. at 262 (noting that, viewed in the light of the NLRA’s purpose, “the Board’s recognition that [section] 7 guarantees an employee’s right to the presence of a union representative at an investigatory interview in which the risk of discipline reasonably inheres is within the protective ambit of the section read in the light of the mischief to be corrected and the end to be attained”) (internal quotations omitted).

Yet, in extending additional statutory protection to employees, the Court was mindful of the role that investigatory interviews play in maintaining workplace discipline.²³ As such, the Court adopted the Board's earlier limitations: it restricted the right of representation to those investigatory interviews where the employee requests representation because he or she reasonably fears the interview will result in discipline, and it allowed the employer to deny a request for representation without explanation.²⁴ The Court further noted that under no circumstances would the employer be obligated to bargain with a union representative during the interview; in fact, quoting the language of the Board's brief, the Court concluded that the employer "is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation."²⁵ As we shall see, the precise meaning of this phrase has given rise to many interpretative problems.

POST-WEINGARTEN CASES

The standard articulated by the Supreme Court in *Weingarten* requires union representatives to maintain a delicate balance between the employee's right to "assistance" and "council,"²⁶ and the employer's right to conduct its investigation without undue interference.²⁷ However, the exact contours of that balance remain unclear; the Court appears to have envisioned the union representative's role as that of a mediator, facilitating the interview process and safeguarding the employee's rights without transforming "the interview into an adversary contest."²⁸ Yet safeguarding an employee's rights often requires a representative to assert such rights over an employer's objections. In the decades since *Weingarten*, the Court has never clarified the precise boundaries of the union representative's role during an investigatory interview. In the absence of further guidance, the Board and the courts have reviewed

23. Sarah C. Flannery, *Extending Weingarten to the Nonunion Setting: A History of Oscillation*, 49 CLEV. ST. L. REV. 163, 165-66 (2001) ("It is important to note that as much as the *Weingarten* Board affirmed its prior construction of § 7, which created the right for a union employee to request and obtain representation at certain investigatory interviews, it also affirmed the limitations that prior Board decisions placed on such a right.") (citations omitted).

24. *Weingarten*, 420 U.S. at 257-59 (citations omitted).

25. *Id.* at 259-60.

26. *Id.* at 260-63; Sw. Bell Tel. Co., 251 N.L.R.B. 612, 613 (1980).

27. *Weingarten*, 420 U.S. at 258.

28. *Id.* at 263.

each case on an ad hoc basis,²⁹ guided only by the general principle that the “[p]ermissible extent of participation of representatives in interviews . . . lie[s] somewhere between mandatory silence and adversarial confrontation.”³⁰

As previously noted, the *Weingarten* Court allowed the employer to insist “that he is only interested, at that time, in hearing the employee’s own account of the matter under investigation.”³¹ This language was initially interpreted by many employers to permit the union steward’s presence, but not active participation, at the investigatory interview.³² Almost immediately, however, the Board and courts began to interpret this language more narrowly in order to effectuate the *Weingarten* Court’s other objectives—the support and protection of the employee in the face of potential discipline. As one court observed,

[c]learly, the union representative could not perform these functions if he were not allowed to speak. Although the union representative’s presence need not transform the proceedings into an adversary contest, and although the employer is still free to “insist that he is only interested, at that time, in hearing the employee’s own account of the matter under investigation,” it would be pointless to afford the employee the right to a muzzled representative.³³

This reasoning has led to the gradual expansion of the union representative’s role from a silent observer of the proceeding, to a participant providing “advice and active assistance,”³⁴ to a vocal advocate of the employee’s rights.³⁵

29. U.S. Postal Serv., N.L.R.B. No. 82 slip. op. at 7-8 (Dec. 28, 2007) (noting that “each factual situation differs because of the individual conduct of the supervisor conducting the investigatory interview and the employee representative attending the interview, [therefore] the boundaries for appropriate participation must vary for each factual situation”).

30. U.S. Postal Serv., 288 N.L.R.B. 864, 867 (1988).

31. *Weingarten*, 420 U.S. at 260 (citing Brief of Petitioner at 22, *NLRB v. J. Weingarten*, 420 U.S. 251 (1975)).

32. See, e.g., *NLRB v. Sw. Bell Tel. Co.*, 730 F.2d 166, 171-72 (5th Cir. 1984).

33. *Warwick Sch. Comm. v. State Labor Relations Bd.*, No. 79-2170, 1980 WL 336101, at *3 (R.I. Super. Ct. Apr. 23, 1980) (quoting *Weingarten*, 420 U.S. at 260, 263) (citation omitted).

34. *Washoe Med. Ctr., Inc.*, 348 N.L.R.B. No. 22, slip op. at *1 (2006) (quoting *Barnard Coll.*, 340 N.L.R.B. 934, 935 (2003)); *U.S. Postal Serv.*, 2006 N.L.R.B. LEXIS 505, at *15 (2006) (finding that an employer’s restrictions on an employee looking at his representative during an investigatory interview were unwarranted interferences with the employee’s *Weingarten* rights).

35. The importance of a representative’s role is further complicated when the steward also serves as a translator during the employee-employer meeting. See, e.g., *Barnard Coll.*, 340 N.L.R.B. at 939-40. Under such circumstances, it may be desirable to provide an additional *Weingarten* representative; however, such inquiry is beyond the scope of the current paper.

The Expansion of the Union Representative's Role from Silent Observer to Active Participant

The issue of whether an employer may silence an employee's chosen *Weingarten* representative during an investigatory interview was first addressed by the Board in *Texaco, Inc.*³⁶ In *Texaco*, an employee asked the acting union steward to accompany him to an investigatory meeting with his supervisor.³⁷ When the two arrived at the meeting, the supervisor advised the union steward that he would not be permitted to say anything during the interview.³⁸ The steward obeyed, remaining silent while the unaided employee admitted to violating plant safety regulations; the employee was subsequently reprimanded.³⁹

In reviewing the case, the Board held that the employer had violated section 8(a)(1) by requesting that the union representative remain silent during the interview.⁴⁰ The Ninth Circuit affirmed,⁴¹ specifically addressing the Supreme Court's statement that an employer "is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation."⁴² The court explained that,

this language, (taken by the Court from the Board's brief in *Weingarten*) is directed toward avoiding a bargaining session or a purely adversary confrontation with the union representative and to assure the employer the opportunity to hear the employee's own account of the incident under investigation. The passage does not state that the employer may *bar* the union representative from *any* participation. Such an inference is wholly contrary to other language in the *Weingarten* opinion which explains that the representative should be able to take an active role in assisting the employee to present the facts.⁴³

Thus, according to the Board and the Ninth Circuit, *Weingarten* does not relegate a union representative to a passive observer of the

36. 251 N.L.R.B. 633, 633 (1980).

37. *Id.* The meeting was called after the foreman, Linnell, discovered that a safety device of one employee, Deutsch, had not been activated. Linnell questioned other employees about the incident and then asked Deutsch to report to the office. *Id.*

38. *Id.* at 641.

39. *See id.*

40. *Id.* at 633-34, 643.

41. NLRB v. *Texaco, Inc.*, 659 F.2d 124, 125-27 (9th Cir. 1981).

42. NLRB v. *J. Weingarten*, 420 U.S. 251, 260 (1975).

43. *Texaco, Inc.*, 659 F.2d at 126 (emphasis added).

investigatory interview.

Yet not all circuits agreed with the *Texaco* court's interpretation of *Weingarten*; the same year that the Board decided *Texaco*, it also decided *Southwestern Bell Telephone Co.*, a case that was eventually heard on appeal by the Fifth Circuit.⁴⁴ In *Southwestern Bell*, an employee was summoned to a meeting with several supervisors to discuss his alleged theft of company property.⁴⁵ At the outset of the meeting the employer's security chief, a former FBI agent, instructed the union steward to remain silent.⁴⁶ The security chief then proceeded to threaten the employee with criminal action until he confessed.⁴⁷

Consistent with *Texaco*, the Board found that the employer had violated section 8(a)(1) by restricting the steward's participation beyond what was necessary to ensure the "reasonable prevention of a collective-bargaining or adversary confrontation with the statutory representative."⁴⁸ The Board reasoned that "an employer's right to regulate the role of the statutory representative at an investigatory interview is limited to a reasonable prevention of such a collective-bargaining or adversary confrontation with the statutory representative."⁴⁹ However, unlike the Ninth Circuit, the Fifth Circuit refused to enforce the Board's order, finding that the Board had "made an unwarranted extension of the employee's *Weingarten* rights."⁵⁰ The court went on to distinguish *Southwestern Bell* from *Texaco*, noting that whereas the representative in *Texaco* was permanently silenced, the interviewer in *Southwestern Bell* had permitted the steward "to make any additions, suggestions, or clarifications he desired" after the initial questioning was concluded.⁵¹

44. *Id.* at 124; *Sw. Bell Tel. Co.*, 251 N.L.R.B. 612, 612 (1980); *Sw. Bell Tel. Co. v. NLRB*, 667 F.2d 470, 470, 472 (5th Cir. 1982).

45. *Sw. Bell Tel. Co.*, 251 N.L.R.B. at 612. The employee was identified to police and company security officers by the owner of the pawnshop where a pair of the company's climbing hooks and a safety belt were found. *Sw. Bell Tel. Co.*, 667 F.2d at 472.

46. *Sw. Bell Tel. Co.*, 251 N.L.R.B. at 613.

47. *Id.* at 617. After directing the union steward to remain silent, the lead investigator, a former FBI agent, questioned the employee about the theft, advising him that "a police officer was on his way to the meeting and that if he didn't confess to these charges, that he would be taken downtown." *Id.* The lead investigator did not inform the employee that the Post Office had already decided not to file criminal charges. *Id.*

48. *Id.* at 613 (reasoning that "the mere silent presence of [the] union steward at the interview was insufficient to alter the imbalance which the Supreme Court sought to alleviate in its *Weingarten* opinion").

49. *Id.*

50. *Sw. Bell Tel. Co.*, 667 F.2d at 472-73.

51. *Id.* at 473, 474 n.3. Significantly, the Fifth Circuit failed to compare other circumstances of the investigations in *Texaco* and *Southwestern Bell*, such as the employee's familiarity with the

More recently, in *Lockheed Martin*,⁵² the Board directly addressed the Fifth Circuit's distinction between the total and partial silencing of a union representative. In *Lockheed*, the employer conducted a series of investigatory interviews after a hostile work environment complaint was filed by a female employee against several male co-workers.⁵³ When the union representative arrived and inquired into the purpose of the meeting, the investigator told him to "shut-up as she was asking the questions."⁵⁴ Although the union representative was later allowed to ask questions, the Board adopted the Administrative Law Judge's ("ALJ") finding that the employee's section 7 rights had been improperly limited.⁵⁵ The Board reasoned that the steward's eventual participation did not "excuse [the employer's] effort to confine his participation during the interview."⁵⁶ This holding is especially significant because "it is the duty of an [ALJ] to apply established Board precedent which the United States Supreme Court has not reversed."⁵⁷ Thus, while the circuits may ultimately refuse to enforce the Board's decisions, the Board itself will not countenance even temporary attempts to silence a union representative.

The Expansion of the Union Representative's Role from Active Participant to Advocate

Under *Texaco* and *Lockheed Martin*, an employer violates section 8(a)(1) when it attempts to relegate a *Weingarten* representative, even temporarily, to the role of a passive observer.⁵⁸ This interpretation

investigator and the relative seriousness of the allegations. Compare *Texaco, Inc.*, 251 N.L.R.B. 633 (1980) (employee confronted by a familiar supervisor after failing to comply with plant safety regulations), with *Sw. Bell Tel. Co.*, 251 N.L.R.B. at 613 (employee confronted by an FBI-trained security specialist after being accused of criminal theft). It seems likely that in light of the Supreme Court's desire to protect fearful employees from advanced investigatory techniques used by unknown security personnel, this distinction should have been significant. See *NLRB v. J. Weingarten*, 420 U.S. 251, 265 n.10 (1975) (citations omitted).

52. *Lockheed Martin Astronautics*, 330 N.L.R.B. 422, 429 (2000).

53. *Id.* at 422. Specifically, a female security guard suffered from a medical condition that prevented her from carrying a side arm and handling classified trash. *Id.* When the female employee learned that her condition was being discussed by several of her male co-workers, she "filed an internal complaint with the Respondent, contending that the talk had created a hostile work environment." *Id.*

54. *Id.* at 425-29.

55. *Id.* at 423, 429.

56. *Id.* at 429.

57. U.S. Postal Serv., 2006 NLRB LEXIS 476, at *46 n.12 (2006).

58. *Texaco, Inc.*, 251 N.L.R.B. 633, 643 (1980); *Lockheed Martin Astronautics*, 330 N.L.R.B. at 430.

appears to be consistent with the Supreme Court's desire for union stewards to protect inexperienced and fearful employees during the investigatory process.⁵⁹ Yet, as previously discussed, the goals of the *Weingarten* Court were not limited to the protection of the employee; rather, the Court also sought to preserve the employer's right to investigate in an environment free from collective bargaining or "adversary contest."⁶⁰ Although the term "adversary contest" is not defined in either *Weingarten* or subsequent case law, the Court's presumed intent was to prevent the union representative from hindering the employer's questioning with objections.⁶¹ Such a restriction seems logical given that the employer may refuse the employee's request for representation and opt to forgo the interview entirely.⁶²

Recently, however, several Board decisions have extended the right of active participation and allowed *Weingarten* representatives to object to the employer's questions.⁶³ Such holdings create additional uncertainty for the employers, unions, and employees because they must all predict where the Board will draw the line between protected "participation" and unprotected adversarial behavior.

*New Jersey Bell Telephone Co.*⁶⁴ is the seminal case regarding the right of a *Weingarten* representative to object to an employer's questions. In *New Jersey Bell*, several employees were investigated in connection with on-site incidents that occurred following a dispute between the employees and their supervisor.⁶⁵ During the interview, the investigators repeatedly asked the employee questions that he had already answered. The *Weingarten* representative objected pursuant to union policy, which recommended that stewards advise their members not to answer the same question twice.⁶⁶ However, the investigators

59. NLRB. v. J. Weingarten, 420 U.S. 251, 262-63 (1975).

60. *Id.* at 258-59.

61. See *Ford v. Wainwright*, 477 U.S. 399, 418, 426 (1986) (Powell, J., concurring in part and concurring in judgment) (noting that an adversary contest refers to proceedings, which take place in open court, on the record, and with live testimony, cross-examination, and oral argument by counsel); *United States v. Wilson*, 503 U.S. 329, 345 (1992).

62. *Weingarten*, 420 U.S. at 258-59.

63. See, e.g., *Yellow Freight Sys., Inc.*, 317 N.L.R.B. 115, 117 (1995); *U.S. Postal Serv.*, N.L.R.B. No. 82 slip op. at 7-8 (Dec. 28, 2007).

64. 308 N.L.R.B. 277 (1992).

65. *Id.* at 277 ("[A] dispute arose at the Respondent's Bergenfield, New Jersey facility regarding whether a particular job assignment could be performed safely. Immediately following this dispute, an incident occurred at the facility in which a ladder, apparently rigged to do so, fell on one of the Respondent's supervisors. In addition, that supervisor's office was ransacked.").

66. *Id.* at 277-78 & 278 n.6. With regards to the Union's policy, Member Devaney reports that "[a]bout a month before the conduct at issue here, the Union had concluded that the

believed that the objections were an undue interference with their right to conduct the interview; the police were called, the union representative was escorted off the property, and another union official was brought in to replace him.⁶⁷

In a 2-1 decision, the Board overruled the ALJ's conclusion that the employer had violated section 8(a)(1) by ejecting the employee's chosen union representative from the interview.⁶⁸ The Board reasoned that the steward had exceeded the permissible role of a union representative by attempting to prevent the employer's repetitious questioning.⁶⁹ Specifically, the Board concluded that allowing a representative to set "such a rigid limitation on questioning would only serve to turn an

Respondent's security [sic] representatives were harassing and intimidating employees during investigatory interviews and twisting information provided by employees. The Union's vice president had advised union delegates to suggest to employees subject to such interviews that they not answer the same question a second time." *Id.* at 284 n.2 (Devaney, Member, concurring in part, dissenting in part).

67. *Id.* at 278.

68. *Id.* at 284-86 (Devaney, Member, concurring in part, dissenting in part). ALJ Fish reasoned that

advising employees to answer questions only once, as well as the Union's policy supporting such a position, is a reasonable exercise of the Union's representative function, and does not and did not herein, unduly interfere with Respondent's right to conduct its interviews, nor transform the interview into an "adversarial confrontation."

Id. at 302. The ALJ went on to point out that the repetitive questioning was an "example of an investigative technique, that undoubtedly would not be utilized by a mere supervisor conducting an interview. Thus, the Court recognized that it is appropriate for the union representative to protect an employee against the use of these kinds of investigatory techniques utilized by the security representatives." *Id.* Similarly, Member Devaney pointed out that the employees were in a catch-22 situation: "if they declined to make incriminating statements, they would be disciplined for withholding information, but if they did give incriminating statements, they would be disciplined for participating in or failing to report the incident in question." *Id.* at 286 (Devaney, Member, concurring in part, dissenting in part). Thus,

[a]s the union representative responsible for protecting [the employee's] rights in the interviews, [the representative] could not be compelled to remain mute. In light of the high-pressure situation in which the employees were placed, [the representative] was justified in aggressively objecting to the security representatives' repetitive questions. To do less might have allowed the employees to be pressured into unwarranted admissions.

Id.

69. *See id.* at 280 & n.11 ("According to the Respondent's security officials, [the employee] answered virtually all questions the first time through with 'I don't know' or 'I don't remember.' Indeed, it is questionable that [the employee], as our dissenting colleague suggests, really 'responded to' the questions when first asked. Given [the employee's] unresponsive answers, we find it entirely understandable and reasonable that the [employer] would want to probe [the employee's] memory and candor without constant interference from Huber, the *Weingarten* representative. Contrary to the judge and our dissenting colleague, the [employer's] questioning, in these circumstances, cannot fairly be deemed to be harassment.").

investigatory interview into a formalized adversarial forum.”⁷⁰

The limitation on questioning that the Union seeks to impose under the aegis of *Weingarten* would severely circumscribe an employer’s legitimate prerogative to investigate employee misconduct We cannot reconcile such a restriction with the Court’s explicit intention to preserve legitimate employer prerogatives, and our duty to maintain the careful balance of the rights of employer and employee articulated by the Court.⁷¹

Significantly, the Board did not foreclose the possibility of a union representative ever objecting to an employer’s questions.⁷² On the contrary, the court acknowledged that “a *Weingarten* representative may advise against answering questions that are reasonably perceived by the representative as abusive, misleading, badgering, confusing, or harassing.”⁷³ However, it is the Board that ultimately decides whether a question is reasonably perceived as objectionable. Thus, in *New Jersey Bell*, the majority found that the employer’s use of repetitious questioning was not sufficiently “harassing” to warrant infringing upon the employer’s right to question its employee.⁷⁴

Several years after its decision in *New Jersey Bell* the Board was again called upon to determine whether a *Weingarten* representative had unduly interrupted an employer’s legitimate prerogative to conduct an investigatory interview. In *Yellow Freight Systems, Inc.*,⁷⁵ an employee was asked to attend a pre-disciplinary coaching session⁷⁶ after he made an inappropriate remark to a female worker.⁷⁷ During the coaching session, the union representative repeatedly interrupted the employer’s agent as he read from a company document explaining sexual

70. *Id.* at 279.

71. *Id.*

72. *Id.* (citing U.S. Postal Serv., 288 N.L.R.B. 864, 868 (1988)).

73. *Id.*; see also *U.S. Postal Serv.*, 288 N.L.R.B. at 868 (finding that an employer violated section 8(a)(1) in attempting to silence a union representative who interrupted to protect an employee from, among other things, confessing and being pressured to take a polygraph).

74. *N.J. Bell Tel. Co.*, 308 N.L.R.B. at 277, 279.

75. 317 N.L.R.B. 115 (1995).

76. *Id.* at 117. A coaching session is a voluntary “preprogressive discipline mechanism to resolve work problems arising between the employee and [the employer] by mutual recognition of the problem, a discussion of it, and a mutually agreed-on resolution.” *Id.* The session is not considered to be part of the disciplinary system. *Id.*

77. *Id.* at 118. Specifically, a supervisor, who had just returned from a sexual harassment seminar, overheard the employee request that a female co-worker step into the open so that he and the other truck drivers could “check [her] out.” *Id.* At the time, the male employee was sitting in the dispatch office with fifteen other drivers, some of whom laughed at his comment. *Id.*

harassment.⁷⁸ The union representative then proceeded to “disrupt the process by verbally abusive and arrogantly insulting interruptions, by conduct that grossly demeaned [the supervisor’s] managerial status in front of an employee and fellow manager and that consisted of violent desk pounding and shouted obscenities, and finally by point-blank falsely calling [the supervisor] a liar”⁷⁹ Ultimately the interview was terminated and the steward received a warning letter regarding his conduct. The union filed a section 8(a)(1) charge, alleging that the interview’s termination and the steward’s subsequent discipline violated the employee’s section 7 rights.⁸⁰

In assessing the ULP charges, the ALJ found that the union representative had impermissibly transformed the “coaching session into an adversarial confrontation,” and had lost section 7 protection.⁸¹ In reaching this determination, the ALJ refused to apply the *Severance Tool Industries*⁸² test, which is commonly used in the context of collective bargaining, negotiations, or representation at a disciplinary proceeding to determine whether a representative’s conduct has been sufficiently egregious as to warrant the loss of section 7 protection. The ALJ reasoned that *Weingarten*’s prohibition against representatives obstructing “the employer in exercising the legitimate prerogative of investigating employee misconduct,” called for a more restrictive test than that which would be applied in other contexts.⁸³ The Board adopted the ALJ’s conclusions.⁸⁴ Thus, under *Yellow Freight Systems*, stewards receive significantly less section 7 protection in *Weingarten* interviews than they do in other employer-union interactions, where the Board has “repeatedly held that strong, profane, and foul language, or what is normally considered discourteous conduct, while engaged in protected activity, does not justify disciplining an employee acting in a representative capacity.”⁸⁵

78. *Id.* at 119. During the session, “the supervisor utilizes a preprinted form containing headings preceding blank specifics [sic] to be filled in. The headings are: entitled problem, employee view of causes, supervisor’s view of causes, employee’s view of solution, supervisor’s view of solution, agreed-on solution, solution start date, employee signature, and supervisor signature.” *Id.* at 117.

79. *Id.* at 124.

80. *Id.* at 119-20.

81. *Id.* at 124.

82. 301 N.L.R.B. 1166 (1991).

83. *Yellow Freight Sys., Inc.*, 317 N.L.R.B. at 124.

84. *Id.* at 115.

85. *Noble Metal Processing, Inc.*, 346 N.L.R.B. No. 78, slip op. at 1 (Mar. 31, 2006); *see also* *Severance Tool Indus.*, 301 N.L.R.B. 1166, 1170 (1991); *Syn-Tech Windows Sys., Inc.*, 294 N.L.R.B. 791, 792 (1989); *Atl. Steel, Co.*, 245 N.L.R.B. 814, 816 (1979) (noting that the four

Yet, the Board's willingness to regard *Weingarten* interviews as something separate and apart from other employer-union confrontations may be waning. Recently, in *United States Postal Service*,⁸⁶ the Board recognized the right of a union representative to intervene in a timely manner in order to protect an employee from unwittingly answering a loaded question. In *United States Postal Service*, a postal worker was accused of failing to deliver a stack of mail.⁸⁷ During the investigatory interview that followed, the investigator asked whether the employee was aware of the penalties for willfully delaying the mail.⁸⁸ The *Weingarten* representative⁸⁹ "attempted to challenge the question with respect to the implication of the word 'willful,'" rightly supposing that the investigator would have taken an affirmative answer as an admission of a willful delay; however, the investigator prevented the steward from speaking.⁹⁰

The Board found that the employer had violated section 8(a)(1) by improperly limiting the steward's participation at a "crucial juncture of the interview,"⁹¹ reasoning that "neither an employer's right to conduct the interview, nor any other legitimate prerogative, extends to entrapping an employee into unknowingly confessing to misconduct without objection from his representative."⁹² The Board stressed the *Weingarten* Court's recognition of "the importance of enforcing the right to a union representative 'when it is most useful to both employee and employer.'"⁹³

factors to be balanced are: "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice"); *Stephens Media, LLC*, 2008 N.L.R.B. LEXIS 68, *77 (2008) (citations omitted); *Max Factor & Co.*, 239 N.L.R.B. 804, 817-18 (1978); *U.S. Postal Serv.*, 250 N.L.R.B. 4, 4 n.1 (1980).

86. *U.S. Postal Serv.*, 351 N.L.R.B. No. 82, slip op. at 1 (Dec. 28, 2007).

87. *Id.*, slip op. at 4. Specifically, the Post Office imposes penalties for "willful" delay of mail delivery. *Id.*, slip op. at 2, 4. As such, if a carrier discovers that he has left mail behind at the facility, he is required to call the post office and return to retrieve that mail so that delivery can be arranged. *See id.*, slip op. at 4.

88. *Id.*, slip op. at 1, 4-5.

89. *Id.*, slip op. at 4. Under a joint contract administration manual prepared by the union and the Post Office, "the employee has the right to a steward's assistance – not just a silent presence. The employer would violate the employee's *Weingarten* rights if it refused to allow the representative to speak or tried to restrict the steward to the role of a passive observer." *Id.*, slip op. at 3.

90. *Id.*, slip op. at 1-2, 4-5.

91. *Id.*, slip op. at 1, 8.

92. *Id.*, slip op. at 2.

93. *Id.* (quoting *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 262 (1975)).

The moment of maximum usefulness may arrive, as it did here, in the middle of the employer's questioning – particularly when one considers, as did the *Weingarten* Court, that the employee under investigation “may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors.”⁹⁴

Thus, the majority saw fit to expand employees' section 7 protection in spite of the Court's simultaneous desire to protect employers from adversary conflicts with union representatives.

The move away from employer's rights was noted in a concurring opinion by Member Kirsanow, who expressed concern that the majority's decision undermined the careful balance that the *Weingarten* Court had attempted to create between the rights of employees and employers. He reasoned that the employer's silencing of the steward's objection was “comparable, in a courtroom, to a judge overruling an objection and requiring the witness to answer the objected-to question,”⁹⁵ and fell precisely within the Court's finding that “[t]he employer . . . is free to insist that he is only interested, at the time, in hearing the employee's own account of the . . . investigation.”⁹⁶ However, the majority found the comparison inapposite:

[o]ur colleague's analogy between a disciplinary interview and a legal proceeding conducted by an impartial judge is not convincing. *If anything the analogy is much closer to a police interview with a suspect represented by counsel.* And in that situation, the lawyer could certainly participate as [the steward] tried to do.⁹⁷

The majority's likening of the investigatory interview to a criminal proceeding supports Member Kirsanow's fear that the Board may be tipping the scales too far in favor of employee rights; a police interview, with its accompanying constitutional protections, is likely precisely the type of adversarial contest that the *Weingarten* Court intended to avoid.

IMPLICATIONS

As is clear from the preceding overview, the proper role of a union representative during an investigatory interview remains unresolved.

94. *Id.*

95. *Id.*

96. *Id.* (quoting *Weingarten*, 420 U.S. at 260).

97. *Id.*, slip op. at 2 n.2 (emphasis added).

Currently, the issue of which words or actions will push a representative's conduct into the forbidden realm of "adversary confrontation" can only be decided ex-post facto by a judge's or an arbitrator's subsequent ruling; a ruling that may or may not be enforced on appeal.⁹⁸ Indeed, in light of the majority's recent pronouncements in *United States Postal Service*, which analogize investigatory interviews to police investigations, it remains to be seen whether the distinction between adversarial and non-adversarial conduct by union stewards will continue to be a deciding factor in the Board's jurisprudence.⁹⁹

Regardless of what future Board decisions may hold, however, there are two important consequences of employers' and union representatives' current inability to know whether their conduct during an interview is permissible under *Weingarten*. First, the employers' inability to set appropriate guidelines for supervisors and security officers places them at an increased risk of subsequent adverse rulings by the Board and arbitrators. Second, the threat that a union steward may inadvertently lose section 7 protection and become subject to personal discipline during the course of the representation may chill the zealotry of his or her advocacy and compromise the protection that the Court intended to provide for employees.

Increased Susceptibility of the Employers

The Board's continued reliance on an ad hoc approach to resolving alleged *Weingarten* violations poses a serious problem for employers, whose inability to set appropriate guidelines for supervisors and security officers places them at an increased risk of subsequent adverse rulings by the Board and arbitrators. In fact, *Weingarten*'s unpredictable standards and inconsistent application led two early commentators to remark that "*Weingarten* stands as a relic, a dangerous anachronism that looms in the darkness waiting to consume the employer with costly and needless litigation. To avoid its pitfalls, the employer should shun the interview altogether, and garner sufficient information on its own, independent of an interview."¹⁰⁰ Over the years, the Board has attempted to mitigate some of the employer's risk by limiting the

98. Compare *NLRB v. Sw. Bell Tel. Co.*, 730 F.2d 166, 172 (5th Cir. 1984) (choosing not to enforce the Board's decision), with *NLRB v. Texaco, Inc.*, 659 F.2d 124, 126-27 (9th Cir. 1981) (enforcing the Board's decision that the respondent violated the statute).

99. *U.S. Postal Serv.*, 351 N.L.R.B. No. 82, slip op. at 2 n.2, 7-8.

100. Neal Orkin & Louise Schmoyer, *Weingarten: Rights, Remedies, and the Arbitration Process*, 40 LAB. L.J. 594, 602 (1989).

remedies available in most *Weingarten* cases; however, the Board's policy of deferring to arbitral awards has rendered these protections largely illusory. We will now address these related issues.

Taracorp and the Limitation of Employer Remedies by the Board

As a basic premise, the denial of an employee's *Weingarten* rights is a violation of the NLRA and within the Board's exclusive enforcement jurisdiction.¹⁰¹ Typically, when an employee has been disciplined or discharged under circumstances that violate the NLRA, the Board will grant a make-whole remedy of reinstatement, backpay, and the expungement of all related disciplinary records.¹⁰² However, in the context of *Weingarten* violations the Board has been inconsistent in its remedial approach, oscillating between the issuance of make-whole remedies and mere cease-and-desist orders.¹⁰³

The earliest Board opinions refused, without any explanation, to afford "affirmative relief to employees disciplined for conduct that was the subject of interviews conducted in violation of their *Weingarten* rights."¹⁰⁴ This position was later modified, with "equally little analysis," to allow for make-whole remedies unless the employer could affirmatively show that it would have taken the same disciplinary action against the employee absent its own impermissible conduct.¹⁰⁵ Under this latter analysis, the Board reasoned that *Weingarten* violations lend themselves to make-whole remedies because, "if the employer had permitted a union representative to participate in the . . . interview, the adverse personnel action which the employer actually took after the interview might not have been taken or might have been less severe."¹⁰⁶ The Board further concluded that allowing make-whole relief would prevent employers from benefiting from their unlawful actions. As the Board explained:

[t]he implication, if not the direct teaching [of *Weingarten*] . . . is that if lawfully obtained evidence of employee wrongdoing and unlawfully

101. Paul H. Derrick, *Employee Investigations: Representation Rights Extended to Nonunion Employees*, 12 S.C. LAW. 32, 35 (2001).

102. Moberly, *supra* note 6, at 531 (noting that "[t]he purpose of the remedy is 'to return the unlawfully discharged employee to the status quo that would have existed absent the unfair labor practice'"); Orkin & Schmoyer, *supra* note 100, at 596-97; Derrick, *supra* note 101, at 32.

103. Orkin & Schmoyer, *supra* note 100, at 596.

104. Moberly, *supra* note 6, at 530 (citations omitted).

105. *See id.* at 530 (citing U.S. Postal Serv., 241 N.L.R.B. 141, 154 (1979)).

106. *Id.* at 542-43 (quoting U.S. Postal Serv., 241 N.L.R.B. at 154).

obtained admissions are commingled by an employer in arriving at a decision to discharge, the fruit of the poisonous tree taints the lawful evidence and renders the employer liable for a full remedy.¹⁰⁷

Thus, the Board's conceptualizing of investigatory interviews in terms of a criminal investigation led to an expansion of employer liability.

The Board's current framework for analyzing *Weingarten* violation remedies was set forth in *Taracorp Industries*.¹⁰⁸ In *Taracorp*, the Board reverted to a modified version of its earliest holdings, finding that section 10(c) of the NLRA, which states that "[n]o order of the Board shall require the reinstatement of any individual . . . who has been suspended or discharged, or the payment to him of any backpay, if such an individual was suspended or discharged for cause,"¹⁰⁹ prohibits awarding a make-whole remedy to an employee disciplined for cause *even if* the employer has violated his or her section 7 rights under *Weingarten*.¹¹⁰ The Board reasoned that the "typical' *Weingarten* cases fall within this prohibition, because in such cases the reason for the discharge is not an unfair labor practice, but some type of employee misconduct."¹¹¹

Perhaps unsurprisingly, this shift in the Board's jurisprudence was a reaction to its expansion of employees' *Weingarten* rights in other areas. Specifically, the *Taracorp* Board noted that it

would find a make-whole remedy in *Weingarten* cases inappropriate because we believe that past Board decisions have exceeded the intended scope and limitations found in the Supreme Court's *Weingarten* decision. What began as a limited protection of employees and a potential guide to management in conducting fair and expeditious investigations of employee misconduct has become a labyrinth of rules and procedures analogous to the law of criminal procedure. As Member Hunter stated in a related context, the Board's expansionist policies in the *Weingarten* field have served "to encourage the transformation of investigatory interviews into formalized adversary proceedings, a result the Supreme Court clearly

107. Ill. Bell Tel. Co., 275 N.L.R.B. 148, 150 (1985).

108. 273 N.L.R.B. 221, 222 (1984) (overruling the Board's earlier holding in *Kraft Foods, Inc.*, 251 N.L.R.B. 598 (1980), that while the denial of an employee's *Weingarten* rights cannot insulate the employee from discipline under all circumstances, a make-whole remedy is appropriate if the disciplinary decision was based on information obtained solely during the unlawful interview).

109. 29 U.S.C § 160(c) (2000).

110. *Taracorp Indus.*, 273 N.L.R.B. at 221-22 (citations omitted).

111. Moberly, *supra* note 6, at 535 (quoting *Taracorp Indus.*, 273 N.L.R.B. at 223).

wished to avoid.”¹¹²

Thus, under *Taracorp*, employee discipline will not be nullified if the discipline was for cause—even if the employee’s rights were violated in the process.¹¹³

Yet *Taracorp* does not prohibit make-whole remedies for all *Weingarten* violations; rather, the Board recognized that certain *Weingarten* violations have “a sufficient nexus between the unfair labor practice committed (denial of representation at an investigatory interview) and the reason for discharge (perceived misconduct) to justify a make-whole remedy.”¹¹⁴ Specifically, the Board defined three categories of cases.¹¹⁵ First, in cases where the employee had been discharged or disciplined for participating in a protected concerted activity, a make-whole remedy of reinstatement and backpay is suitable.¹¹⁶ Such situations arise not only when the employee is disciplined for asserting his or her *Weingarten* rights during an investigatory interview, but also when the discipline results from “the employee’s conduct *during* [an] unlawful interview.”¹¹⁷ Second, a make-whole remedy is also appropriate in cases where an employee is discharged or disciplined for what initially appears to be a legitimate reason, but further investigation reveals to be an unfair labor practice.¹¹⁸ Finally, as previously discussed, a make-whole remedy is *not* appropriate in cases where an employee is discharged or disciplined for just cause, unrelated to the violation of his or her section 7 rights.¹¹⁹

The Board’s distinction between the three classes of *Weingarten* violations has important consequences for employers and union officials attempting to gauge whether a steward’s participation in an investigatory interview is appropriate; a representative’s conduct will generally fall under the first category of cases, in which a make-whole remedy is appropriate even under *Taracorp*. However, as we have already seen, union representatives receive less protection in the *Weingarten* context

112. *Taracorp Indus.*, 273 N.L.R.B. at 223 (quoting *Materials Research Corp.*, 262 N.L.R.B. 1010, 1021 (1982) (Member Hunter, concurring and dissenting)).

113. See *Comm’n Workers of Am. v. NLRB*, 784 F.2d 847, 852 (7th Cir. 1986); Raymond L. Hogler, *Taracorp and Remedies for Weingarten Violations: The Evolution of Industrial Due Process*, 37 LAB. L.J. 403, 406-07 (1986).

114. Moberly, *supra* note 6, at 542 (quoting *Taracorp Indus.*, 273 N.L.R.B. at 223).

115. Orkin & Schmoyer, *supra* note 100, at 598.

116. *Id.*

117. Moberly, *supra* note 6, at 542-43 (citing *U.S. Postal Serv.*, 241 N.L.R.B. 141, 154 (1979)).

118. Orkin & Schmoyer, *supra* note 100, at 598.

119. *Id.*

then they do in other employer-union dealings, making it less clear when a representative's conduct will be deemed protected under section 7.¹²⁰ As a result of this uncertainty, employers must carefully evaluate any disciplinary action taken against a union steward for his or her representation during an investigatory interview, since the make-whole remedies may be available if the Board ultimately determines that the representative's conduct was, in fact, protected.

For example, in *New Jersey Bell*, an employee's union representative was forcefully ejected from an investigatory interview after objecting to the investigator's use of repetitive questioning.¹²¹ The representative was subsequently arrested, charged with criminal trespass, and terminated.¹²² In assessing the appropriate remedy, the Board reasoned that although the employer had been within its rights to eject the steward from the meeting, all additional disciplinary measures had violated section 8(a)(1).¹²³ As such, the Board ordered a make-whole remedy, requiring the employer to offer the steward "immediate and full reinstatement to his former job or . . . to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits resulting from his discharge."¹²⁴ The employer was also required to expunge all records relating to the incident, withdraw all the criminal charges, and pay for any legal expenses associated with those charges.¹²⁵

The Effect of Arbitral Awards on *Weingarten* Violations

The increased exposure of employers is not limited to situations involving the Board; employees can also obtain make-whole relief for *Weingarten* violations through arbitration. The availability of relief through arbitration is crucial for two reasons. First, according to one survey, of the major collective bargaining agreements analyzed, over ninety-nine percent contained grievance and arbitration procedures;¹²⁶

120. See *Yellow Freight Sys. Inc.*, 317 N.L.R.B. 115, 124 (1995); *Mead Corp.*, 331 N.L.R.B. 509, 514 (2000); *Stephens Media, LLC*, 2008 N.L.R.B. LEXIS 68, at *76-77; *Max Factor & Co.*, 239 N.L.R.B. 804, 817-18 (1978).

121. *N.J. Bell Tel. Co.*, 308 N.L.R.B. 277, 285 (1992).

122. *Id.* at 285, 298.

123. *Id.* at 280, 282-83 (noting that the steward's representation was a "motivating factor" in the employer's decision to terminate the steward's employment).

124. *Id.* at 283.

125. *Id.* at 283-84.

126. Hogler, *supra* note 113, at 407 (citation omitted).

thus, disputes concerning *Weingarten* violations are much more likely to be settled by an arbitrator than by the Board. Second, labor arbitrators “generally regard the right to union representation at an investigatory interview as ‘an implied right of procedural just cause in management’s disciplinary process, [and] do not appear to view [section] 10(c) of the NLRA as an impediment to the award of make-whole relief in *Weingarten* cases.’”¹²⁷ Thus, for the purpose of arbitration, it is immaterial “whether the due process guarantee is an inherent part of just cause or one arising out of a specific contract provision.”¹²⁸ This approach to *Weingarten* has not been altered by *Taracorp*.¹²⁹

The practical implications of these two realities are understood in the context of the Board’s long-standing policy of deferring to arbitration awards. For example, under *Collyer Insulated Wire*,¹³⁰ when a collective bargaining agreement provides for arbitration, the Board will not begin a ULP proceeding until the arbitration has run its course.¹³¹ Similarly, in the post-arbitration context, under *Spielberg Manufacturing Co.*¹³² and *Olin Corp.*,¹³³ the Board will defer to the arbitrator’s decision when “the arbitral proceeding appears to have been fair and regular, all parties agreed to be bound, the arbitrator’s decision is not clearly repugnant to the purposes and policies of the NLRA, and the arbitrator considered the unfair labor practice issue.”¹³⁴

In the *Weingarten* context, the Board has relied on these principles to uphold arbitral make-whole remedies. For example, in *Pacific Southwest Airlines, Inc.*,¹³⁵ two employee-witnesses to an on-the-job drinking incident were denied union representation during investigatory telephone interviews and were subsequently terminated for refusing to answer the employer’s questions.¹³⁶ In assessing the case, the arbitrator ordered the employees reinstated without backpay, reasoning that the employer’s conduct had “violated the employees’ contractual right to

127. Moberly, *supra* note 6, at 548 (internal quotations omitted) (quoting Maui Pineapple Co. v. ILWU, 86 Lab. Arb. Rep. (BNA) 907, 910 (Feb. 25, 1986) (Tsukiyama, Arb.) (emphasis added)); Hogler, *supra* note 113, 408, 410. (citation omitted).

128. Peter Florey, *Due Process in the Discipline Process*, 54 DISP. RESOL. J. 63, 64 (1999).

129. Moberly, *supra* note 6, at 552.

130. 192 N.L.R.B. 837 (1971).

131. *Id.* at 842-43.

132. 112 N.L.R.B. 1080 (1955).

133. 268 N.L.R.B. 573 (1984).

134. Moberly, *supra* note 6, at 555 (internal quotations omitted); Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955); Olin Corp., 268 N.L.R.B. 573, 573-74 (1985).

135. 242 N.L.R.B. 1169 (1979).

136. *Id.* at 1169.

union representation and, in all likelihood, their statutory right to such representation under *Weingarten* as well.”¹³⁷ Significantly, *Pacific Southwest Airlines* was decided at a time when the Board “generally afforded no affirmative relief to employees disciplined for conduct that was the subject of interviews conducted in violation of their *Weingarten* rights.”¹³⁸ Nonetheless, the Board upheld the arbitral award, reasoning that arbitrator’s analysis satisfied the *Spielberg* deferral requirements.¹³⁹

The fact “that deferral to arbitration may be appropriate even though the relief awarded by the arbitrator ‘is not coextensive with the Board’s remedy in unfair labor practice cases’” suggests that the “Board undoubtedly would apply this principle in the converse situation and defer to the arbitrator’s award of make-whole relief to a *Weingarten* victim, even in cases in which *Taracorp* would now prohibit the Board itself from granting such relief.”¹⁴⁰

[A]ny apparent diminution of an employee’s procedural rights effectuated by *Taracorp* is in fact largely illusory. While the Board will no longer provide a make-whole remedy for *Weingarten* violations where cause for discipline exists, it will force the parties to arbitrate the matter and will give substantial deference to the award¹⁴¹

Thus, *Taracorp*’s remedial limitations ultimately do little to eliminate the risks and uncertainties associated with the Board’s ad hoc approach to investigatory interviews.

Chilling Effect on the Quality of Employee Representation

The employer is not the only party exposed to increased risk by the Board’s ad hoc approach to *Weingarten* interviews; the uncertainty surrounding the limits of permissible representative conduct is also problematic for employees and stewards. As a general principle, an employer violates section 8(a)(1) when it disciplines or threatens to discipline an employee for his or her union representative’s conduct during an investigatory interview.¹⁴² This is true even when the

137. Moberly, *supra* note 6, at 556 (citing *Pac. Sw. Airline v. Airline, Aerospace & Employees Teamsters, Local 2707*, 70 Lab. Arb. Rep. (BNA) 205, 215 (Dec. 29, 1977) (Jones, Jr., Arb.)).

138. *Id.* at 530.

139. *Id.* at 558-59.

140. *Id.* at 560-61 (quoting *Derr & Gruenwald Constr. Co.*, 315 N.L.R.B. 266, 267 n.7 (1994)).

141. Hogler, *supra* note 113, at 409.

142. *N.J. Bell Tel. Co.*, 308 N.L.R.B. 277, 279 n.10 (1992) (“To countenance such a threat would mean that employees would be subject to retaliatory action based on the conduct of their

representative's conduct is so egregious as to lose section 7 protection.¹⁴³

As previously discussed, however, a union representative's conduct during an investigatory interview may expose him or her to personal discipline, expulsion, or both if the conduct strays beyond the bounds of section 7 protection, as determined under the reduced standard of protection articulated by the Board in *Yellow Freight Systems*.¹⁴⁴ While such disciplinary measures against a representative may eventually be redressed by an arbitral award or a make-whole remedy by the Board, even the threat of discipline or expulsion will often be sufficient to chill the representative's efforts during the interview, exposing the employee to punishment. In *United States Postal Service*, for example, a postal clerk was investigated for possible theft.¹⁴⁵ When she persisted in denying any wrongdoing during the investigatory interview, the employer threatened her with a polygraph test.¹⁴⁶ The employee's representative objected and was ordered to leave the room on the grounds that he was interfering with an official investigation.¹⁴⁷ Faced with the threat of expulsion, the representative quickly apologized and promised the employer that he would not interrupt again.¹⁴⁸ In assessing the employer's actions, the Board concluded that the threat of expulsion had violated section 8(a)(1) by denying the representative the right to participate in the interview;¹⁴⁹ however, subsequent opinions have upheld the employer's right to threaten a representative when his or her conduct strays beyond the protection of section 7.¹⁵⁰

Weingarten representative. In our view, this would needlessly deter employees from exercising their [section] 7 right to choose such a representative.”)

143. *See id.*

144. 317 N.L.R.B. 115, 123-24 (1995). In *Mead Corp.*, the union representative attacked the interviewer's personality, attitude, and intellectual capacity and disrupted the interview. 331 N.L.R.B. 509, 514 (2000). The Board found that the employer's discipline of the representative was appropriate. *Id.* at 509.

145. 288 N.L.R.B. 864, 865-86 (1988). The employee, Ms. Sharon Wall, had occasionally made errors in her cash and stamp accounts, and had also been accused of short-changing customers. *Id.* In response to these problems, the employer issued Ms. Wall \$650 worth of stamps, without providing the normal documentation as a test of her integrity. *Id.* “Normal procedure requires that any discrepancy such as that involved in the ‘test’ be reported, but Wall failed to make such a report,” and was subsequently interviewed by postal inspectors. *Id.*

146. *Id.* at 866-68.

147. *Id.* at 866-67. Allegedly, the representative said, “Wait a minute, sit down, you're not going to take the polygraph, don't take the polygraph, or words to that effect.” *Id.*

148. *Id.* at 867-68.

149. *Id.* at 868.

150. N.J. Bell Tel. Co., 308 N.L.R.B. 277, 280 (1992) (reasoning that because the steward had exceeded the permissible role of a *Weingarten* representative and “forfeited his protected right to remain on the [employer's] premises as [the employee's] representative . . . the [employer] acted

United States Postal Service reveals the chilling effect that the threat of expulsion or discipline can have on *Weingarten* representation. Although such threats are only lawful when the representative's conduct loses section 7 protection, under the Board's current analytical framework, the determination as to whether protection was, in fact, lost can only be made ex-post facto. Thus, a representative threatened with discipline or expulsion faces a Hobson's choice. On one hand, the representative may limit his or her participation in order to remain in the room with the employee. On the other hand, the representative may continue to champion the employee's rights, risking discipline, expulsion, and replacement by a less zealous advocate. Regardless of the representative's chosen path, the quality of the representation is compromised and the employee is placed at increased risk for discipline. Such risks often cannot be fully remedied by an arbitrator or the Board. In fact, the *Weingarten* Court specifically observed the inherent danger of delaying

representation until the filing of a formal grievance challenging the employer's determination of guilt after the employee has been discharged or otherwise disciplined. At that point . . . it becomes increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished. The employer may then be more concerned with justifying his actions than re-examining them.¹⁵¹

Thus, the threat of discipline against an employee's chosen

lawfully in ejecting [the steward] from the interview, directing him to leave the premises and, on [his] refusal to do so, causing his arrest and filing trespass charges against him"); see also *King Soopers, Inc.*, 2001 N.L.R.B. Lexis 395, *1 (May 18, 2001). In *King Soopers*, a union representative was threatened with personal discipline after she commented on the perceived unfairness of the investigator's treatment of the employee. *Id.* at *4, *5, *43. Specifically, the steward made a series of "catty," personal comments toward the interviewer, including the remark that "the only reason that you're writing Diana Wood up is because she's my friend, you're always picking on my friends . . ." *Id.* at *43. The union alleged that the threat of discipline violated 8(a)(1) since the representative's conduct was "consistent with the established right of union representatives to provide active assistance and counsel," and the steward's conduct had neither interfered with the employer's questioning, nor been sufficiently egregious to lose the protection of the NLRA. *Id.* at *45. Nonetheless, the ALJ found that the threat of discipline was within the employer's rights, reasoning that the remark "that immediately preceded [the] threat was no more than a coarse personal insult that can hardly be deemed a plea to [the interviewer] for reconsideration of her decision or otherwise an attempt to assist [the employee]." *Id.* at *47. Thus, the ALJ concluded that an employer may lawfully threaten a *Weingarten* representative with discipline once he or she loses section 7 protection. *Id.* at *48 & nn.26-49.

151. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 263-64 (1975).

representative may tip the scales too far in favor of the employer, negating the protection that the *Weingarten* Court sought to provide employees.

SUGGESTIONS

In *Weingarten*, the Supreme Court attempted to strike a delicate balance between the employees' need for assistance and council, and the employers' need to investigate potential employee wrongdoing; however, the Board's attempt to maintain this equilibrium has resulted in a confused and often contradictory standard in which the balance between the employees and the employers is maintained to the detriment of both. Having explored the consequences of the Board's ad hoc approach, both in terms of the increased risk to employers and the chilling effect on union representation, it is clear that resolving *Weingarten's* uncertainty in favor of a more bright-line approach would be beneficial to all.

The ideal solution would be for the Supreme Court to grant certiorari in order to more clearly define the role of the *Weingarten* representative and resolve the myriad questions surrounding *Weingarten's* holding.¹⁵² In the absence of Supreme Court guidance, however, at least three possibilities exist for clarifying the steward's role in investigatory interviews. First, employers and unions could use the collective bargaining process to create detailed policies for the conduct of investigators, stewards, and employees during investigatory interviews. Second, employers could simply eliminate investigatory interviews, choosing instead to discipline their employees on the basis of information gathered through other means. Finally, the Board could expand the protections afforded to *Weingarten* representatives in a manner consistent with other employer-union interactions.¹⁵³ We will now address each of these possibilities.

Encouraging Employers and Unions to Resolve the Uncertainties Through the Collective Bargaining Process

One possible solution is for employers and unions to resolve the uncertainties of the Board's ad hoc approach to *Weingarten* rights

152. Another lingering issue is whether *Weingarten* rights apply in a non-union setting. See *infra* note 159.

153. See *Yellow Freight Sys., Inc.*, 317 N.L.R.B. 115, 123-24 (1995).

through collective bargaining. This option has always been available and is already utilized by many employers and unions,¹⁵⁴ which use past conflicts to create tailor-made polices regulating the conduct of investigators, stewards, and employees during investigatory interviews. This solution offers the additional benefit of comporting with overall U.S. labor policy, which favors collective bargaining.

Yet resolution through collective bargaining may not be effective in all circumstances. In order to resolve the problems inherent in the Board's ad hoc approach, detailed provisions would need to be agreed upon—provisions that would likely call for the abandonment of the current balancing approach in favor of either eliminating investigatory interviews or granting stewards a broader advocacy role consistent with that provided during disciplinary hearings, negotiations, and collective bargaining.¹⁵⁵ Even assuming that *Weingarten* rights were considered a mandatory subject of collective bargaining, section 8(d) of the NLRA, which governs collective bargaining, does not require either party to agree to a proposal or make concessions;¹⁵⁶ rather, the parties need only meet at reasonable times and confer in good faith with respect to mandatory subjects of bargaining.¹⁵⁷ Thus, where the employer-union relationship is tenuous, it is unlikely that encouraging employers and unions to resolve the uncertainties surrounding investigatory interviews will provide a real solution to *Weingarten*'s problems.

154. See, e.g., U.S. Postal Serv., 351 N.L.R.B. No. 82, slip op. at 3 (Dec. 28, 2007) (noting the existence of a joint contract administration manual granting employees the right to their chosen steward's assistance, and not just silent presence, during an investigatory interview).

155. It is unlikely that the Union could agree to waive the employee's right to representation during a *Weingarten* interview, since section 7 protection belongs to the employees and not to the union. See, e.g., NLRB v. Magnavox, 415 U.S. 322, 324 (1974) (holding that because section 7 grants rights to the employees and not the union, the union may not waive these rights by sanctioning an otherwise unlawful policy during collective bargaining).

156. 29 U.S.C. § 158(d) (2000) (“[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of [concessions] . . .”).

157. Compare NLRB v. Montgomery Ward, 133 F.2d 676, 686 (9th Cir. 1943) (defining the duty to bargain collectively in good faith as the “obligation . . . to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement”), with NLRB v. A-1 King Size Sandwiches, Inc., 732 F.2d 872, 873, 877 (11th Cir. 1984) (holding that an employer had failed to bargain in good faith where its proposals were “so unusually harsh and unreasonable that they were] unworkable”).

Eliminating Investigatory Interviews

Given the problems inherent in balancing employee and employer rights in the context of *Weingarten* interviews, a second option is to simply eliminate the practice of investigatory interviews altogether. This course of action, which has also been available since before *Weingarten* was decided,¹⁵⁸ would not only save employers from the risks associated with *Weingarten* interviews, but could also be undertaken without compromising employee rights.

From an employer's perspective, the risks associated with *Weingarten* interviews greatly outweigh the possible benefits. The availability of surveillance and loss-prevention technologies often provide employers with sufficient information to discipline or terminate an employee without an interview. Thus, attempts to threaten or goad an employee into confessing through repetitive or loaded questions only exposes employers to liability, forcing the arbitrator or the Board to decide not only whether resulting discipline was for cause, but also whether the investigation itself violated the employee's rights.¹⁵⁹ In fact, even interviews that do not result in discipline may become the basis for ULP charges over the employer's conduct during the interview, increasing the employer's risk without any accompanying benefit.¹⁶⁰

Moreover, employees would not be disadvantaged by eliminating investigatory interviews since employers have always been free to forgo such fact-finding meetings in favor of immediate discipline or termination.¹⁶¹ Grievances resulting from such decisions would then be dealt with at a disciplinary hearing, in which the union representative's role as an advocate is more clearly defined and protected, or by a neutral

158. *Quality Mfg. Co.*, 195 N.L.R.B. 197, 198-99 (1972).

159. In *IBM Corp.*, the Board found that *Weingarten* rights did not extend to non-union workers. 341 N.L.R.B. 1288, 1289 (2004). This was a reversal of its 2000 decision in *Epilepsy Foundation of Northeast Ohio*, 331 N.L.R.B. 676 (2000), *aff'd*, F.3d 1095 (D.C. Cir. 2001). Were the Board ever to re-extend *Weingarten* rights to non-union settings, the cost-benefit analysis for employers may be slightly different; although employers would still be subject to section 8(a)(1) charges for their conduct during the investigatory interview, it is less likely that resulting disciplinary decisions would be subject to arbitration. Therefore, under *Taracorp*, employees and their representatives would be precluded from obtaining make-whole remedies unless they could show that they were disciplined for their conduct during the interview itself. Under such circumstances, it may be beneficial for the employer to permit the employee to tell his or her side of the story.

160. *See, e.g.*, *U.S. Postal Serv.*, 288 N.L.R.B. 864, 864, 866 (1988) (where the *Weingarten* interview did not result in a recommendation that the employee be disciplined but the employer was still forced to endure the time and expense associated with defending a ULP charge).

161. *NLRB v. J. Weingarten*, 420 U.S. 251, 258-59 (1975).

arbitrator. While the *Weingarten* Court expressed fears that such a solution would detract from the effectiveness of the steward's representation and render it more difficult for an "employee to vindicate himself,"¹⁶² in reality, many discipline problems are ultimately resolved in this manner, with investigatory interviews merely providing an additional step in the process. Thus, eliminating investigatory interviews would resolve the uncertainties associated with *Weingarten* without altering the balance between employee and employer rights.

Accepting Weingarten Representatives as Employee Advocates

A final possible solution is for the Board to vest union representatives with the same power to advocate for the employees during investigatory interviews as they have in other contexts.¹⁶³ As with the elimination of investigatory interviews, this option would largely maintain the current balance between employees and employers, while eliminating much of the uncertainty and risk associated with the Board's ad hoc approach. For example, while allowing stewards to take on a more adversarial role may hinder the employer's investigation, the additional burden to employers would be negligible since the Board's current interpretation allows for a union representative to lawfully object to a broad range of questions in order to protect the employee's rights.¹⁶⁴ Moreover, acknowledging the representative's role as the employee's defender would provide a familiar framework in which all parties could operate—a framework that is already employed in the context of collective bargaining, negotiations, and disciplinary proceedings.¹⁶⁵ Such a framework would not only fulfill the expectations of union representatives and employees, who are likely to view the situation in terms of the more familiar attorney-client relationship, but would also negate the chilling effect of the ad hoc approach by largely exempting representatives from personal discipline arising from their conduct

162. *Id.* at 263-64.

163. *See, e.g.,* *Severance Tool Indus. Inc.*, 301 N.L.R.B. 1166, 1169-70 (1991); *Syn-Tech Windows Sys.*, 294 N.L.R.B. 791, 791 (1989); *Atl. Steel Co.*, 245 N.L.R.B. 814, 816-17 (1979).

164. *U.S. Postal Serv.*, 351 N.L.R.B. No. 82, slip op. at 7 (Dec. 28, 2007) (holding that a union representative may object to an employer's loaded questions in order to protect the employee); *N.J. Bell Tel. Co.*, 308 N.L.R.B. 277, 279 (1992) (holding that an employer may object to questions reasonably perceived to be "abusive, misleading, badgering, confusing, or harassing").

165. *See Atl. Steel*, 245 N.L.R.B. at 819-20 (discussing the role of the union representative in accompanying an employee to a meeting with the employer and in filing an employee grievance); *see also Severance Tool Indus.*, 301 N.L.R.B. at 1169-70 (discussing the union representative as a defender of employee rights).

during the interviews.¹⁶⁶ Thus, allowing stewards to zealously defend employees would effectuate Congress's desire to eliminate the "inequality of bargaining power between employees . . . and employers,"¹⁶⁷ without a corresponding decrease to employer rights.

CONCLUSION

In *Weingarten*, the Supreme Court attempted to create a delicate balance between the rights of employees and employers. In the thirty years since that decision, however, the Board's ad hoc approach has failed to maintain that balance and created additional risks for employers, unions, and employees because they all must await a judge's or arbitrator's subsequent ruling in order to know whether their conduct during an interview crossed the invisible *Weingarten* line that separates lawful from unlawful conduct. The results of this uncertainty, in the form of increased risk to employers and a chilling of employee rights, have rendered investigatory interviews a dangerous and ineffective means of ferreting out employee wrong-doing. Thus, unless and until the Board and the Supreme Court more clearly define the role of *Weingarten* representatives, employers, unions, and employees who are unable to resolve the details of *Weingarten* rights through collective bargaining would be better served by simply avoiding investigatory interviews altogether.

166. See *Atl. Steel*, 245 N.L.R.B. at 819-20; *Severance Tool Indus.*, 301 N.L.R.B. at 1169-70.

167. 29 U.S.C. § 151 (2000); see also *Weingarten*, 420 U.S. at 262.