WEINGARTEN RIGHTS: NOW YOU SEE THEM, NOW YOU DON'T.

By

Bonnie L. Roach*

We've all seen the crime drama shows – the shows where the criminal is finally caught, read his/her Miranda rights and taken away to face Lady Justice. Miranda rights have even penetrated the modern lexicon to such an extent that laypersons can immediately tell you that they have the right to an attorney should they be arrested. But what about the average employee who may face an interrogation, not by the police, but by the employer who is investigating some sort of work-related wrongdoing? Why should they be denied some sort of assistance, if not by an attorney, a coworker who can assist them by witnessing the interrogation and providing assistance when they can?

The Supreme Court answered that question in *NLRB v. Weingarten*, whereby the Court declared that unionized employees had the right to request that a co-worker accompany an employee to an interview for the purpose of disciplining an employee. By allowing a coworker to accompany the employee, much of the interview process will be witnessed by another party, thus preserving, in part, the integrity of the system. It also tends to balance out the scales of power by having an advocate for the employee be physically present during the interview which may psychologically boost the employee's perception of power. So, the coworker acts much like the attorney in the interview – a countervailing force to the employer's position power.

Since we are so accustomed to having fair representation in our legal system, it would seem to be logical that the same process be extended to the workplace not only in the unionized sector, but the non-union setting as well. However, the NLRB seems to have difficulty in deciding whether or not Weingarten rights should extend to the non-union setting. Case history demonstrates that the NLRB has had major shifts in their views as to what rights nonunion employees have regarding their rights to representation in disciplinary interviews. The National Labor Relations Act, the primary law which confers representation rights for employees, provides the statutory foundation for representation rights.

Relevant Sections of the NLRA

Sections of the National Relations Act have provided the statutory language by which the courts and the NLRB have determined whether nonunion employees are entitled to representation rights for investigatory interviews which might lead to discipline. Section 7 of the NLRA speaks directly to the rights of the employee. The plain language of the Act ""to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." strongly suggests that should employees feel the need to have a coworker present during a disciplinary interview, then in the interest of "mutual aid or protection", the employee ought to be able to have a representative of their own choosing. [1] If this is so, then any denial of representation would constitute a violation of Section 7 and thus result in a charge of an unfair labor practice.

Section 8(1) of the Act state that it will be an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7".[2] Section 8(2) adds that it will be an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)".[3] The plain language interpretation suggests that an employer would be violating the rights of the employee, whether he/she be union or nonunion should they refuse to interact with the employee's choice of representative UNLESS there was a collective bargaining agreement which would designate the appropriate representative to represent the interests of all of the unionized employees. However, the Act is silent on specifying the nonunion representative and thus, by default, the language of the NLRA would suggest that the employee's choice of representative should be enough to require the employer to negotiate with that coworker.

As Section 9 (a) illustrates that for union employees who are voted by the majority of the employees is the appropriate representative for resolving any grievances and to be the exclusive representative of the bargaining unit and that

> any individual employee or a group of group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective- bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.[4]

While it is clear that the Act supports the presence of the representative for any action affecting the terms and conditions of employment for the individual employee, it is not so clear that the nonunion employee has those same rights, although if the nonunion employee has the right to choose a representative then the employer would be required to have that nonunion representative present at the disciplinary interview. But, that is an inference that has yet to be consistently drawn and for the NLRB, the question remains as to whether the nonunion employee must be afforded the same opportunity for representation as their unionized counterpart. Since one of the purposes of the NLRA was to equalize the bargaining power between employer and employee and since the Act discusses the rights of employees in general, it might be assumed that the law is intended to protect the nonunion employee albeit in a different way than those who are represented by a union.

The NLRB had wrestled with this issue and has exhibited a bewildering number of contradictory findings. To best understand the NLRB's stand on nonunion representation in disciplinary interviews requires a review of the court and Board decisions and their evolution into the Board's position on representation as it stands today. The whole subject of employee representation in disciplinary interviews was articulated by the U.S. Supreme Court in *NLRB v. Weingarten.*[5]

Weingarten v. NLRB

Weingarten operated about 100 retail stores. Some of the stores had lunch counters and some had food that could be carried out. Leura Collins, one of the sales personnel worked at the lunch counter at store #2. The stores had hired a surveillance company to guard against employee theft through undercover agents. One of the surveillance employees, Agent Hardy, was dispatched to investigate a report that Collins had taken cash from the cash register. Unbeknownst to the manager, the security agent went to the store and watched Collins' activities. He then went to the manager to inform him that there was no merit to the claim and had found no inappropriate activity on the part of Collins. The manager said that he was told by an employee that Collins had bought a box of chicken to eat which cost around $2.98 but had only put $1 in the cash register.[6]

Collins was summoned to meet with Agent Hardy and the store manager who both questioned her about the activities. She admitted that she bought the chicken to donate to a church function, but she claimed that she had chosen four pieces of chicken which totaled a dollar, but since the store was out of the smaller containers, she used the larger containers to hold the chicken. Hardy checked the story out and other employees verified Collins story. He came back and apologized to Collins for inconveniencing her.[7]

She burst into tears and said that the only thing that she had ever received for free was the free lunches that were given to employees. While this was true of employees working at lunch counters, it was not the policy for those working at the food lobby areas. It was calculated that Collins owed $160 for all of the lunches and at that time, Collins refused to sign the statement and requested the attendance of the shop steward, but the manager denied her request. Hardy had a telephone conference with headquarters who informed him that they were uncertain as to whether the policy against free lunches was in effect at the store where Collins was assigned. Hardy promptly terminated the interview with Collins. The manager asked her to keep the matter to herself, but she promptly reported the incident to her shop steward and the union. A grievance was filed on Collin's behalf alleging an unfair labor practice since the company unilaterally revoked the free lunch policy the day after Collin's interview which constitutes an 8(a)(5) violation of the National Labor Relations Act. However, under the collective bargaining agreement, the matter was subject to arbitration and so the National Labor Relations Board (NLRB) dismissed the case for arbitration.[8]

In *Weingarten*, the Court examined the Board's construction of Section 7 rights to provide employees with representation in interviews which would lead to disciplinary action in the cases of

Garment Workers v. Quality Manufacturing, Co. and *Mobil Oil Corporation.*[9]. In *Mobil Oil*, the Board concluded:

> An employee's right to union representation upon request is based on Section 7 of the Act which guarantees the right of employees to act in concert for 'mutual aid and protection.' The denial of this right has a reasonable tendency to interfere with, restrain, and coerce employees in violation of Section 8(a)(1) of the Act. Thus, it 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. Such a dilution of the employee's right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action.[10]

The Board concluded that the Section 7 right to representation is only triggered when the employee requests it (which isn't always the case), and must only be given the right in cases where the employee *reasonably* believes that the interview will lead to discipline.. An employee may decide to proceed without representation which is the prerogative of the employee. The employee may not even avail themselves of a representative unless the employee reasonably believes the interview will result in discipline. Whether the employee's belief is reasonable will depend upon the facts of the case.[11] In this case, Collins had a reasonable belief that her interview would result in disciplinary action since she was the beneficiary of an exception in the collective bargaining agreement which would have allowed the manager to automatically fire Collins should it be proven that she had committed an act of dishonesty. Because the investigation did not uncover any dishonest activity by Collins, she was not fired, but she was alerted to the fact that the interview was disciplinary in nature.[12]

By the same token, the previous position of the Board has said that representation rights could not interfere with legitimate employer prerogatives, such as to refuse to allow the request for representaton. The employer had the right to deny the employee the request for representation, but in doing so, the employer might be forced to carry on the investigation without the testimony of the employee. Of course, the employee was free to agree to continue the interview without a representative.[13] The Board explains why they adopted this view:

> This seems to us to be the only course consistent with all of the provisions of our Act. It 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.[14]

The Board cautioned that if the employee opts to have a member of the union represent them during the interview, the employer has no duty to bargain with the representative. The representative is merely there to clarify certain issues with the employee or to lend moral support at the interview.

The Supreme Court upheld the Board's interpretation of the language of Section 7 which reads, '(e)mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.'[15] The Board determined that an employee who asked for a union representative to represent them in a interview which was likely to result in a disciplinary action was engaging in an activity for their

mutual aid or protection. Even if it is a single employee, the request for representation by a union member helps protect the employee and the bargaining unit by ensuring that the employer does not unjustly punish a bargaining unit employee.[16]

The Court stated that the NLRB had interpreted Section 7 in such a way to further the essential purpose of the NLRA which was to, 'the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of . . . mutual aid or protection.' To that end the Act is designed to eliminate the 'inequality of bargaining power between employees . . . and employers.'[17] The Act was designed to address the inequality of power between employer and employee[18] and provides the kind of protection that the act was designed to address[19]

The Court felt that the NLRB's interpretation of the Act would help both employee and employer in another way. There is little doubt that an employee who faces disciplinary action will experience significant stress during a disciplinary interview and it is very possible that the employee may be unable to adequately express himself or herself when questioned by management or simply isn't knowledgeable enough to point out extenuating circumstances or other factors that might significantly affect the outcome of the interview.[20]

> [Participation by the union representative] might reasonably be designed to clarify the issues at this first stage of the existence of a question, the bring out the facts and the policies concerned at this stage, to give assistance to employees who may lack the ability to express themselves in their cases, and who, when their livelihood is at stake, might in fact need the more experienced kind of counsel which their union steward might represent. The foreman, himself, may benefit from the presence of the steward by seeing the issue, the problem, the implications of the facts, and the collective bargaining clause in question more clearly. Indeed, good faith discussion at this level may solve many problems, and prevent needless hard feelings from arising . . . . (It) can be advantageous to both parties if they both act in good faith and seek to discuss the question at this stage with as much intelligence as they are capable of bringing to bear on the problem.[21]

While it is clear that union representation at a disciplinary interview furthers the objectives of the NLRA, the federal appellate courts took issue with the NLRB's construction of the Act stating that there is no requirement under the law that a union representative be present during an investigatory interview. In *Texaco, Inc. Houston Producing Division v. NLRB*,[22] the Appellate court stated it was not a violation of §8(a)(1) where the employer refused to grant an employee union representation in the disciplinary interview. The NLRB stated that here, the issue was whether the employer was refusing to deal with the union which is impermissible under §8(a)(5). The Supreme Court found the distinction unnecessary since the decision in *Weingarten* would supersede that decision.[23] The Board asserted that even though past decisions might be interpreted as being contrary to the Board's current interpretation, which was due to the fact that previous decisions "do not reflect a considered analysis of the issue."[24] Given that, and in the light of significant developments in industrial life believed by the Board to have warranted a reappraisal of the question, the Board argues that the case is one where '(t)he nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer. And so, it is not surprising that the Board has more or less felt its way . . . and has modified and reformed its standards on the basis of accumulating experience.'[25]

The Supreme Court agreed that the NLRB's construction of Section 7 was well within the Board's purview and the scope of the statute.[26] The Court went on to say that the Board was well in its rights to change its interpretation based upon cumulative experience in which any agency must make modifications in its interpretation of the law based on trial and error.[27] The Court felt that evolving policies regarding the NLRA should be left to the Board's discretion with regard to providing employees with mutual protection and aid and that the Appellate Court impermissibly interfered with the Board's authority by saying that there was no need to provide mutual aid and protection in an investigatory interview.[28] At no time was the Court suggesting that any decision or policy of the Board should be rubberstamped,[29] but it was saying that the Board would be in the best position to understand the changing industrial climate and make the proper decisions and interpretations.[30] Given this, the Court determined that the Board properly decided that

employees could call upon union representatives to accompany them in disciplinary interviews.[31] As the Court stated:

> The statutory right confirmed today is in full harmony with actual industrial practice. Many important collective-bargaining agreements have provisions that accord employees rights of union representation at investigatory interviews. Even where such a right is not explicitly provided in the agreement a 'well-established current of arbitral authority' sustains the right of union representation at investigatory interviews which the employee reasonably believes may result in disciplinary action against him.[32]

The Court reversed the Appellate's court decision and established definitively that employees have the right to representation during interviews with the employer that might lead to disciplinary action.

Do Weingarten Rights Extend to the Nonunion Employee?

Although the Weingarten case seemed to settle the issue of representation at disciplinary interviews for unionized employees, it was silent on whether nonunion employees would be afforded the same option. Then, in 1982, the NLRB found that *Weingarten* rights extended to nonunion employees in *Material Research Corp.*[33] This holding was premised on the assumption that an employee's right to assistance emanates from § 7 of the NLRA, rather than from a union's right of representation under § 9, but the Board later reversed itself in *Sears Roebuck & Company* in saying that *Weingarten* rights do not extend in situations where there is no certified or recognized union.[34] Three years later the Board seemed to modify its position in *E.I. Dupont De Nemours* which followed the reasoning in *Sears Roebuck*, but added that the statute could be amenable to other interpretations.

The Board completely reversed its position in *Epilepsy Foundation of Northeast Ohio*[35] where two employees, Arnis Borgs and Ashraful Hasan, had complained about the supervision of their superior, Rick Berger to Christine Loehrke, who was Berger's supervisor. In one scheduled meeting between Berger, Borgs and Loehrke, Borg had requested that Hasan be allowed to accompany him to the interview. His request was refused. He was denied the request and so he declined to meet with Berger. When he returned to work the next day, he was fired by Loehrke after she had told him to go home for a day and to report back the following morning. Loehrke cited the reason she fired him was for his refusal to meet with Berger without Hasan. Hasan did agree to meet with Berger and Loehrke who told Hasan that the memo to Berger was inappropriate and that any further misconduct would result in termination. When Hasan later refused to sign a list of performance objectives given to him by Berger, he was discharged by Loehrke for gross insubordination.[36]

The administrative law judge (ALJ) who heard the case had ruled that Borgs' dismissal was not under review since *Weingarten* rights did not apply to nonunion employees and thus did not violate §8(a)(1) of the NLRA. Hasan's termination was not at issue either since there was no nexus between his discharge and any protected activity under the NLRA. In a 3-2 vote, the NLRB reversed the findings of the ALJ in part and extended *Weingarten* protection to nonunion employees. The also found that these rights applied retroactively to Borgs and found that his dismissal was in violation of the NLRA. Hasan's termination was also found to be a violation his rights to engage in protected activity since the memo was intertwined with both Hasan's and Borgs' terms and conditions of employment. The Foundation petitioned the Appellate Court to hear the matter.[37]

The court noted that Section 7 rights had been extended to union and nonunion employees in NLRB v. Washington Aluminum Co.[38] However, the *Weingarten* case only presented the issue in a unionized setting and was silent on the issue of whether the right would extend to non-union employees. The Board in *Epilepsy Foundation* overruled *DuPont* by stating that its interpretation was "inconsistent with the rationale articulated in the Supreme Court's *Weingarten* decision, and with the purposes of the Act."[39]

Epilepsy Foundation appealed this decision alleging that the Board had used an impermissible interpretation on the act based on three things:

> First, the presence of a coworker in an investigatory interview is neither "concerted" nor "for mutual aid and protection" and, therefore, it is not within the ambit of § 7. Second, the application of *Weingarten* in the nonunion workplace is at odds with § 9(a) of the Act, which provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by a majority of the employees in [an appropriate bargaining unit] shall be the exclusive representatives of all the employees in such unit." 29 U.S.C. § 159(a). Third, the *Weingarten* rule violates the First Amendment rights of nonunion employers to speak individually with their employees.[40]

The Foundation also claimed that its interview was not investigatory interviews as was defined in *Weingarten*. In addition, the Board had not adequately explained its departure from its previous decisions. The Court of Appeals rejected these claims.

The purpose of Section 7 of the NLRA is that "[e]mployees shall have the right ... to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[41] Since a request by an employee to have a coworker present at an interview which is likely to lead to disciplinary action could be construed as engaging in mutual aid or protection, then the court reasoned that the Board's interpretation of the Act was appropriate. Epilepsy Foundation argued that unrepresented employees could not invoke the same kind of collective rights as their unionized counterpoint due to the fact that the coworker how has been asked to assist the employee during the interview has no existing duty to the nonunion employee and thus cannot be acting in that employee's mutual aid and protection.[42]

The Board rejected that view saying that if an employee requests another employee to be present at the investigatory interview, that coworker provides the employee with an advocate, witness and/or advisor which is activity for the mutual aid and protection of the employee. Since a nonunion employee is just as interested in being protected against unjust action as the union employee does, then both share this interest by invoking their *Weingarten* rights.[43] The Court used the reasoning in *Weingarten* which stated that the Board should be give deference since it is the most appropriate body to gauge the changing industrial climate and thus should have the authority to extend *Weingarten* rights to nonunion employees. In fact, the decision in *Weingarten* which found that Section 7 of the NLRA provided the right for union representation in interviews that may result in disciplinary action, supported the Board's decision in *Epilepsy Foundation.* The entitlement to Section 7 rights extends to both union and nonunion employees.

> This rationale is equally applicable in circumstances where employees are not represented by a union, for in these circumstances the right to have a coworker present at an investigatory interview also greatly enhances the employees' opportunities to act in concert to address their concern 'that the employer does not initiate or continue a practice of imposing punishment unjustly.[44]

The Board's argument, encapsulated by Board member Brame, was that extending *Weingarten* rights to nonunion employees would be a violation of Section 9(a) of the NLRA which contains the exclusivity provision.[45] Brame contended that if *Weingarten* rights were given to the nonunion employees, this would cause the employer to be forced to deal with the equivalent of a labor organization which conflicts with 9(a). The Court rejected that argument and agreed with the majority of the Third Circuit which stated that Section 9 involves collective bargaining and not "dealing" and since the Supreme Court determined that the employer is not compelled to bargain with the *Weingarten* representative, there is no conflict with Section 9(a).[46] Furthermore, the Appellate court noted that while Section 9(a) does not limit the rights of nonunion employees under Section 7, the employer may voluntarily allow a representative and is under no obligation to even hold an investigatory interview – the evidence can be gathered through other means.[47]

The remaining issues that Epilepsy Foundation brought before the court were summarily dismissed. The first was that the Board's interpretation of the NLRA was an unconstitutional restriction of free speech and that the facts of *Weingarten* do not fit this case. Since neither argument was raised properly, the court refused to consider them. The Respondents last claim was that the Board did not provide justification for its interpretation of the Act which was deemed meritless by the Court.[48]

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.[49]

Since the Court felt that Epilepsy Foundation was questioning the wisdom of the interpretation, the argument failed. The court did agree that the Board's new interpretation of Section 7 could not be retroactively applied to Borgs' situation and felt that the Board erred in retroactively applying the requirement of representation for a nonunion employee.[50] Finally, the Board determined that Borgs and Hasan were discharged because they were not challenging their supervisor's directions, but merely their attempts to raise issues concerning the terms and conditions of their employment and it was the Board's decision that Epilepsy Foundation committed an unfair labor practice by discharging them.[51] The Court felt that one of the memos clearly was a rejection of Berger's supervisory authority and thus constituted insubordination. The Board's finding that the Foundation committed an unfair Labor Practice against Borgs and Hasan was reversed.[52]

The IBM Reversal

Just when the rights of nonunion employees seemed to be secure, the Board once again reversed itself in *In Re IBM Corp*,[53] by stating that *Weingarten* rights no longer should be extended to the nonunion workplace and while the *Weingarten* view of the right to have representation at a investigatory interview is permissible, the Board felt that the better interpretation was to deny the rights of the nonunion worker to the same representation.[54] The Board dismissed the Section 8(a)(1) charge of an unfair labor practice against IBM when it denied a nonunion employee representation and a disciplinary interview.

The sudden and inexplicable about face of the Board is not clarified in this decision which appears to be a rather desperate attempt at justifying its position. The ALJ decided that since *Epilepsy Foundation* had extended the right to representation to nonunion employees, IBM was guilty of an 8(a)(1) unfair labor practice by denying one of its workers the request for an attorney or coworker to be present at an investigatory interview of alleged sexual harassment. Two other employees were also denied that right and all were dismissed. The ALJ concluded that the employer was guilty of violating Section 8(a)(1). When the matter went before the NLRB, IBM requested that *Epilepsy* be overturned by the Board's return to previous precedence which stated that *Weingarten* rights be only extended to unionized settings which was the finding in *DuPont*.[55] The DuPont Board stated that nonrepresented employees do not have a right to representation for disciplinary interrogations for three reasons -- a nonunion representative could not benefit the bargaining unit as a whole as could the union representative; could not address the imbalance of power between employer and employee; and could not facilitate the process as a union representative might.[56] IBM contended that allowing nonunion employees to have *Weingarten* rights might compromise sensitive employee information and the ability of the employer to carry out an investigation.[57] The joint *amici curiae* stated the same thing and went on to say that the presence of a nonunion representative would increase the chance that the interrogated employee might not tell the truth.[58]

After all was said and done, the Board decided that labor relations policy would best be served to overrule *Epilepsy Foundation* and return to the *DuPont* precedence which stated that *Weingarten* rights should not be extended to the nonunion setting .[59] The Board acknowledged that it is a permissible interpretation of the act that *Weingarten* rights do extend to nonunion employees is also a permissible interpretation of the Act and the Board must choose either interpretation at its discretion.[60]

The IBM Board cited to *Weingarten* where the Court stated that the Board has a duty to "to adapt the Act to changing patterns of industrial life.… [T]he Board has the 'special function of applying the general provisions of the Act to the complexities of industrial life."[61] One of those complexities was the increase in disciplinary actions that are required in the workplace for violence, discrimination, sexual harassment, fiduciary and corporate abuses.[62] The Board reasoned that since the industrial climate had become substantially more volatile and the need for investigatory interviews had increased so substantially, the findings in *DuPont* were more relevant and so was the ruling.[63]

In *DuPont*, the Board declared that a nonrepresented employee does not have Section 7 rights do not entitled an employee to have representation in a disciplinary interview for three reasons and the IBM

Board carefully compared the effectiveness of the union representative with that of the nonunion coworker to justify denying *Weingarten* rights to nonunion employees.

A union representative is the legally assigned representative of not only the employee, but the entire bargaining unit. Therefore, the representative, by representing the employee at a disciplinary interview, represents the rights of all of the bargaining unit. The nonunion representative has no such duty to represent employees' interests let alone the nonunion employee. The nonunion employee has no designated authority and thus cannot nor is required to represent a defined group of people. The nonunion representative is concerned with the immediate situation and not with the future interests of the employees. The nonunion representative is there to act as a witness and a source of support for the employee, but is not duty bound to serve those functions for the rest of the employees.[64]

Secondly, the Board asserted that the coworker cannot level the playing field in terms of power in the same way that the union representative can. As a practical matter, the union representative is the same individual and is very comfortable with dealing with management since he or she has had frequent encounters with the employer. The inference is that the union representative is a professional advocate who has a duty to represent the bargaining unit. As such, the union representative can be a much more effective advocate whereas the inexperienced coworker may not simply because they don't have the incentive or the experience.[65]

Finally, the Board asserts that the skills of the union representative are quite different than the coworkers'. In *Weingarten*, the Court noted that a "knowledgeable" union representative can facilitate the interview by "eliciting favorable facts," clarifying issues, and eliminating extraneous material, all of which save the employer valuable production time.[66]

The Board also felt that the union representative is accustomed to administering collective-bargaining agreements and is familiar with the "law of the shop." By being knowledgeable about both, the union representative has the backdrop of policy which can help in situations where the employer may discipline the employee. A union representative's experience allows the representative to avoid having employees file a grievance by proposing solutions to workplace issues.[67]

The coworker has no such experience with being the statutory representative of the workers and so is less effective at effectively representing the employee according to the Board. The most the coworker could do is offer moral support and while that might be comforting to the employee, the ineffectiveness of the coworker might actually impede the process of the disciplinary interview simply because the coworker is less experienced and knowledgeable in representation and contractual issues.[68]

One other problem in having a coworker represent the employee is the possibility that the coworker actually was a participant in the wrongdoing whereas the union representative would not and thus it would be a more objective representation and not pose as many difficulties.[69] The Board honed in on the fact that the employer allowed to deal with individual employees in a nonunion setting whereas the employer is compelled to deal with the union representative in the unionized setting.[70] Since the *Epilepsy* Board did not take this into account, the Board basically took that ability away from the employer which is why the Board decided to go back to the *DuPont* precedent which had been in effect 12 years prior to the *Epilepsy* decision.[71] The concept of "dealing" was said to be confined to Section 2(5) portion of the definition of "labor organization" by the *Epilepsy* Board, but in *IBM* , the Board said that this was an incorrect interpretation and that the proper interpretation is that "dealing" is to "condemn direct contacts between a unionized employer and employees".[72]

There is also the issue of whether the presence of a coworker would compromise the confidentiality of the process. Employers are finding it increasingly necessary having to conduct various disciplinary investigations since their legal responsibilities to maintain a safe and secure work environment due to the increasing number of laws, court cases and administrative rulings.[73] The Board notes that confidentiality would be compromised with the nonunion representative for the simple reason that the employee's privacy would be jeopardized in having a layperson present at the investigatory interview since there is no guarantee that the coworker would keep the information private. They are not under a duty to keep the interview information confidential whereas the union representative has a specific legal duty not keep such matters confidential. Revealing confidential information would affect the employer's ability to conduct future investigations in an effective way.[74]

While it was acknowledged that the employer had the option of conducting the interview without the presence of the employee, many employers would want information straight from the employee and that would not be possible under the decisions in *Weingarten* and *Epilepsy.*[75]

Many other concerns arise with the presence of the coworker. There may be a lack of candor and less likelihood that the employee would want to divulge sensitive facts in the presence of the coworker. Finally there may be the danger that the nature of the investigation and the proceedings of the interview could be revealed by the coworker thus compromising the ability of the employer to conduct a proper investigation. Even thought the Board is cognizant of the fact that these concerns might also be true in the union setting, the totality of the problems led the Board to overrule *Epilepsy*. The dissent argues that if the problems that the majority cite also exist in the unionized setting, then it stands to reason that both union and nonunion workers deserve *Weingarten* rights, but the majority argued that it makes sense neither to extend the right to both union and nonunion employees nor does it make sense to deny both their rights to representation. Instead, the majority states that based on all of the facts, denial of *Weingarten* rights to nonunion employees makes sense. That is not to say that nonunion employees can't request a coworker, but the employer has the right to deny the request.[76]

The Board recognized the fact that by limiting the right to representation in a unionized firm may lead to unsatisfactory results. It was very possible that by the employee refusing to participate in the investigatory interview, the resulting decision may be flawed based on the nonparticipation of the employee. As a consequence, the employer may be charged with conducting an unfair investigation and if the employee was disciplined as a result, the employer could face liability for wrongful termination or other charges of acting in an illegal manner.[77]

Even though the Board did acknowledge that the presence of a coworker might be helpful in very specific ways,[78] they felt that employees could avail themselves of other ways of help such as mediation or an ombudsperson.[79]

The bottom line was that the Board felt their decision in *IBM* was correct in that it carried out the mandate held in *Weingarten* and articulated in *DuPont* which was to achieve a

> "fair and reasoned" balance between the conflicting interests of labor and management-we best effectuate the purposes of the Act by limiting the right of representation in investigatory interviews to employees in unionized workplaces who request the presence of a union representative.[80]

The dissent felt that the Board was not acting in a fair and balanced manner and was denying the nonunion employee the fundamental rights to representation. The Board responded:

> We are *not* saying that a nonunion employee lacks a Section 7 right to seek mutual aid and assistance from a fellow employee. We are *not* saying that a nonunion employee is incapable of representing a fellow employee. We are *not* saying that nonunion employees lack the legal right to seek to stand up for each other. We are *not* saying that nonunion employees lack the protection of the Act or that such protection is endangered.[81]

Furthermore:

> As shown, our colleagues misunderstand our position. Most assuredly, we do not seek to turn the American workplace into "a new front in the war on terrorism," and we do not seek to have the Board lead the charge in any such war. With all respect, that language does not further a reasonable analysis of the issue before us. We will nonetheless respond. We simply observe that some employers, faced with security concerns that are an outgrowth of the troubled times in which we live, may seek to question employees on a private basis for a host of legitimate reasons. Those employers start no war, and the Board does not encourage them, or discourage them, from having such private inquiries. The Board simply refrains from forbidding employers to hold such private inquiries."[82]

The decision to limit *Weingarten* rights to unionized employees refines the decision in *Epilepsy* in that even though it was recognized that the employer had no duty to bargain with the representative coworker, the nonunion employer was forbidden to deal with the solitary employee in disciplinary matters. The nonunion employer should be allowed to directly deal with their employees and since the decision in *Epilepsy* would prohibit this, the denial of *Weingarten* rights is more in "harmony with the historic distinction between unionized and nonunion employers."[83] So, even though the right to representation for nonunion employees was granted in *Epilepsy* the Board felt the right was imprudently given. The Board concluded that there must be a bright-line test as to when the rights of the employees outweigh the need to conduct a proper investigation and that anything less would cause confusion as to when the *Weingarten* rights would apply and when they wouldn't.[84] The dissent pointed out that the problems with nonunion representation would also be present in the unionized setting, but the Board responded to this by saying that Section 9 provides the right to representation for unionized employees but nonunion does not share this right. Therefore, in unionized settings, the balance swings towards the rights of the employee whereas in the nonunion sector, the rights of the employer to conduct an investigation outweigh the rights of the employee. For all of these reasons, the Board overturned the precedence in *Epilepsy* stating that nonunion employees are not entitled to representation in interviews likely to result in discipline.[85]

The reasoning by the majority seems to strain credibility in that the Board makes sweeping assumptions about the lack of effectiveness and lack of confidentiality that comes with a nonunion representative, and these sweeping generalizations do not seem to be grounded in research. As such, it is questionable whether the Board's position is likely to undergo yet another transformation.

The Dissent in IBM

Members Leibman and Walsh noted in their dissent that nonunion American workers basically had been stripped of a "of a right integral to workplace democracy."[86] Since the NLRA covers all workers and since turning to a coworker for "mutual aid and protection" as stated in Section 7 is the most fundamental way to obtain that mutual aid and protection in a nonunion environment then the majority has taken away the only type of protection that a nonunion employee may have available in a disciplinary interview[87]

Not only was the right taken away, but it was taken away based on presumptions that have no visible empirical support. The crux of the majority argument was that representation by a coworker is inherently inferior than that of the union representative. The dissent notes that it is troubling that the majority was so willing to divest the nonunion worker of representation without any credible evidence of their supposition. The majority had very little problem in removing the fundamental right of representation for the questionable reason that "such a right would make it impossible for nonunion employers to conduct effective workplace investigations and so would endanger the workplace."[88] The majority made much note of how the workplace has become more tumultuous in terms of workplace violence and organizational wrongdoing since the terrorist attacks and thus the need for effective disciplinary investigations has increased and must be safeguarded from anything that might compromise the integrity of the process.[89]

The dissent responds to this line of logic with a high degree of skepticism citing that there is no evidence that any investigation was compromised since *Epilepsy* when a coworker represented an employee in a disciplinary interview nor is it reasonable to make an assumption that the mere presence of a coworker significantly affects such issues. As the dissent puts it, "we would hope that the American workplace has not yet become a new front in the war on terrorism and that the Board would not be leading the charge, unbidden by other authorities."[90]

The dissent argued that nonunion employees have a right to representation which is strongly grounded in the NLRA.[91] It was noted that two of the Board members agreed that allowing nonunion employees representation at disciplinary hearings was one way of interpreting the act, but they (and a third member) held that for policy reasons, the right must be withheld.[92]

The history of the NLRA was examined by the dissent, who noted the fluctuating views of the Board, but held that the proper right to representation was restored in *Epilepsy* and was upheld by the District of Columbia Circuit Court of Appeals.[93] In that decision, nonunion employees were granted the right to representation in any interview where there is a strong possibility of disciplinary action. The dissent cites that the majority has ignored the fact that Section 7 of the NLRA protects all workers—both union and nonunion. In fact, one commentator noted that prior to *Epilepsy* that the "scope of coverage of

section 7 and its application to nonunion employees may have been one of the best-kept secrets of labor law."[94]

Indeed, the Board in *Materials Research* made a careful review of all Board decisions, statutory language, and various federal court decisions including the Supreme Court's and concluded:

> It is by now axiomatic that, with only very limited exceptions, the protection afforded by Section 7 does not vary depending on whether or not the employees involved are represented by a union, or whether the conduct involved is related, directly or indirectly, to union activity or collective bargaining.[95]

The dissent agrees with the Board in *Epilepsy* which stated:

> We believe, in other words, that the Supreme Court's decision in *Weingarten* supports the right to representation, even in nonunion settings, because that right is grounded in Section 7 and because the "right to have a coworker present at an investigatory interview … greatly enhances the employees' opportunities to act in concert to address their concern 'that the employer does not initiate or continue a practice of imposing punishment unjustly.'[96]

As the *Materials Research* Board stated:

> [A] request for the assistance of a fellow employee is … concerted activity-in its most basic and obvious form-since employees are seeking to act together. It is likewise activity for mutual aid or protection: by such, all employees can be assured that they too can avail themselves of the assistance of a coworker in like circumstances ….[97]

The dissent notes that the D.C. Circuit has endorsed this reasoning and further states that to assume that concerted activity is not at work here is "terribly shortsighted"[98] and finds the reasoning in *Epilepsy* "compelling".[99] The Court further regards that any claim that the decision in *Epilepsy* was not sufficiently explained to be "plainly meritless".[100] Yet the majority has essentially done away with any right of the nonunion employee to have representation in a disciplinary interview.

The decision by the majority to overturn *Epilepsy* is based on the premise that Section 7 of the NLRA essentially renders it impermissible to extend *Weingarten* rights to nonunion employees.[101] The dissent points to various Board decisions which makes it permissible to interpret Section 7 as extending to the nonunion employee and that a single employee can be engaged in "concerted activity" and there is no difference between a union employee asking for help with that of a nonunion employee asking for help.[102]

The dissent notes that the concurrence relies heavily on their interpretation of *Weingarten* yet the decision never prohibits extending the right of representation to nonunion employees and yet the Board does just that. The dissent finds it compelling that the dissent in *Weingarten* noted that with the Supreme Court's decision, representation "also exists in the absence of a recognized union."[103] The dissent cites to other decisions which have been consistent in the *Weingarten* dissent,[104] such as the Second Circuit which said that "representative right … must also apply to a nonunion representative."[105]

The opinion of the majority is based on the conception of concerted activity that was rejected by the Board in *Meyers Industries, Inc*.[106] The majority states that *Weingarten* rights do not apply since there cannot be a presumption of concerted activity in a nonunion setting. The dissent stated that the majority misunderstands *Meyers II* since the Board reiterated that the "definition of concerted activity … encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action."[107] Any employee who calls upon a coworker to help represent him or her in a disciplinary interview or to serve as a witness would fall under the *Meyers II* definition. The dissent concludes that the majority rejects the notion that nonunion employees can be engaged in concerted activity through their misinterpretation of *Meyters II*.[108]

The dissent also found it troubling in how the majority seemed to find that differences between nonunion and union settings justified denying nonunion worker their *Weingarten* rights. Two arguments

were advanced by the majority. The first argument, is the contention that allowing *Weingarten* rights in the nonunion setting would impermissibly force the employer to deal with a representative whereas the nonunion employer has the unique ability to deal with the employee directly. Dealing with a coworker is not the same as a union representative and thus does not prevent the employer from directly dealing with the employee. The *Epilepsy* Board and the D.C. Circuit reject this view:

> Simply put, requiring a nonunion employer to permit coworker representation (if it chooses to conduct an investigatory interview) is not the equivalent of requiring the employer to bargain with, or to deal with, the representative. Describing the argument as based on the "historic distinction between unionized and nonunion employers," as opposed to the Act itself, does not save it.[109]

The second issue in the majority's analysis is the fact that by having nonunion representation in disciplinary interviews would compromise the integrity of such investigations. The majority never cites the legal foundation from which it draws this conclusion and although the dissent concedes that while there might exist a possibility that the employer might face more difficulties in conducting an investigation when a representative is present, such difficulties don't justify the complete withholding of representation rights to the nonunion employee.[110] In fact, the dissent points out that if employees are guaranteed the right to representation as stated in Section 7 of the Act then, presumptively, denying the right to representation would result in a Section 8(a)(1) violation, although some exceptions could be made.[111]

The dissent takes issue with the majority's assertion that only a union representative can effectively represent the employee and can do this without the fear of leaking confidential information and thus allowing the employer to achieve a more effective investigation. The dissent points out that the duty of the union representative is to the employee, not the employer. Furthermore, given the fact that the union representative might be more skilled at representation, the employer might actually encounter more obstacles in the investigatory process because of the union representative's skill.[112]

The majority in *IBM* never offers concrete evidence that nonunion representation is inherently less effective than a union representative in interviews leading to disciplinary actions. In fact, the dissent notes that the majority "shows a startling lack of interest in what is actually happening in American workplaces."[113] The dissent notes that there is no evidence that any investigation was compromised since the *Epilepsy* decision although a problem could arise if the accused employee chooses a possible coconspirator as their representative. If that happens, the dissent felt it would be more appropriate to deal with such situations on a case by case basis rather than denying the right altogether.[114]

The dissent concluded that while *Weingarten* rights do not provide similar protections to employees as does the Constitution, it does provide an element of due process to the workplace in having a representative who acts as a witness and/or advisor.[115] Given the trend towards alternative dispute resolution processes being used in the workplace granting *Weingarten* rights to nonunion employees seems to be more in touch with the times.[116] On the other hand, allowing employers to weld power over an unrepresented employee is "no longer strikes us as either natural or desirable."[117]

Conclusion

The decision in *IBM* is the latest in the Board's reversals on the matter of extending *Weingarten* rights to the nonunion employee. While the majority may claim that their decision is consistent with prior decisions and interpretations of the NLRA, the decision itself seems to rely on suppositions without any factual information to support their view. The Board's decision impacts the vast majority of employees since unions represent only a small fraction of the workforce. Furthermore, the allegation of the majority that union representation is superior to that of nonunion representation is fundamentally flawed and without foundation. Union representation can be as problematic, if not more so as the dissent in *IBM* points out. Rather than preventing mandatory nonunion representation, the Board should be implementing a process by which a nonunion representative's effectiveness should be evaluated. By articulating a specific duty for the nonunion employee to serve the interests of employee, the Board has both addressed the right of all employees to obtain representation and to curtail possible problems that the Board fears. This seems extremely unlikely at the present time and while the dissent in *IBM* seems to be the more reasoned

interpretation of the NLRA and the issue of nonunion representation, it may take the federal court system to reestablish the rights of the nonunion employee.

FOOTNOTES

*****Associate Professor, Ohio University, Athens, OH

[1] 29 USC sec. 7 §157 which states: Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].
[2] 29 USC Sec 8(a)(1) §158
[3] 29 USC Sec 8(a)(2) §158
[4] 29 USC Sec.9(a) §159.
[5] *NLRB v. Weingarten*, 420 U.S. 251 (1975)
[6] *Id.* at 254.
[7] *Id.* at 255.
[8] *Id.* at 256.
[9] *Garment Workers v. Quality Mfg*. Co., 420 U.S. 276 (1974) and *Quality Mfg. Co*., 195 N.L.R.B. 197, *Mobil Oil Corp*., 196 N.L.R.B. 1052 reviewed by 482 F.2d 842 (CA7 1973),
[10] *Mobil Oil Corp*., *supra* note 9.
[11] *Quality Mfg. supra* note 9 at 198 n. 3.
[12] *Weingarten supra* note 5 at 257.
[13] *Mobil Oil Corp, supra* note 9, at 1052.
[14] *Quality Manufacturing supra* note 9 at 198-199.
[15] *Mobil Oil Corp. v. NLRB*, 482 F.2d 842, 847 (CA7 1973).
[16] *NLRB v. Peter Cailler Kohler Swiss Chocolates Co*., 130 F.2d 503, 505-506 (CA2 1942), cited with approval by this Court in *Houston Contractors Assn. v. NLRB*, 386 U.S. 664, 668-689, (1967).
[17] 29 U.S.C. Section 1 §151
[18] *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316, (1965)
[19] *NLRB v. Hearst Publications, Inc*., 322 U.S. 111, 124, (1944).
[20] *See*, e.g., *Independent Lock Co*., 30 Lab.Arb. 744, 746 (1958)
[21] Ibid**.** *See also Caterpillar Tractor Co*., 44 Lab.Arb. 647, 651 (1965) 'The procedure . . . contemplates that the steward will exercise his responsibility and authority to discourage grievances where the action on the part of management appears to be justified. Similarly, there exists the responsibility upon management to withhold disciplinary action, or other decisions affecting the employees, where it can be demonstrated at the outset that such action is unwarranted. The presence of the union steward is regarded as a factor conducive to the avoidance of formal grievances through the medium of discussion and persuasion conducted at the threshold of an impending grievance. It is entirely logical that the steward will employ his office in appropriate cases so as to limit formal grievances to those which involve differences of substantial merit. Whether this objective is accomplished will depend on the good faith of the parties, and whether they are amenable to reason and persuasion.'
[22] *Texaco, Inc., Houston Producing Division v. NLRB*, 408 F.2d 142 (5 Cir. 1969).
[23] *Weingarten, Inc. supra* note 5 at 264.
[24] The precedents cited by the Court of Appeals are*: Illinois Bell Telephone Co*., 192 N.L.R.B. 834 (1971); *Texaco, Inc., Los Angeles Terminal*, 179 N.L.R.B. 976 (1969); *Wald Mfg. Co*., 176 N.L.R.B. 839 (1969), aff'd, 426 F.2d 1328 (CA6 1970); *Dayton Typographic Service, Inc*., 176 N.L.R.B. 357 (1969); *Jacobe-Pearson Ford, Inc*., 172 N.L.R.B. 594 (1968); *Chevron Oil Co*., 168 N.L.R.B. 574 (1967); *Dobbs Houses, Inc.*, 145 N.L.R.B. 1565 (1964). See also *NLRB v. Ross Gear & Tool Co*., 158 F.2d 607 (CA7 1947).
[25] *Electrical Workers v. NLRB*, 366 U.S. 667, 674, 81 S.Ct. 1285, 1290, 6 L.Ed.2d 592 (1961).
[26] *Weingarten supra* note 5 at 265-6.
[27] *Id. See also NLRB v. Seven-Up Co.*, 344 U.S. 344, 349, (1953).

[28] *Weingarten supra* note 5 at 266.
[29] *NLRB v. Brown*, 380 U.S. 278, 291, (1965).
[30] *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 236, (1963); *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798, (1945); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 196-197 (1941), and *American Ship Building Co. v. NLRB*, 380 U.S., at 316.
[31] *Weingarten supra* note 5 at 266.
[32] *Id*. at 267. See also *Chevron Chemical Co*., 60 Lab.Arb. 1066, 1071 (1973).
[33] *Materials Research Corp*., 262 N.L.R.B. 1010, (1982) 1982 WL 24684 (1982)
[34] *Sears, Roebuck & Co*., 274 N.L.R.B. 230, 1985 WL 45768 (1985)
[35] *Epilepsy Foundation of Northeast Ohio v. NLRB* 268 F.3d 1095, (C.A.D.C.,2001).
[36] *Id*. at 1098.
[37] *Id*.
[38] *NLRB v. Washington Aluminum Co*., 370 U.S. 9 (1962)
[39] *Epilepsy Foundation. of Northeast Ohio*, 331 N.L.R.B. No. 92, 2000 WL 967066 (July 10, 2000), at 2.
[40] *Epilepsy supra* note 35 at 1099.
[41] 29 U.S.C. § 157
[42] *Epilepsy supra* note 35 at 1100.
[43] *Id*. at 1095.
[44] *Id*. at 1109 citing *Glomac Plastics, Inc.*, 234 N.L.R.B. 1309, 1311, 1978 WL 14203 (1978*).*
[45] *Epilepsy supra* note 35 at 1101.
[46] *Id*. at 1101 citing *Slaughter v. NLRB*, 794 F.2d 120, 127 (1986).
[47] *Id.*
[48] *Id*.
[49] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 866 (1984).
[50] *Epilepsy supra* note 35 at 1102-3.
[51] *Id*. at 1103.
[52] *Id*. at 1103-5.
[53] *In Re IBM Corp.* 341 NLRB No. 1288, Cases 11-CA-19324, 11-CA-19329, and 11-CA-19334 June 09, 2004
[54] *Id* at 1295.
[55] *IBM supra* note 53 at 1290-3 S*ee E. I. du Pont & Co*., 289 NLRB 627 (1988).
[56] E. I. du Pont & Co., 289 NLRB 627, 629-630 (1988).
[57] *Epilepsy* at 1293.
[58] *Ibid.*
[59] *E. I. du Pont & Co*., 289 NLRB 627 (1988).
[60] *Id.* at 3. The DuPont decision modified the NLRB's earlier decision in *Sears, Roebuck & Co*., 274 NLRB 230 (1985), which found that Weingarten rights must not apply in a nonunion setting.
[61] *Weingarten* , *supra* note 5 at 266.
[62] *IBM supra* note 53 at 1292.
[63] *Id*.
[64] *Id*.
[65] *Id.* at 1292.
[66] *Id.* citing *Weingarten supra* note 5 at 263
[67] *Id*.
[68] *Id*.
[69] *Id*.
[70] *Id* at 1292-3.
[71] *Id*.
[72] *Id*. "The Board holds that "direct dealing, by its very nature, improperly affects the bargaining relationship*." American Pine Lodge Nursing,* 325 NLRB 98, 99 (1997).
[73] *Id*.
[74] *Id* at 1293.
[75] *Id*.
[76] *Id*. at 1293-4.
[77] *Id*, at 1294.

[78] *Id* quoting *Du Pont*, *supra* note 59 at 630
[79] *Id*.
[80] *Id*. at 1293-5 quoting D*u Pont*, *supra* note at 630-631.
[81] *Id*. at 1295.
[82] *Id*. at 1294-5.
[83] *IBM* at 1294-5
[84] *Id*. at 1295.
[85] *Id*.
[86] *Id* at 1305-6.
[87] *Id*.
[88] *Id*
[89] *Id*.
[90] *Id*.
[91] *Id*.
[92] *Id*
[93] *Id*. citing *Epilepsy Foundation supra* note 35.
[94] *Id* at 1306-7 quoting William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again*, 23 BERKELEY J. EMPLOYMENT & LABOR L. 259, 267 (2002).
[95] *Id*. quoting *Materials Research Corporation* 262 NLRB No. 122 at 1012, 1982.
[96] *Epilepsy Foundation*, *supra* note 39 at 678, quoting *Weingarten*, *supra* note 5 at 260
[97] *Materials Research supra* note 33 at 1015.
[98] *Epilepsy Foundation supra* note 35 at 1100.
[99] *Id*.
[100] *Id*. at 1102.
[101] *Id*. at 1307.
[102] *Id*. at 1397 See *E. I. du pont & Co*., *supra* note 59 at 628. Section 7's words, of course, admit of the possibility that "an individual may be engaged in concerted activity when he acts alone." *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984). With respect to the statutory language, there is no basis for distinguishing between an employee's request for a union representative and his request, in a nonunion workplace, for a coworker's presence. Cf. *Weingarten*, *supra*, note 5 at 260 ("The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of section 7…").
[103] *Id*. quoting *Weingarten supra*, note 5 at 270 fn. 1 (dissenting opinion of Justice Powell).
[104] *Id*. *See*, *e.g*., *ITT Lighting Fixtures v. NLRB*, 719 F.2d 851, 855-856 (6th Cir. 1983); *Anchortank, Inc. v. NLRB*, 618 F.2d 1153, 1157 (5th Cir. 1980); *NLRB v. Columbia University*, 541 F.2d 922, 931 (2d Cir. 1976). As discussed, the Third Circuit and the District of Columbia Circuit have squarely held that the position taken in *Epilepsy Foundation* is permissible.
[105] *NLRB v. Columbia University*, 618 F.2d 922 at 931 fn. 5.
[106] *Meyers Industries, Inc.* 281 NLRB 882 (1986) (Meyers II), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).
[107] *Id*. at 887 (1986)
[108] *IBM supra* note 53 at 1307-8.
[109] *Id*. at 1311 fn 25. " We understand the concurrence-which champions the common-law right of nonunion employers to "deal with employees on an individual basis"-to endorse the strong form of this unsuccessful argument. To the extent our colleagues use the phrase "dealing with," they seem to neglect its status as a term of art incorporated in the Act. See Sec. 2(5) (defining "labor organization" as existing "for the purpose of … dealing with employers"). The role of a coworker representative, as elucidated in the Board's decisions (see fn. 4, supra), is not that of a labor organization. As we have explained, the Weingarten right to representation is based on Sec. 7, not Sec. 9, and Weingarten itself makes clear that even in a union setting, the employer has no duty to bargain with the representative. *Supra* note 5 at 259-260."
[110] *Id* at 1310-11.
[111] *Id*.
[112] *Id* at 1309-10.
[113] *Id*.

[114] *Id*.
[115] *Id*.
[116] *Id*.
[117] *Id*. at 1310.