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NATIONAL LABOR RELATIONS BOARD
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AN OVERVIEW OF THE
DEVELOPMENT AND
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RIGHT TO REPRESENTATION

JOHN H. FANNING*

I. INTRODUCTION

In NLRB v. J. Weingarten, Inc.,¹ the Supreme Court affirmed a holding of the National Labor Relations Board (the Board) that an employer commits an unfair labor practice under section 8(a)(1) of the National Labor Relations Act (the Act)² by denying an employee's request for union representation at an investigatory interview which the employee reasonably believes might result in disciplinary action.³ In reversing a decision of the United States Court of Appeals for the Fifth Circuit, which had denied enforce-

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2. 29 U.S.C. § 158(a)(1) (1976). Section 8(a)(1) states that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]. . . ."
3. 420 U.S. at 466-68.
ment of the Board's order in *Weingarten*, the Supreme Court upheld the Board's construction of section 7 of the Act. This construction acknowledges that the right of employees to engage in concerted activity for mutual aid or protection encompasses the right of an employee not only to insist upon, but to have, the assistance of his union representative at such an interview. Specifically, the Court agreed with the Board's holding that an employer's denial of such a request interferes with, restrains, and coerces the employee in the exercise of his rights guaranteed by section 7 of the Act.

From the standpoint of a decisionmaker, *Weingarten* is significant for its recognition of the Board's "responsibility to adapt the Act to changing patterns of industrial life." While the Court noted that the Board's construction of section 7 was "newly arrived at" and contrary to earlier Board precedent holding that section 7 provided employees no right to representation at investigatory interviews, the Court held, nevertheless, that such contrary precedent did not impair the validity of the Board's *Weingarten* holding. Noting that the Board has the "special function of applying the general provisions of the Act to the complexities of industrial life," the Court stated:

The use by an administrative agency of the evolutionary approach

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5. 420 U.S. at 266-68. Section 7 provides:

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) . . .

6. ILGWU v. Quality Mfg. Co., 420 U.S. 276 (1975). In *Quality Mfg.*, the Court, for the reasons stated in its *Weingarten* opinion, affirmed a finding by the Board that an employer violated section 8(a)(1) by disciplining an employee for refusing to attend an investigatory interview absent the requested union representative when the employee reasonably feared that the interview might result in discipline. *Id.* at 280-81. For the NLRB's decision, see Quality Mfg. Co., 195 N.L.R.B. 197 (1972), enforcement denied in part, 481 F.2d 1018 (4th Cir. 1973), rev'd, 420 U.S. 276 (1975).
7. See Mobil Oil Corp., 196 N.L.R.B. 1052 (1972), enforcement denied, 482 F.2d 842 (7th Cir. 1973) (court found no concerted activity within meaning of the Act).
8. 420 U.S. at 266.
9. *Id.* at 267.
10. *Id.* at 264-65.
11. *Id.* at 265.
12. *Id.* at 266 (quoting NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963)).
is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decision making. " 'Cumulative experience' begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process." 13

The Court thus recognized the Board's duty to balance the competing interests of employees and their employer when the Board is faced with a claim that a particular employer action restrained, coerced, or interfered with section 7 rights. In doing so, the Court also recognized the Board's authority to alter the balance of the competing interests in light of industrial developments.

In the seven years since the Supreme Court's Weingarten decision, the Board has continued to interpret section 7 of the Act in the context of employee requests for representation at meetings in which the reasonable fear of disciplinary action obtains. In this article I shall present an overview of the Board's efforts in this area of the law. I shall discuss the origins and the evolution of the right to representation, as well as the Board's post-Weingarten application of the right. In doing so, I hope to provide a view of the current status of the law and an awareness of the statutory policies which gave rise to the right.

II. ORIGINS OF THE RIGHT

The Board first faced the question of whether section 7 encompassed the right of an employee to refuse to deal with his employer without representation in Ross Gear and Tool Co. 14 In Ross Gear, the employer discharged a member of the bargaining committee for refusing to attend a meeting with management unaccompanied by her fellow committee members. The Board found that the purpose of the meeting was to discuss a matter that had been raised during collective bargaining negotiations and that the employee had been summoned, in part, because of her membership on the bargaining committee. 15 Under such circumstances, the Board concluded that the employee was within her statutory rights to insist that the em-

14. 63 N.L.R.B. 1012 (1945), enforcement denied, 158 F.2d 607 (7th Cir. 1947).
15. Id. at 1034.
ployer deal with the whole committee, rather than her alone, and that the discharge therefore violated section 8(a)(1). The Board's holding in *Ross Gear* clearly effectuated a statutory policy underlying section 7 of the Act: In order to redress the imbalance of power between employers and employees, employees have the right to be represented by their collective bargaining agent in matters affecting terms and conditions of employment. However, the Board specifically distinguished the facts of the instant case, where the meeting had been called to discuss matters appropriate for the bargaining table, from the case where an employee is summoned to a meeting held to admonish the employee for misconduct. In the latter instance, the employer's legitimate right to manage its business and impose discipline is an added weight to be balanced against the concommitant right of employees to act in concert to protect themselves against adverse employer action.

In *Dobbs House, Inc.* the Board addressed the issue of whether section 7 encompassed a right to representation during an interview from which disciplinary actions might result. There, the Board adopted a trial examiner's finding that the employer did not violate section 8(a)(1) by denying an employee's request that a union representative be allowed to attend a meeting called for the purpose of discharging the employee for misconduct. The trial examiner had stated:

I fail to perceive anything in the Act which 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. An employer undoubtedly has the right to maintain day-to-day discipline in the plant or on the working premises and it seems to me that only exceptional circumstances should warrant any interference with this right.

The trial examiner distinguished *Ross Gear*, noting that under the instant facts the employee “was discharged for cause and the discharge conference was not predicated upon her involvement in any

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16. *Id.* The Board also found that discharge necessarily constituted discrimination which discouraged union membership in violation of section 8(a)(3). *Id.*
17. *Id.* at 1033-34.
19. *Id.* at 1571.
20. *Id.*
protected union activity." The decision in Dobbs House recognized the legitimate right of an employer to impose discipline for misconduct. The decision, however, also limited the right to representation to meetings where an employee was to be disciplined for concerted or union activities but did not address the full scope of activity adversely affected by the employer's denial of the representation request. For, it was by requesting or insisting upon union representation that the employee exercised his section 7 rights.

This fact was recognized in Texaco, Inc., Houston Producing Division. There, the employee had been suspended for an alleged theft and was thereafter given the opportunity to meet with management to defend himself. Before the meeting, the employee requested union representation and the union requested the right to be present. The Board found that the employer's denial of the employee's request violated section 7. The Board noted that the meeting was "not simply part of an investigation" and that the employee's attendance was not solely to provide the company with information. Rather, the Board viewed the meeting as one held in order for the company to conclude its case against the employee and provide a record to support disciplinary action. Given the nature of the meeting, the Board stated:

Thus it is clear that on November 17 the Company sought to deal directly with [the employee] concerning matters affecting his terms and conditions of employment. Yet, as noted, the employees in the unit had selected the Union to deal with the [company] on such matters and there is no evidence that either [the employee]—assuming he could have done so—or the Union had waived to any extent the right of representation or had agreed to channelize disputes concerning such right into the procedures of the contract grievance provisions. Consequently, . . . the [company's] refusal to respect [the employee's] request that the bargaining representative be permitted to represent him at the meeting interfered with and restrained him in the exercise of his rights guaranteed by Section 7 of the Act.

The Board's reasoning was similar to that utilized in Ross Gear.

21. Id.
22. 168 N.L.R.B. 361 (1967), enforcement denied, 408 F.2d 142 (5th Cir. 1969).
23. Id. at 362-63.
24. Id. at 362.
25. Id.
26. Id.
27. Id.
Once the Board had determined that discipline was a matter affecting an employee's terms and conditions of employment, it followed that a represented employee had a right not to be compelled to deal with his employer alone, meaning that the employee had a right to be represented by the exclusive bargaining agent. This reasoning affected the development of the law in two significant ways. First, given that discipline was a term and condition of employment, it followed that not only did the employee have a right to be represented by the union, but that the employer had an affirmative obligation under section 8(a)(5) to meet with the union. In *Texaco*, the Board found that, in light of the employee's request for representation and the union's willingness to represent him, the employer's refusal to deal with the union violated section 8(a)(5). Second, the Board was compelled to restrict the employee's right to representation and the union's right to represent the employee to interviews involving terms or conditions of employment. The Board, therefore, distinguished between interviews conducted solely for the purpose of gathering information and those which did not yet involve discipline from interviews in which a decision to discipline the employee had already been made.

In a number of post-*Texaco* cases, the Board adhered to the view that the right to representation attached only to disciplinary interviews and stemmed both from the employee's rights under section 7 and the union's rights under section 8(a)(5). For example, in

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28. *Id.* The reasoning employed by the Board should not be read as differentiating the section 7 rights of represented employees from those granted unrepresented employees. The Board in *Texaco* was faced with having to apply section 7 to a request for union representation. The Board found that the refusal to respect the request for representation was a restraint on rights guaranteed by section 7. *Id.* The Board was not faced with, nor did it decide, whether a request for representation by an unrepresented employee likewise fell within the protective ambit of section 7.

29. 29 U.S.C. § 158(a)(5) (1976). Section 8(a)(5) provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . ." *Id.*

30. 168 N.L.R.B. at 362.

31. The Court of Appeals for the Fifth Circuit denied enforcement of the Board's order in *Texaco*. *Texaco* Inc., Houston Producing Div. v. NLRB, 408 F.2d 142 (5th Cir. 1969). However, it did so solely because it viewed the interview as investigatory rather than disciplinary. *Id.* at 145. Further, the Court characterized the section 7 right involved as the right of employees "to bargain collectively through their chosen representatives." *Id.* at 144. Thus, the Fifth Circuit adopted the Board's investigatory/disciplinary distinction as well as its view that section 7 provides an employee a right to representation by his union in matters regarding terms and condition of his employment.

Chevron Oil Co., the Board adopted a trial examiner's decision finding that an employer violated neither section 8(a)(1) nor section 8(a)(5) by denying an employee's request for representation at a mere factfinding interview. Similarly, in Dayton Typographical Service, Inc., the Board adopted a trial examiner's dismissal of an alleged section 8(a)(1) violation that was based on the denial of a request for union representation at a purely investigatory interview. Relying on both Texaco and Chevron Oil, the trial examiner concluded that

only where an employee as is called in discussion with management on a problem involving his performance, which has gone beyond the fact finding or investigatory state to a point where management has decided that discipline of that specific employee is appropriate, that the Employer is required on demand of either the employee or his bargaining agent to permit that agent to be present.

The next significant development in the evolution of the right to representation occurred in Quality Manufacturing Co. There a majority of the Board found that section 7 guaranteed a right to representation on a basis distinct from that found to exist in Texaco, one which rendered irrelevant any distinction between investigatory and disciplinary interviews. The employee in Quality Manufacturing...
was suspended and then discharged for refusing to attend an investigatory interview without union representation.  

Further, one union steward was suspended and another was suspended and discharged for insisting upon representing the employee.  

Despite the fact that the interview was investigatory in nature, the Board found that the employee's discharge violated section 8(a)(1). In doing so, the Board first distinguished *Texaco* and the cases based thereon as involving only the issue of whether an employer's denial of a request for representation violated its duty to bargain with the union under section 8(a)(5). The Board noted that none of those cases involved a "situation where an employee or his representative had been disciplined or discharged for requesting, or insisting on, union representation in the course of an interview." Further, according to the majority, those cases had not directly considered the section 7 right of individual employees to act in concert "for mutual aid or protection."  

What led the Board to characterize *Texaco* and its progeny as limited solely to the union's right to represent the employee under section 8(a)(5) was the Board's adoption of a new view of the employee's request in terms of the guarantees of section 7. In *Texaco*, the employee's request was seen as the exercise of the right to be represented by one's union in matters affecting terms and conditions of employment. Such right stemmed from the section 7 guarantee that employees had the right to bargain with their employer through representatives of their own choosing. In *Quality Manufacturing*, however, the Board viewed the employee's insistence upon representation not as a refusal to deal individually with the employer over a bargainable matter but rather as concerted activity for mutual aid or protection. This new view rendered meaningless any distinction between investigatory and disciplinary interviews insofar as the employee's section 7 rights were concerned. Since through the request the employee sought protection or aid against employer action, it was no longer necessary that the interview involve an actual term or condition of employment; a potential that the employee's continued

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40. 195 N.L.R.B. at 197-98.  
41. *Id.*  
42. *Id.* at 199.  
43. *Id.* at 198.  
44. *Id.*  
45. *Id.*  
46. 168 N.L.R.B. at 362.  
47. *Id.*  
employment or working condition would be adversely affected as a result of the interview was sufficient. The Board thus stated:

After reflection, we have concluded that it is a serious violation of an employee's individual right to be represented by his union if he can only request or insist on such representation under penalty of disciplinary action. And while the employer's denial of such request may not derogate the bargaining rights of the union, in violation of Section 8(a)(5), in the case of a purely investigatory interview, this is not to say either: (a) that the employer may discipline the employee for demanding representation; or (b) that the employer may insist, by threatening to discipline the employee's representative, that the interview be held without his presence. 50

Having found that an employee engages in concerted activity for mutual aid or protection by requesting or insisting upon union representation at an investigatory interview, 51 the Board, in Quality Manufacturing, proceeded to balance this right against the employer's legitimate interests and prerogatives in investigating misconduct. The Board held that the right applied only to interviews in which the employee had a reasonable ground to believe that the interview would adversely affect his working conditions. 52 In further recognition of the employer's interest, the Board noted that the employer, when faced with a request for representation, was under no obligation to conduct the interview. 53 Rather, the employer could inform the employee that no interview would be conducted unless the employee was willing to attend unrepresented. 54 The employer could thus "reject a collective course in situations such as investiga-

49. Later, the Board applied the "mutual aid or protection" analysis to requests for representation at disciplinary interviews. Certified Grocers, 227 N.L.R.B. 1211 (1977), enforcement denied, 587 F.2d 449 (9th Cir. 1978); see infra text accompanying notes 117-34.

50. 195 N.L.R.B. at 198. The Board in Quality Mfg. also found that the discipline of the union stewards violated section 8(a)(1) as the discipline stemmed from the stewards' attempts to perform their duties as union officials by representing the employee. Id. at 199.


52. 195 N.L.R.B. at 198-99. The Board stated that "reasonable ground" would be determined by objective standards under all the circumstances in the case. Id. at 198 n.3. It also stated that the right would not apply to run-of-the-mill shop floor conversations such as the giving of instructions, counselling, or correction of work technique, where no reasonable ground existed for the employee to believe that discipline would result. Id. at 199.

53. Id.

54. See id.
tory interviews where a collective course is not required" while the employee was still guaranteed his right to protection by his chosen representatives. The Board noted that, with participation in the interview being voluntary, the employee risked losing whatever benefit might result from the interview and that the employer was free to act upon whatever information it had absent the interview.

In Quality Manufacturing, the employee had been disciplined because she exercised a section 7 right—the insistence upon representation by her union. In Mobil Oil Corp., the Board extended its holding in Quality Manufacturing, finding that the section 7 right to engage in concerted activity for mutual aid or protection also barred an employer from conducting an investigatory interview after denying the employee’s request. In Mobil Oil, the employees involved had a reasonable fear of discipline but did not refuse to attend the investigatory interviews. Rather, at the employer’s insistence, each employee attended the interview after his individual request for representation was denied. The Board noted, as it had in Quality Manufacturing, that the employer had the right to offer each employee the option of attending the interview without representation or foregoing the benefit of any interview. But to compel the employee to attend the interview unassisted constituted, according to the Board, “unwarranted interference” with the employee’s section 7 right to “insist on concerted protection, rather than individual self-protection, against possible adverse employer action.”

The Board’s view that section 7 provided a right to union representation at investigatory interviews which an employee reasonably feared would result in discipline was met with disagreement when the Courts of Appeals for the Fourth and Seventh Circuits denied enforcement in NLRB v. Quality Manufacturing Co., and Mobil Oil

55. Id. at 198.
56. Id. at 199.
57. 196 N.L.R.B. 1052 (1972), enforcement denied, 482 F.2d 842 (7th Cir. 1973). The same panel that constituted the majority on Quality Mfg., Former Chairman Miller, Member Fanning and Member Jenkins, decided the Mobil Oil case. Former Member Kennedy, as he had in Quality Mfg., dissented.
58. Id.
59. Id. The Board took the opportunity to emphasize that, while the employee had an individual right under section 7 to union representation at an investigatory interview, the union had no particular right to represent the employee other than that which it could obtain through collective bargaining. Id. The Board thus continued to distinguish between investigatory and disciplinary interviews insofar as the union’s rights under section 8(a)(5) were concerned.
60. 481 F.2d 1018 (4th Cir. 1973), rev’d, 420 U.S. 276 (1975).
Corp. v. NLRB, respectively, on this issue. In Quality Manufacturing, the Fourth Circuit found that the Board's construction of section 7 was contrary to the Texaco line of cases, holding that no right to representation existed at investigatory interviews.

The Seventh Circuit, in Mobil Oil, correctly noted that the Board's decision had not been based on the section 7 right of employees to bargain collectively through representatives of their own choosing, as had been the case in Texaco. Nevertheless, it found that the section 7 right to act in concert for mutual aid or protection was not so broad as to encompass a right to union representation at investigatory interviews where the employee reasonably feared discipline.

In Weingarten, the Supreme Court resolved the issue, holding that the Board's construction of section 7, though not required was at least, permissible under the Act. In its decision, the Court first set out the section 7 right to representation as it had been developed by the Board in Quality Manufacturing and Mobil Oil. First, the right only arises in situations where the employee requests representation and has a reasonable belief that the investigation will result in disci-

61. 482 F.2d 842 (7th Cir. 1973).
62. 481 F.2d at 1024-25. The court criticized the Board for failing to cite any legislative history or present “persuasive analysis of the statutory provisions” in support of its holding. Id. at 1025. In regard to the Board's previous decisions, the court stated:

[T]he Board has no power to alter or rearrange employer-employee relations to suit its every whim. Rather, the Board can only determine whether the Act has been violated. And it would appear that in the entire history of the law... the management prerogative of conducting an investigatory interview such as Quality attempted here has not been considered a violation of the Act.

63. 482 F.2d at 847-48. The court found that the Board's construction of section 7 was based solely on the literal wording thereof rather than on underlying statutory policy. Finding that the basic thrust of section 7 is to enable employees to organize and apply economic pressure against their employers, the court stated:

In our opinion, economic pressure may properly be applied to compel employers to follow acceptable investigatory procedures, or to determine the consequences of various kinds of misconduct, but economic pressure should not be a component of the fact-finding process itself. The requested Union representation at an investigatory interview is clearly not the kind of “concerted activity” with which § 7 is primarily concerned.

64. 420 U.S. at 266-67. The Board had found, relying on Mobil Oil, that the employer violated section 8(a)(1) by conducting an investigatory interview after denying the employee's request for union representation. J. Weingarten, Inc., 202 N.L.R.B. 446, 449, enforcement denied, 485 F.2d 1135 (5th Cir. 1973) (holding that the interview was a premature stage at which to invoke a requirement of union representation where the purpose of the interview did not involve the imposition of disciplinary proceedings), rev'd, 420 U.S. 251 (1975).
pline. Second, the exercise of the employee's right may not interfere with legitimate employer prerogatives, meaning that the employer was under no obligation to conduct the interview. Since the union derived no rights from the employee's exercise of his individual section 7 right, the employer did not have to bargain with the union representative during any interview.

Having set forth the contours and limits of the right, the Court proceeded to explicate its basis. It found that an employee's request for union representation during an investigatory interview fell within the literal wording of the section 7 phrase "concerted activities . . . for mutual aid or protection," despite the fact that only the individual employee had an immediate stake in the outcome of the investigation. The Court, instead, viewed the request as concerted activity because the union representative would safeguard the interests of all unit employees against unjust disciplinary procedures and his presence would assure all employees that they could also have his assistance if called to an investigatory interview. The Court also noted that the Board's construction of section 7 effectuated the most fundamental policy of the Act: the elimination of the imbalance of power between employers and employees. By requesting union representation, the employee was in effect seeking the aid and protection of his fellow employees against adverse employer action. The Board's holding that section 7 accorded employees the right to such representation was, according to the Court, "within the protective ambit of that section 'read in light of the mischief to be corrected and the end to be attained.'"

III. POST _WEINGARTEN_ DEVELOPMENTS

The Supreme Court's decision in _Weingarten_ left open a number of important subsidiary questions regarding the section 7 right to representation: While the right attaches to interviews in which the reasonable fear of discipline obtains, what sort of exchange or confrontation between an employer and an employee, in terms of both extent and purpose, constitutes such an interview? Since an employee must request representation, what constitutes a sufficient request? Given that exercise of the _Weingarten_ right need

65. 420 U.S. at 257.
66. _Id._ at 258-59.
67. _Id._ at 260.
68. _Id._ at 260-61.
69. _Id._ at 262.
70. _Id._ at 262 (quoting NLRB v. Hearst Publications, 322 U.S. 111, 124 (1944)).
not transform the interview into an adversary contest, what is the proper role of the representative and to what extent can the employer place limitations on that role? What is the proper remedy for a violation of the *Weingarten* right?

In a number of post-*Weingarten* decisions, the Board has addressed these and other questions, continually defining the "contours and limits" of the section 7 right to engage in concerted activity for mutual aid or protection as it relates to employer-employee exchanges which present the potential for discipline.

A. The "Interview"

1. The Requirement of an "Exchange"

The section 7 right affirmed in *Weingarten* requires some sort of exchange between employer and employee that may affect the employee's terms and conditions of employment. Thus, the Board has recognized the fact that not all meetings between an employer and employees involving discipline or the potential thereof rise to the level of an "interview" for purposes of the *Weingarten* right. For example, the Board has held that an employer can summarily warn, discipline, or pink slip an employee without having to provide a representative.\(^7\) Such action merely represents the ministerial act of imposing discipline without any exchange or discussion during which the assistance of a representative could be sought or rendered. Further, the *Weingarten* right as affirmed by the Supreme Court is expressly limited by the employer's prerogative to forego the interview and impose discipline on the basis of whatever information it has before it, rather than comply with a request for representation. This limitation had been imposed in *United States Gypsum*,\(^7\) a pre-*Weingarten* decision. There, the Board adopted a trial examiner's decision finding that an employer had lawfully denied an employee's request for a union representative when the employee was admonished in a supervisor's office regarding an exchange with his foreman. The trial examiner noted that the employee was asked no questions, that no suggestion was made, "either expressly or by implication," that he admit or deny any accusation, or give assurance that the alleged offense would not be repeated.\(^7\) The limitation has also been followed in post-*Weingarten* decisions. Thus, in *Amoco Oil* Co., 238 N.L.R.B. 551, 552 (1978).

73. *Id.* at 308.
the Board held that an employer did not unlawfully deny an employee's request where the employer "confined himself to a single sentence informing [the employee] of his suspension" and made "no attempt to question him, engage in any manner of dialogue, or participate in any other interchange which could be characterized as an interview." These decisions merely represent the fact that a prerequisite to the attachment of any right is the opportunity for its exercise.

The Board has also limited the application of the *Weingarten* right to meetings between an employer and employee which, by their nature, allow for an "exchange." In *United States Postal Service*, the Board found that the right to representation did not attach to a "fitness for duty" medical examination. The Board found that the "hands on" examination involved therein did not "meet with . . . the tests set forth in the *Weingarten* line of cases, or the rationale underlying these tests which envision a confrontation between the employer and employee." The Board also noted that, given the nature of a physical examination, the employer did not have the option of proceeding on its own and independently acquiring the information it needed. Significantly, however, the Board refused to pass on whether the *Weingarten* right attached to any "interview" portion of a medical examination which could result in action adverse to an employee's interests or affect his terms and conditions of employment.

The requirement that the confrontation between the employer and employee include an exchange, as opposed to the physical examination of a person or documents without any attendant questioning or discussion, is consistent with the statutory policies underlying the *Weingarten* right. For unlike a questioning or other exchange, where explanations and mitigating factors can be proffered, where arguments can be made and minds changed, and where an employee's position can be defended, a physical examination does not

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75. 238 N.L.R.B. at 552. *But cf.* Alfred M. Lewis, Inc., 229 N.L.R.B. 757 (1977) (employee has right to union representation at counseling sessions with employer in which employee's work performance is discussed), *enforcement denied in part*, 587 F.2d 403 (9th Cir. 1978).
76. 252 N.L.R.B. 61 (1980).
77. *Id.* at 64-65.
78. *Id.* at 61.
79. *Id.* In this regard, however, see Prudential Ins. Co. of America, 251 N.L.R.B. 1591 (1980), *enforcement denied*, 661 F.2d 398 (5th Cir. 1981).
80. 252 N.L.R.B. at 61.
present a perceived threat which is capable of being countered by concerted action.

2. The Nature and Purpose of the “Interview”

Determination of the type of discussion or interchange that should give rise to the section 7 right to representation is more complex than determination of whether an interview has taken place at all. Clearly, the interview must present some potential for action adverse to the employee’s job interests. It can be argued, however, that every time a supervisor talks with an employee there exists a potential for discipline, whether as a function of the subject matter of the discussion, meaning past or present misconduct or performance, or merely as a result of what transpires during the discussion. Therefore, a distinction must be made between those employer-employee meetings which present a real, discernible potential for disciplinary action and those in which the potential is, at best, remote. The exercise of the Weingarten right has thus been limited to those employer-employee meetings in which the employee has a reasonable fear of discipline. Generally, whether a reasonable fear of discipline attaches to any interview or discussion is determined by the circumstances of each case,81 however, certain types of discussions, by their very nature, have been found not to give rise to a reasonable fear.

In Quality Manufacturing, the Board excepted from the section 7 right to representation the “run-of-the-mill shop floor conversations as, for example, the giving of instruction or training or needed corrections of work techniques.”82 While such conversations could conceivably result in discipline sometime in the future, they are more a part of the act of supervision than something that could reasonably be perceived as the employer’s investigatory or disciplinary process. As such, the need of an employer to engage in day-to-day supervision of employees clearly outweighs the employee’s need for assistance with regard to such conversations. One can only imagine the havoc that would occur in the workplace if an employer were required to accede to a request for representation each time a supervisor attempted to instruct or criticize an employee in the normal course of his duties.

The Board has also excepted from the application of the Weingarten right other types of employer-employee meetings or exchanges which, like the “run-of-the-mill shop floor discussion,” are

81. Id. at 63.
82. 195 N.L.R.B. at 199.
not "calculated to form the basis for taking disciplinary or other job-affecting actions against [employees] for past misconduct." In *Yellow Freight Systems, Inc.*, the Board adopted an administrative law judge's finding that *Weingarten* did not apply to a confrontation between an employee and his superiors over a job assignment, a confrontation that resulted in the employee's termination. In *Yellow Freight*, the employee, a truck driver, refused to take an assigned run because he believed that to do so would violate federal regulations. During a twenty-minute discussion over whether federal regulations did, in fact, permit his acceptance of the run, the employee allegedly requested and allegedly was denied, the assistance and presence of his union representative. The administrative law judge found that assuming, *arguendo*, the employee had requested representation, the discussion did not fall within the purview of *Weingarten* since it was neither an investigatory nor disciplinary interview. The administrative law judge also noted that the employee had sought the assistance of his representative not as a means of guarding against possible discipline, but only to assist him in clarifying his job duties.

Recently, a Board majority held that *Weingarten* rights did not attach to a meeting called to read plant rules to employees. In *Northwest Engineering Co.*, the employer, in response to what it perceived as a work slowdown, called a meeting of crew members. At that meeting the employer distributed and read aloud its plant rules, pointed out what it considered to be rules violations, and referred to certain employees as rules violators. In reversing the administra-

83. 252 N.L.R.B. at 61.
84. 247 N.L.R.B. 177 (1980).
85. Id. at 179.
86. Id.
87. Id. at 182.
88. Id. That section 7 rights may therefore have attached to the confrontation in a context other than that contemplated by *Weingarten* was not placed before, or decided by, the Board. For example, it could be argued that the section 7 right to engage in concerted activities for mutual aid or protection encompassed the right of the employee to the assistance of his union agent for the purpose of pressing his claim to management during the disagreement over the proper interpretation of the collective bargaining agreement. Cf. NLRB v. Interboro Contractors, 388 F.2d 495 (2d Cir. 1967) (concerted activity may include filing complaints for solely personal reasons). Such “representation” however, would not, as in *Weingarten*, be sought for the purpose of seeking protection against a perceived threat to the employee's job interests.
89. 265 N.L.R.B. No. 26, 1982-83 NLRB Dec. (CCH) ¶ 15,311, at 26,013 (Oct. 22, 1982). Chairman Van de Water, Member Fanning and Member Zimmerman composed the majority. Members Jenkins and Hunter dissented.
tive law judge’s finding that the employer unlawfully denied an employee’s request that a union representative be allowed to attend the meeting, the majority found that the meeting was informational only and that no discipline was either contemplated or meted out in regard to the work slowdown.91 Emphasizing that the exercise of the Weingarten right should not interfere with legitimate employer prerogatives, the Board stated:

*Weingarten* rights do not arise simply because an employer calls a meeting of its employees to discuss a perceived problem in the way its employees are carrying out their duties. Work performance is a matter of legitimate concern to an employer. An employer surely retains the prerogative of calling a meeting of a group of employees, at which no disciplinary action is contemplated or taken, simply to advise them of the employer’s valid work performance expectations and to inform them of the possible consequences of noncompliance, without invoking the spectre of *Weingarten*.92

Nor was the character of the meeting changed, according to the majority, by the fact that the employees were put on notice that future violations of its rules could lead to discipline.93 The *Weingarten* rights, it admonished, “is not concerned with employees having reason to believe that discipline will be imposed for future offenses; it relates to past conduct for which employees fear the imposition of current sanctions.”94

The Board requires that an employer-employee meeting be reasonably seen as forming the basis for taking disciplinary action over past misconduct before the meeting will be held to give rise to a reasonable fear of discipline. The Board’s position represents a balance between the employee’s need for protection against the employer and the employer’s right to engage in the day-to-day management of its business by direction and supervision of its employees. The *Weingarten* right, despite its importance, should come into play only when the prospect of discipline is realistic, as evidenced by an exchange concerning the imposition of discipline or subject matter for which discipline might be imposed. This limitation, however, does not mean that the *Weingarten* right applies only to meetings or exchanges that are part of an employer’s formal disciplinary or investi-

91. *Id.*, 1982-83 NLRB Dec. at 26,014.
92. *Id.* (footnote omitted).
93. *Id.*
gatory process. Once circumstances giving rise to a reasonable fear of discipline are present, it matters not where or when the exchange takes place or the manner in which it is conducted.\textsuperscript{95} Nor should the limitation that an employer-employee meeting must be calculated or intended to form the basis for a possible disciplinary decision be read to require that such purpose must exist prior to the meeting. Confrontations or meetings may, during their course, change focus and the right of an employee to protect his job interests through concerted activity for mutual aid or protection should not depend on whether a meeting, which in fact presents a reasonable fear of discipline, was not originally intended or calculated to do so.

The requirement that the employer-employee exchange present circumstances giving rise to a reasonable fear of discipline is an important aspect of the \textit{Weingarten} right. Whether a reasonable fear of discipline exists in regard to any employer-employee meeting is determined by “objective standards under all the circumstances of the case”\textsuperscript{96} and not by the employee’s subjective state of mind. It is important to note, however, that “all the circumstances” are not limited to those existing before or at the outset of the meeting. Rather, they include the meeting itself which, depending on its nature, extent, or purpose, may render irrelevant concerns that would otherwise be a reasonable fear of discipline on the part of the employee. \textit{Northwest Engineering} serves as an illustration of this point. There, the employee requesting the presence of the union agent at the outset of the meeting did so under circumstances which, it could be argued, supported a reasonable fear of discipline on the part of the employee. However, given the fact that the employer, having denied the request for representation, did not engage in any conduct which, in fact, concerned discipline over past misconduct, the employee’s original fears, reasonable or not, were viewed by the majority as irrelevant.\textsuperscript{97} In answering the assertion made by dissenting Members Jenkins and Hunter, that the employer was not privileged to deny the request for representation made by an employee who had a reasonable fear of discipline in regard to the upcoming meeting,\textsuperscript{98} the majority stated:

\begin{itemize}
\item \textsuperscript{95} See, e.g., AAA Equip. Serv. Co., 238 N.L.R.B. 390 (1978), enforcement denied, 598 F.2d 1142 (8th Cir. 1979). The Board has found, however, that “location of an interview is one of the contributing factors in determining whether, under all of the circumstances of a particular case, an employee reasonably believed that an interview might result in his discipline.” General Elec. Co., 240 N.L.R.B. 479, 481 n.12 (1979).
\item \textsuperscript{96} NLRB v. J. Weingarten, Inc., 420 U.S. at 257 n.5; Quality Mfg. Co., 195 N.L.R.B. at 198 n.3.
\item \textsuperscript{97} 265 N.L.R.B. No. 26, 1982-83 NLRB Dec. at 26,015.
\item \textsuperscript{98} \textit{Id.}, 1982-83 NLRB Dec. at 26,017.
\end{itemize}
The dissent errs in focusing exclusively on [the employees'] fear without taking into account the context of the meeting and its stated purpose. An employee's fear of discipline cannot by itself convert a meeting into a disciplinary or investigatory exercise. If the meeting is not intended to be and in fact is not concerned with discipline or an investigation into employee conduct, and the employee is made aware of this either before or at the meeting, the employee's fear to the contrary is immaterial.99

The above is nothing more than a recognition of the fact that it is the employer who controls the purpose, course, and extent of any meeting and, therefore, it is the employer's actions that will determine both whether an interview has taken place and whether Wein­
garten rights attach to the interview. The corollary to this point is that an employer denying a request for representation with regard to any confrontation, in which an employee reasonably fears discipline, acts at its peril if it fails to avoid a discussion to which section 7 rights would attach.

The situation in which the actual conduct or purpose of a meeting renders irrelevant a reasonable fear on the part of the employee should, however, be contrasted with the situation in which the employee acts on the basis of a reasonable fear and refuses to participate absent the granting of his request.100 In the former situation, it cannot be determined whether the employee's section 7 right has been restrained or coerced until the confrontation is over and its purpose and extent is analyzed in terms of section 7 guarantees. In the latter situation, whether the confrontation or meeting presents a reasonable fear of discipline must be determined by the circumstances at the time of refusal and if such reasonable fear exists, the intended purpose of the meeting or the course the meeting would have taken is irrelevant. This follows from the fact that the employee who refuses to participate on the basis of a reasonable fear of discipline is seeking mutual aid or protection against a perceived threat and his section 7 right to do so does not, ultimately, depend on the correctness of his perception. Rather, since the employer controls the purpose and the extent of the exchange, the burden shifts to the employer should he choose to proceed, to assure the employee that his fear however reasonable is unjustified and that no discipline will result.101

99. Id., 1982-83 NLRB Dec. at 26,017 n.4.
101. The Board has found such assurances significant in determining whether certain meetings required that requests for representation be granted. See Lennox Indus.,
The Board has also interpreted the *Weingarten* right as it applies to meetings or interviews which, while concerning employment or discipline, occur after the employment relationship has been severed. In such meetings, the issue arises as to whether an ex-employee may invoke *Weingarten* rights. In *Polson Industries*, the Board adopted an administrative law judge’s finding that no section 7 rights to representation applied to a meeting held to discuss an employee’s voluntary termination. The administrative law judge found that the meeting had overtones of an investigatory interview in that the management officials present could have altered the ex-employee’s status by reinstating him. However, given the fact that the employee himself had terminated the employment relationship, the administrative law judge reasoned:

To hold *Weingarten* applicable in the situation would expand the rule to the point of making it applicable not only to employees who reasonably expect to be disciplined as a result of the interview but also to applicants for employment who also can expect their employment status to be affected by the outcome of the interview.

As the employee in *Polson* had voluntarily severed the employment relationship, the meeting therein concerned discipline only in the sense that a decision not to rehire an ex-employee could be so construed. The administrative law judge therefore correctly found that the employee was nothing more than an applicant who had no statutory right to compel the presence of a representative at the meeting. Discharged employees, it could be argued, should be viewed differently by virtue of the fact that the meeting would necessarily concern reconsideration of the employer’s decision to terminate the employment relationship: discipline in the sense contemplated by *Weingarten*. However, *Weingarten* involves an employer’s prevention of the exercise of concerted activity for mutual aid protection. Although the right to engage in such activity is granted to employees in general, its exercise in the *Weingarten* context is only relevant as to active employees of the employer. Applicants and ex-employees are employees under section 2(3) of the Act in

103. *Id*.  
104. *Id.* at 1212.  
105. *Id*.  
106. *Id*.  
107. Applicants and ex-employees are employees under section 2(3) of the Act in
the lack of active employee status that precludes any distinction between employees who have been discharged, employees who have quit, and applicants in regard to their ability to compel the employer, as a function of section 7, to allow for the exercise of concerted activity on his property. Thus, in Party Cookies,\textsuperscript{108} the Board adopted an administrative law judge's decision holding that a discharged employee had no section 7 right to representation at a meeting held subsequent to his discharge.\textsuperscript{109}

That \textit{Weingarten} rights do not attach to meetings held subsequent to but concerning an employee's discharge is supported by the fact that a discharged employee cannot, in any reading of \textit{Weingarten}, be compelled to attend a post-discharge meeting. Although the discharged employee may feel obligated to attend a post-discharge meeting for fear that the discipline will not receive favorable reconsideration, he does not act out of a fear that his current status will be adversely affected. Unlike the active employee, a discharged employee cannot fear that his refusal to abide by his employer's wishes may result in his losing that which he has already lost; only that he may not regain that which he has already lost.\textsuperscript{110}

3. The Investigatory-Disciplinary Distinction

In its \textit{Weingarten} opinion, the Supreme Court recognized that, under the \textit{Texaco} line of cases, the Board had found a statutory right to union representation during disciplinary interviews.\textsuperscript{111} As previously discussed,\textsuperscript{112} that right ran to the employee under the section 7 guarantee that employees have the right to bargain through representatives of their own choosing and to the union, under the em-
ployer's section 8(a)(5) obligation to bargain in good faith. As also discussed,\textsuperscript{113} the rationale of \textit{Texaco} required differentiation between those interviews involving discipline and, therefore, a bargaining obligation, and those possibly leading to, but not yet involving discipline-investigatory interviews. Unfortunately, few interviews between employers and employees lend themselves readily to classification as purely investigatory or disciplinary.\textsuperscript{114} In many interviews that could otherwise be termed investigatory, discipline is not postponed until a later date but is imposed after questioning is completed and the employer is satisfied that the employee is guilty of misconduct or poor performance. In other interviews, discipline has tentatively been decided upon and the employee is called to explain his actions or to present mitigating factors. In still others, the disciplinary decision that has been made is, to an extent, irrevocable and the employee is summoned only to be given and/or discuss the reasons therefore. The problem of classifying interviews as either investigatory or disciplinary is also compounded by the fact that an interview that could be classified as disciplinary only does not necessarily constitute the end of the disciplinary process. Rather, in many cases the disciplinary interview is only the beginning of a grievance process, the end result of which could be affected by what transpires during the alleged disciplinary or exit interview.

In each of the above cases, an employee's request for assistance or representation represents the seeking of aid or protection against possible or actual adverse action by his employer. Thus, given the \textit{Weingarten} holding that the section 7 right to engage in concerted activity for mutual aid or protection applies to an investigatory interview, one which holds out only the possibility of discipline, it follows that the same right adheres to an interview during which discipline is actually imposed.

In \textit{Mount Vernon Tanker Co.},\textsuperscript{115} the Board so found, holding that a seaman had a section 7 right to refuse to attend a logging session absent his requested representative.\textsuperscript{116} Likewise, in \textit{Certified Grocers of California},\textsuperscript{117} a Board panel held that the section 7 right

\begin{itemize}
\item \textsuperscript{113} \textit{Id.}
\item \textsuperscript{114} Although in denying enforcement of \textit{Texaco}, the Fifth Circuit disagreed with the Board and found the interview at issue to be investigatory, not disciplinary. \textit{Texaco Inc., Houston Producing Div. v. NLRB}, 408 F.2d 142, 145 (5th Cir. 1969).
\item \textsuperscript{115} 218 N.L.R.B. 1423 (1975), \textit{enforcement denied}, 549 F.2d 571 (9th Cir. 1977).
\item \textsuperscript{116} \textit{Id.}
\item \textsuperscript{117} 227 N.L.R.B. 1211 (1977), \textit{enforcement denied}, 587 F.2d 449 (9th Cir. 1978); \textit{accord} \textit{Alfred M. Lewis Inc., 229 N.L.R.B. 757 (1977), \textit{enforcement denied in part}, 587 F.2d 403 (9th Cir. 1978).
to engage in concerted activities for mutual aid or protection encompasses a right to representation at an interview held to inform an employee of a previously determined disciplinary decision.\textsuperscript{118} There, the employer had reached a decision to discipline an employee for poor performance. During an interview with the plant manager, who had no authority to alter the discipline, the employee's two requests for union representation were denied. The plant manager told the employee that his record had been reviewed and that his performance had not improved. After denying the employee's request to see his records, the plant manager gave the employee a disciplinary layoff notice. The meeting ended with the employee asking what was expected of him and with the manager responding that the employee should "do [his] job."\textsuperscript{119} The panel majority\textsuperscript{120} rejected the employer's argument that, under the Supreme Court's decision in \textit{Weingarten}, a questioning or attempt to obtain evidence from the employee must take place for an interview to come within the protective ambit of section 7.\textsuperscript{121} The majority noted that the Supreme Court in \textit{Weingarten} had not expressly limited its holding to investigatory interviews and had, in fact, affirmed the Board's interpretation of the right to representation which, as developed, had never been so limited.\textsuperscript{122} The majority also rejected the contention made by dissenting Member Walther that no need existed for a representative in a situation in which the interview was not held "for the purpose of eliciting facts or permitting the employee to explain and/or defend conduct. . . ."\textsuperscript{123} Rather, the majority noted that the employer had engaged in "some discussion" of the employee's work and, therefore, had presented an opportunity for the exercise of the employee's right to seek and have assistance.\textsuperscript{124} Further, the majority noted that the principles enunciated by the Supreme Court in \textit{Weingarten} were equally applicable to the interview involved in the case:

\begin{quote}
The presence of [the employee's] union stewart might have resulted in his apprising [the employee] of his rights, and how much support he could expect from his representative. Also, the union
\end{quote}

\begin{footnotes}
\textsuperscript{118} 227 N.L.R.B. at 1213.
\textsuperscript{119} \textit{Id.} at 1211-12.
\textsuperscript{120} The majority was composed of Member Fanning and former Member Penello. Former Member Walther dissented.
\textsuperscript{121} 227 N.L.R.B. at 1212.
\textsuperscript{122} \textit{Id.} at 1214.
\textsuperscript{123} \textit{Id.} at 1216.
\textsuperscript{124} \textit{Id.} at 1214.
\end{footnotes}
representative might have elicited information that would be necessary for the protection of the interests of the other employees in the unit, a concern expressed in the *Weingarten* decision.\(^{125}\)

Thus, the majority applied to disciplinary interviews, where the right to representation had originated as a function of the bargaining obligation, the mutual aid or protection theory it had used in *Quality Manufacturing* and *Mobil Oil*, to extend a right to representation to investigatory interviews.\(^{126}\)

The Board's holding that the section 7 right to representation affirmed by the Supreme Court in *Weingarten* and *Quality Manufacturing* applied to any interview to which the reasonable fear of discipline attaches and not merely those containing an element of investigation, met with disagreement in courts of appeals,\(^{127}\) particularly the Ninth Circuit, which denied enforcement of *Mount Vernon Tanker Co. v. NLRB*,\(^{128}\) *Alfred M. Lewis, Inc. v. NLRB*,\(^{129}\) and *NLRB v. Certified Grocers*\(^{130}\) on the issue. In *Alfred M. Lewis*, the court held that the right to representation arose only when a "significant purpose of the interview is to obtain facts to support disciplinary action that is probable or is being seriously considered"\(^{131}\) and that, absent an investigatory element, "the protective role of the union representative envisioned by *Weingarten* is not applicable."\(^{132}\) In denying enforcement of *Certified Grocers*, the court found that the purpose of the meeting was not to elicit facts supporting the employer's disciplinary decision or hear the employee's side of the story with a view toward withholding discipline.\(^{133}\) Rather, noting the Board's finding that the sole purpose of the meeting was to deliver a warning notice, the court held that no discussion or consultation

\(^{125}\) *Id.* at 1215 (footnote omitted).

\(^{126}\) *Id.* at 1212-13. The holding that the right to act in concert for mutual aid or protection applies to all "interviews" in which the employee reasonably fears discipline eliminates not only the distinction between investigatory and disciplinary interviews, but also eliminates any need to analyze the employee's request in terms of the section 7 right of employees to bargain collectively through their chosen representative: the theory used in *Texaco*. The Board has not since used the *Texaco* analysis to find a right to representation at any "disciplinary" interview. The Board, however, has never explicitly rejected the theory.

\(^{127}\) See, e.g., Anchortank, Inc., v. NLRB, 618 F.2d 1153 (5th Cir. 1980); NLRB v. Columbia Univ., 541 F.2d 922 (2d Cir. 1976).

\(^{128}\) 549 F.2d 571 (9th Cir. 1977). The lack of an investigatory element was an alternate ground upon which the court denied enforcement. *Id.* at 574.

\(^{129}\) 587 F.2d 403 (9th Cir. 1978).

\(^{130}\) 587 F.2d 449 (9th Cir. 1978).

\(^{131}\) 587 F.2d at 410.

\(^{132}\) *Id.* at 411.

\(^{133}\) *Id.* at 451.
took place.\textsuperscript{134}

In \textit{Baton Rouge Water Works Co.},\textsuperscript{135} a Board majority retreated from \textit{Certified Grocers} and adopted the Ninth Circuit's view. In that case, the employer decided to fire a probationary employee. The employee was summoned to her supervisor's office who told her that she was "not working out." The employee inquired whether she was being fired and was told by the supervisor that it would be in the best interest of the company if it were her last day of employment. The employee then protested that the discharge was unfair and requested union representation. The request was denied. Subsequently, the office manager and assistant personnel manager entered the office and a discussion with employee ensued over the reasons for her termination and her alleged poor performance.\textsuperscript{136}

In a plurality opinion, a Board majority composed of Member Jenkins, former Member Truesdale, and former Member Murphy, held that \textit{Weingarten} rights did not attach to the interview.\textsuperscript{137} Member Jenkins and former Member Truesdale held that, to the extent that \textit{Certified Grocers} provided a right to representation at an interview in which an employee was merely informed that he was being disciplined, the case had been wrongly decided on its facts and was overruled.\textsuperscript{138} Rather, they found that the \textit{Weingarten} right did not apply to a meeting held "solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision."\textsuperscript{139} They specifically emphasized, however, that they were not resurrecting the distinction between investigatory and disciplinary interviews which was abandoned in \textit{Certified Grocers}:

\begin{quote}
We stress that we are not holding today that there is no right to the presence of a union representative at any "disciplinary" interview. Indeed, if the employer engages in any conduct beyond merely informing the employee of a previously made disciplinary decision, the full panoply of protections accorded the employee under \textit{Weingarten} may be applicable. Thus, for example were the employer to inform the employee of a disciplinary action and then seek facts or evidence in support of that action, or to attempt to have the employee admit his alleged wrongdoing or to sign a
\end{quote}

\textsuperscript{134} \textit{Id.}

\textsuperscript{135} 246 N.L.R.B. 995 (1979).

\textsuperscript{136} \textit{Id.} at 995.

\textsuperscript{137} \textit{Id.} at 998. Former Chairman Fanning and former Member Penello each filed a dissent.

\textsuperscript{138} \textit{Id.} at 997.

\textsuperscript{139} \textit{Id.}
statement to that effect, or to sign statements relating to such matters as workmen's compensation, such conduct would remove the meeting from the narrow holding of the instant case, and the employee's right to union representation would attach. In contrast, the fact that the employer and employee thereafter engaged in a conversation at the employee's behest or instigation concerning the reasons for the previously determined disciplined will not, alone, convert the meeting to an interview at which the Weingarten protections apply.\footnote{140}

The significance of Member Jenkins' and former Member Truesdale's opinion lay in their refusal to find that the discussion regarding the employee's work performance and the reasons for the termination did not, in any way, add to the act of disciplining and thereby create an interview to which Weingarten rights attached. Thus, they viewed the interview in \textit{Baton Rouge Water} to be no different from the type of confrontation involved in both \textit{Gypsum}\footnote{141} and \textit{Amoco Oil}\footnote{142} where the Board found that the employers therein had engaged in nothing more than a ministerial act.\footnote{143} What led Member Jenkins and former Member Truesdale to find no significance in the discussion was not simply the employer's failure to seek facts or evidence in support of the discipline or an admission from the employee, but also that the discussion occurred in the context of previously determined discipline.\footnote{144} Since the employer had reached a "final, binding decision"\footnote{145} to discharge the employee, the subsequent discussion was viewed as being incapable of affecting the outcome and any attempt at concerted activity as being meaningless.\footnote{146} They specifically rejected the contention that the presence of the representative would address any of the concerns expressed in \textit{Weingarten}.

Contrary to the contention of the majority in \textit{Certified Grocers}, such a conversation or discussion between the employer and employee does not require the presence of a union representative to inform the employee of his rights and the support the employee

\begin{itemize}
  \item \footnote{140}{\textit{Id.} (footnote omitted).}
  \item \footnote{141}{See supra text accompanying notes 72-73.}
  \item \footnote{142}{See supra text accompanying notes 74-75.}
  \item \footnote{143}{The same could be argued regarding the Ninth Circuit's denial of enforcement of the Board's decisions in \textit{Mount Vernon}, Alfred M. Lewis, and \textit{Certified Grocers}. The court viewed such cases as representing no more than the act of imposing discipline, notwithstanding any discussion that may have occurred.}
  \item \footnote{144}{246 N.L.R.B. at 997.}
  \item \footnote{145}{\textit{Id.}}
  \item \footnote{146}{\textit{Id.}}
\end{itemize}
might expect from the union, or to elicit information necessary for the protection of the interests of the other employees in the unit. Once a disciplinary decision has been made by the employer, the proper forum for the discussion and evaluation of that disciplinary action shifts to the grievance procedure. Unlike an interview at which no formal action is taken by the employer, the invocation of discipline by the employer automatically subjects that decision to the grievance procedure, during which all the events surrounding the disciplinary action can be examined and evaluated by the union, and a decision made by the union as to the best course of action to be taken in light of the interests of all of the employees in the unit.147

In a separate concurring opinion, former Member Murphy expressed no significant disagreement. Stating her opinion that Weingarten required that the Board maintain a real distinction between investigatory interviews and disciplinary actions,148 she found that the Weingarten right attached to any interview, whether it was called investigatory or disciplinary, in which information is sought from the employee.149 Likewise, she found that a conference called to apprise an employee of adverse action or the reasons therefore did not amount to an investigatory interview, even if an “employee’s protestations result in an extended confrontation with representatives of management and discussion is consequently expanded to include specific examples of employee misfeasance.”150

I dissented from the majority decision in Baton Rouge Water.151 As I viewed the matter, the work performance discussion therein converted an otherwise ministerial act into an interview to which section 7 rights attached; a result of the fact that the discussion presented the opportunity for concerted activity designed to counter the disciplinary action. In this regard, the fact that the employee instigated the discussion should be of no relevance.152 The meeting

147. Id. at 997 n.6.
148. Id. at 998 (Member Murphy, concurring).
149. Id.
150. Id.
151. Id. at 999-1000 (former Chairman Fanning, dissenting). In a separate dissent, former Member Penello outlined the development of the Weingarten right, pointing out that Weingarten represented an extension of the right to representation from “disciplinary” interviews to “investigatory” interviews. Id. at 1000 (former Member Penello, dissenting). Former Member Penello thus argued that the effect of the majority’s decision was to remove from employees a section 7 right that existed before the Weingarten decision and upon which the Weingarten right was based. Id.
152. Nor did the majority actually consider the employee’s instigation of the discussion to be relevant. In Texaco, Inc., 246 N.L.R.B. 1021 (1979), a companion case to
had not been concluded and the employer, who could have cut off the employee's protestations and inquiries, chose not to do so.153

The Baton Rouge Water decision is significant because of the majority's questionable reliance on the facts that the employer had decided to impose discipline before the meeting and that the plant manager who conducted the meeting had no authority to alter the discipline. For although the exchange between the employee and her superiors might not have changed the particular outcome of the meeting, the exchange still may have affected both the employer's decision to adhere subsequently to the announced disciplinary decision and its actions in regard to that decision. As the majority recognized, the disciplinary interview was not the end of the disciplinary process.154 Rather, it was only the beginning of a grievance procedure during which the employer would be called on to adhere to its decision and thus, the discipline imposed at the meeting was not, as the majority characterized it, "final and binding."155 Since the work performance discussion potentially could affect the employer's resolve to adhere to the discipline, the statutory concerns underlying the Weingarten right were no less applicable. Similarly, any assistance rendered to the employee in the discussion would be consistent with the role of representative as envisioned by the Court in Weingarten. Could not the representative have presented extenuating factors or elicited facts favorable to the employee who may have been too fearful or inarticulate to do so herself? Could not the representative have assisted the employee in voicing her contention that her discharge was unfair or in countering the employer's contentions as to her alleged faulty performance and its opinion that she was not

Baton Rouge Water, the majority relied on Baton Rouge Water and found that no section 7 right attached to meetings called to inform employees of previously determined disciplinary decisions and to afford the employees an opportunity to explain or defend themselves. Id. at 1022. The majority found it critical that the opportunity provided the employees could not have changed the result of the meeting and that, by the offer, the employer was not attempting to obtain information in support of any decision. In Texaco, Inc., the Baton Rouge Water majority made it clear that they were requiring the existence of an investigatory element before Weingarten rights attached to any employer-employee confrontation. Id. at 1021.


154. 246 N.L.R.B. at 997 n.6.

155. Id. at 997.
working out? Could not such assistance have caused the employer to reconsider and question its initial decision?

Even in the absence of a formal grievance procedure following discipline, situations arise in which an employer is called upon to reconsider or reaffirm an announced disciplinary action and the reasons therefore. A discussion taking place during the imposition of discipline may affect an employer's recommendation to other employers, its own consideration of the employee for reemployment, or its position with regard to an unemployment compensation claim. In cases where the discipline is less than discharge, the discussion may have bearing on how the employer views the employee's work and disciplinary history or treats similar transgressions.

An employer's actions with regard to any of its disciplinary decisions raises real, job related concerns indistinguishable from and of no less importance than those raised by the prospect of the discipline itself. Concerted activity aimed at addressing and alleviating those concerns is no less for the purpose of mutual aid or protection. It was the Baton Rouge Water majority's refusal to give weight to such post-decision concerns which led it therein to unduly restrict the scope of section 7 as it relates to confrontations between employers and employees which concern the imposition of discipline.

The Baton Rouge Water decision also leaves open the issue of whether a right to at least union representation would attach to the type of meeting involved therein as a function of the section 7 right of employees to bargain through representatives of their own choosing, as well as the issue of whether a union would have section 8(a)(5) rights to be present. In concluding that Weingarten rights did not apply to the factual situation present, the majority concluded only that section 7 right to engage in concerted activity for mutual aid or protection did not require that the employer grant the employee's request for union representation. As discussed previously, the Board had, under the pre-Weingarten, Texaco line of cases, found that a right to representation at disciplinary interviews existed as the function of a union's status as exclusive bargaining representative, and the concomitant section 7 right of employees to be represented thereby. Given the work performance discussion which

156. The value of representation is diminished if relegated to the grievance procedure. As the Court noted in Weingarten, "[t]he employer may then be more concerned with justifying his actions than re-examining them." 420 U.S. at 264.
157. At least one federal court of appeals has cited Baton Rouge Water with approval. See Anchortank, Inc. v. NLRB, 618 F.2d 1153, 1167 (5th Cir. 1980).
158. See supra text accompanying notes 28-31.
took place in *Baton Rouge Water*, it would appear that the meeting conducted therein, in terms of both its extent and purpose, was no different than the meeting held in the original *Texaco* decision where the Board stated:

Thus it is clear that on November 17 the Company sought to deal directly with [the employee] concerning matters affecting his terms and conditions of employment. Yet as noted, the employees in the unit had selected the Union to deal with the [company] on such matters and there is evidence that either [the employee]—assuming he could have done so—or the Union had waived to any extent the right to representation or had agreed to channelize disputes concerning such right into the procedures of the contract grievance provisions. Consequently, . . . the [company's] refusal to respect [the employee's] request that the bargaining representative be permitted to represent him at the meeting interfered with and restrained him in the exercise of his rights guaranteed by Section 7 of the Act.159

Whether the present Board would be disposed to apply a right to union representation to a *Baton Rouge Water*-type meeting, one which would inure both to the union and the employee as a function of the bargaining obligations must, of course, await a case which properly presents the issue. By means of this discussion, I seek only to raise the issue and do not imply how I, as a Board member, would decide it. Any decision to again apply the rationale of *Texaco* to meetings or interviews held for the purpose of imposing discipline would require that the Board, in considering the competing interests of the employer, employee, and the union, take into account the present existence of *Weingarten* right as developed by the Board.160

B. *The Request*

As developed by the Board, the *Weingarten* right is the section 7 right to engage in concerted activity for mutual aid or protection

159.  168 N.L.R.B. at 362.

160. In *Weingarten*, the Supreme Court majority noted the existence of the *Texaco* line of cases, but expressed neither agreement nor disagreement with the *Texaco* rationale. 420 U.S. at 264. Dissenting Justices Powell and Stewart, however, did express doubts as to the correctness of the *Texaco* rationale. See id. at 271 n.3. In this regard, compare the Fifth Circuit's decision denying enforcement of *Texaco*, 408 F.2d at 145 (employee had no right to union representation at an investigatory interview simply because employer had previously committed itself to disciplining the employees) with its discussion of the *Baton Rouge Water* and *Texaco* line of cases in Anchortank, Inc. v. NLRB, 618 F.2d 1153, 1168 (5th Cir. 1980) (no right to representation at an interview conducted solely to inform employee of predetermined disciplinary decision).
during certain interviews or meetings at which the reasonable fear of discipline obtains. Since it is an employee right, it must be invoked by request. Absent such request, nothing in the Act requires an employer to allow a representative at such meetings. It is for the employees, not the employer, to determine whether concerted activity is undertaken in response to any employer action.

The nature of the Weingarten right requires that it be invoked only by the employee who reasonably fears discipline. The right to engage in concerted activity for mutual aid protection does not require an employer to permit the representation of an unwilling employee. However, it is not necessary that the employee himself make the request to the employer. All that should be required is that the request be authorized by the employee or that, in the face of a request, the employee indicate his willingness to be represented and thereby adopt the request.

That one's right to representation or assistance may not be invoked by others does not necessarily mean that employee attempts to represent other employees necessarily fall outside the protective ambit of section 7. A request to represent or assist an employee is no less an attempt to engage in concerted activity for mutual aid or protection than is a request to be represented. Thus, in Quality Manufacturing the Board found that two union stewards who sought to represent an employee at an investigatory interview were engaged in concerted activity protected by section 7 and could not be disciplined for their attempts.

A request, to be valid, must be made or communicated to the management official who is conducting the interview or meeting or is

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163. 195 N.L.R.B. at 199.

In Quality Mfg., the stewards insisted upon representing an employee who at the same time, insisted on being represented. Id. at 197-98. Therefore, the stewards and the employee were engaged in concerted activity and thus should be protected by section 7. Section 7 should also provide some limited protection to attempts to represent an unwilling employee. At least until the time that the offer of assistance is rejected by the employee, the union employee who seeks to provide the assistance is attempting to engage in concerted activity and his right to do so should not depend on his lack of success.
capable of granting the request. However, an employee who makes a valid request on the plant floor need not repeat it at the office.

In *Southwestern Bell Telephone Co.*, the Board determined what constitutes a valid request for representation. There, four employees were called to investigatory interviews. During their interviews, one employee asked whether union representation was needed and another stated that he would like to have "someone there to explain . . . what was happening." During a group discussion of the incident being investigated, one of the employees again asked about calling in the union. A Board majority reversed the administrative law judge's finding that none of the employees had made a clear, unequivocal request for representation, finding instead that the request for someone was all that *Weingarten* required to invoke the right to representation. The majority also found that the other statements, though less forthright, constituted valid requests for representation in that they were "sufficient to put the Employer on notice as to the employees' desires."

Once a valid request for representation has been made, an employer must grant the request, exercise its legitimate prerogative to discontinue the attempted interview, or offer the employee the choice of attending the interview unassisted or having no interview at all. Unless the employee voluntarily agrees to remain after having been offered the choice, or is otherwise aware of it, the employer

167. Id.
168. Id. at 1225 (Members Penello and Walther, dissenting).
169. Former Chairman Murphy, Member Fanning and Member Jenkins composed the majority. Former Members Penello and Walther dissented.
170. 227 N.L.R.B. at 1223.
171. Id. A request for a "witness" is sufficient. Good Samaritan Nursing Home, Inc., 250 N.L.R.B. 207 (1980). But see Levingston Shipbuilding Co., 249 N.L.R.B. 1 (1980). In *Levingston*, an employee's statements concerning a "lawyer" were interpreted as going toward legal representation in court and not toward representation of any type at the interview. Id. at 1 n.2. Of course, representation by a private lawyer is not equivalent to union representation as the lawyer cannot claim the status of serving the interests of the entire bargaining unit. See Sentry Investigation Corp., 249 N.L.R.B. 926, 936 n.20 (1980).
172. 420 U.S. at 258.
173. Id.
may not proceed without violating section 8(a)(1). 174

While a request need be only sufficient to put the employer on notice of the employee's desire for representation, the above-described options available to an employer faced with a request for representation presume the ability to comply with the request. However, depending upon their phrasing, not all requests for representation can, in fact, be complied with. For example, a specific individual requested as the representative may not be available. In such circumstances, the Board has found that the employer is not necessarily limited to the option of forgoing the interview or offering the employee the choice of an interview without assistance or no interview at all. 175 Rather, in cases involving the unavailability of a union representative in general or a particular person sought as a representative, the Board has balanced the employee's interest in obtaining representation and the employer's interest in conducting the interview without interference or delay.

In Coca-Cola Bottling Co. of Los Angeles, 176 an employee called to an investigatory interview requested the presence of his union steward who, the employee knew, was on vacation. 177 The administrative law judge found that, by the request, the employee was attempting to postpone the interview 178 and concluded that, under Weingarten, the employer had no obligation to do so. A Board majority 179 adopted the administrative law judge's decision stating:

[T]here is nothing the Supreme Court's opinion in Weingarten which indicates that an employer must postpone interviews with its employees because a particular union representative, here the shop steward, is unavailable either for personal or other reasons for which the employer is not responsible, where another representative is available whose presence could have been requested by the employee in the absent representative's place. Indeed, the Supreme Court was careful to point out that the exercise by employees of the right to representation at an interview may not in-

177. Id.
178. Id. at 1279. The fact that the employee was attempting to postpone the interview would serve as an independent basis for denying the request for representation as the employee was not actually seeking representation. Obviously, Weingarten rights should not be used as a shield against discipline through an insistence on representation by a specific unavailable person.
179. The majority was composed of former Chairman Murphy and former Members Penello and Walther.
terfere with legitimate employer prerogatives. Certainly the right to hold interviews of this type without delay is a legitimate employer prerogative. The fact that “it would not have been a disaster” to postpone the meeting to await [the steward’s] return is therefore immaterial.180

The majority decision in Coca-Cola represents more than a mere balancing of the employer’s interest in conducting the interview without delay or interference and the employee’s interest in being represented. In finding that the employer was privileged to conduct the interview, the majority relied heavily on the fact that, given the unavailability of the particular steward, the employee did not request or propose an alternative:

In fact, Respondent never denied [the employee’s] request; it was simply unable to comply therewith. When [the employee] was informed of this fact, he did not, as he could have, request alternative representation. We see nothing in Weingarten which implies that it is the employer’s obligation to suggest and/or secure alternative representation where the representative originally requested by the employee is unavailable.181

Member Jenkins and I dissented. First, we found the fact that the interview was postponed until the steward returned “would not have been a disaster,” according to the employer, dictated that the proper balance between the employer’s interests and the employee’s be struck in favor of granting the employee’s request.182 This was especially true since the result was that the employee was interviewed without the benefit of any representation at all.183 In this regard, we took issue with the majority’s placing the burden of proposing or securing an alternative to the requested, unavailable steward on the employee and not the employer.184 Unlike the majority, we viewed the employee’s request for the steward as a request for help which, although phrased in terms of the assistance of a particular union agent, was not necessarily limited thereto. As such, the request was, in fact, capable of being complied with by the employer and absent an attempt to comply, was not the employee’s obligation to sort the matter out:

180. 227 N.L.R.B. at 1276 (footnote omitted).
181. Id. (footnote omitted).
182. Id. at 1277 (Members Jenkins & Fanning, dissenting).
183. Id. at 1276. The issue, therefore, was whether the employee was to be accorded representation, not whether the employee would have his choice of representative.
184. Id. at 1277 (Members Jenkins & Fanning, dissenting).
[The employee] did not request any alternative union representation and this factor appears to have influenced the Administrative Law Judge considerably; he apparently concluded that because there was a business agent available [the employee] should have asked for and been content with him. We do not agree.

To put the burden of all this on the employee, as our colleagues do, is completely to negate the purpose of Weingarten. It is because employees are not skilled in the niceties of procedure that they need help. Weingarten holds that the employee is entitled to such help if he asks for it. [The employee] asked. The help was denied, and Respondent proceeded to do what Weingarten says it cannot do—to conduct the interview with the unassisted employee who had not been informed of his rights. The case is as simple as that and the violation plain.

In Coca-Cola, the alternate union representative was not at the site and this fact might serve to explain why the employer was found to have no burden to suggest or supply such representative in place of the absent steward. In a subsequent case, however, another Board majority indicated that, even given the presence of a number of union agents on the scene, an employer was under no obligation to suggest alternatives when the specific representative requested by the employee was absent at the time of the interview. In Roadway Express, Inc., the union had designated a number of alternate committeemen to represent employees during the absence of the regular committeeman. An employee called to an interview concerning an acrimonious exchange with his supervisor stated that he would not attend because his committeeman had gone home ill. There was no evidence that, at the time of his refusal, the employee was aware of the union's designation of alternate committeemen.

Relying on Coca-Cola, the majority reversed the administrative law judge's finding that the employer had violated section 8(a)(1) by summarily suspending the employee for refusing to attend the interview. In so concluding, the majority found that the employee had, in fact, been apprised of the existence of an alternate committeeman, albeit as the employee was leaving the plant, but had rejected such an option. However, the majority also went on to state that it

185. Id.
186. 246 N.L.R.B. 1127 (1979). Former Members Penello, Murphy and Truesdale composed the majority. Member Jenkins and Chairman Fanning dissented.
187. Id. at 1135.
188. Id. at 1130.
189. Id. This finding was, at best, dubious in light of the surrounding circum-
would have reached the same result even if the employees had not been so informed:

Even accepting the premise that [the employee] was not made aware [of the alternate committeeman's status as such] when he initially refused representation by him, we nevertheless adhere to our finding that no violation occurred as we believe that the burden of informing unit members of the designation of union officials is one more appropriately borne by the bargaining agent. Here the Union appointed the three alternate committeemen specifically so that no night-shift employee would be without representation if the need arose. We would, therefore, not hold Respondent accountable for the Union's failure to shoulder its appropriate obligation in this situation.¹⁹⁰

Member Jenkins and I dissented as we had in Coca-Cola, questioning as well as the majority's reliance on the union's actions:

Finally, we disagree with the majority's assertion that the Union's failure to announce [the alternate committeeman's] appointment may operate to [the employee's] detriment. In appointing the committeemen, the Union was attempting to afford night-shift employees additional representation. The Union had no such obligation to do so, and it is clear that, in the absence of any representative at the plant at the time of the interview, an employer must respect the employee's request for assistance, even if it means delaying the interview. Consequently, the majority has turned the Union's voluntary attempt to assist the employees into a pitfall, causing them to be deprived of protections formerly available.¹⁹¹

To the extent that Coca-Cola and Roadway Express relieve an employer of the obligation to afford any representation to an employee who requests, by name, representation by an individual who happens to be unavailable, these decisions distort the Weingarten right and seriously limit the exercise thereof. The right is distorted

¹⁹⁰. Id
¹⁹¹. Id at 1133 (footnote omitted). An employer's right not to delay an interview due to the absence of a specifically requested representative, when the employer provides or proposes an alternative, is discussed below. See infra text accompanying notes 193-203. In Roadway Express, however, the requested representative was due to arrive within one half hour of the incident. As a result of the employer's failure to obtain or propose an alternate, the employee was faced with the prospect of being interviewed without any representation. 246 N.L.R.B. at 1137.
because a request for representation framed in terms of the representation or assistance of a particular person is no less a request for representation than one framed in general terms. Nothing inherent in such a request indicates that the employee desires representation by the requested individual to the exclusion of all others. Absent evidence that the employee in fact desires only representation by the person he names, an employer should not be allowed to seize upon the absence or unavailability of the requested individual to deny the request and stand silent, hoping that the employee will fail to ask for an alternative. If *Southwestern Bell* is of any value as precedent, that option is not available to an employer faced with an employee’s request for a particular representative and should not arise merely because the employee happens to know and mention the name of his union steward. Further, no legitimate employer interest exists in support of such an option.

Apart from the issue of where the burden of proposing or securing alternative representation lies, *Coca-Cola* and *Roadway Express* stand for the proposition that, given the availability of alternative representation, the employee is not guaranteed his choice of representative. Rather, the Board will balance the employee’s desires against the employer’s interest in proceeding without delay and interference. For example, in *Crown Zellerbach, Inc.* \(^{192}\) the Board adopted an administrative law judge’s finding that the employer did not violate the *Weingarten* right when it failed to grant an employee’s request for a union representative and instead provided the assistance of a fellow employee who was the most visible and active union adherent and who had been acting as the *de facto* spokesman for the employees. \(^{193}\) There, the union had been recently certified and had not yet designated any stewards at the employer’s plant. Further, the nearest union official was sixty miles away. \(^{194}\) Under such circumstances, the administrative law judge found that the employer had done all it reasonably could be expected to do. He noted that it was the employer who offered the assistance of the union activist and thereby was attempting to comply with the request for representation rather than overpower the lone employee. He further noted that the employee had accepted the employer’s offer of alternative representation and that the union activist had, in fact, pro-

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\(^{192}\) 239 N.L.R.B. 1124 (1978). The fact that the employer had offered, and the employee had accepted, the alternate representation, *id.* at 1127, made the case readily distinguishable from *Coca-Cola*, upon which the administrative law judge had relied.  
\(^{193}\) *Id.* at 1124.  
\(^{194}\) *Id.* at 1126.
vided the assistance and representation contemplated by the Supreme Court in *Weingarten*. 195

The Board engaged in similar balancing in *Pacific Gas & Electric Co.*. 196 There, in response to a request for union representation by a union steward subjected to an investigatory interview, the employer provided the other union steward present at the site. However, the employee objected to representation by that particular steward since the steward was friendly with the management official conducting the interview, was being considered for a management position at the time of the interview, and had expressed a reluctance to get involved in the matter. The employee instead insisted upon being represented by a fellow steward located at a site five miles away. 197 A Board panel, 198 with Member Jenkins dissenting, adopted the administrative law judge's decision that the employer was under no obligation to postpone the interview in order to obtain the requested off-site steward stating:

The Supreme Court in *Weingarten* neither stated nor suggested that an employee's interests can only be safeguarded by the presence of a *specific* representative sought by the employee. To the contrary, the focus of the decision is on the employee's right to the presence of a union representative designated by the union to represent all employees. 199

The majority rejected the contention that the proximity of the requested steward made both stewards equally available. Further, in discounting the importance of the employee's need to be represented by a steward in whom he had confidence, the majority argued that granting the employee's request for the off-site steward would, in effect, negate the union's choice of its agent:

Our interpretation of *Weingarten* must be tempered by a sense of industrial reality. We do not advance the effectuation of employee rights, or contribute to the stability of industrial relations, if we complicate the already complex scheme of *Weingarten* by introducing the notion that an employee may request this union representative instead of that one, perhaps from a far corner of the plant, and perhaps, in certain instances, contrary to the union's wishes. In the instant case, a duly designated union representative was ready, willing, able and present. We would inquire no

195. *Id.* at 1127. *See also* Southwestern Bell, 251 N.L.R.B. at 625 n.7.
197. *Id.*
198. Former Members Penello and Truesdale composed the majority.
199. 253 N.L.R.B. at 1143 (emphasis in original).
Given the proximity of the requested steward and the nature of the employee's objections to the proffered steward, there is considerable appeal to dissenting Member Jenkins' position that the balance, between the employer's legitimate prerogative of conducting its investigation and the employee's interest in obtaining the representation he sought, should have been struck in favor of the employee. Member Jenkins found that the majority neither required nor relied upon any proffered justification as to why the employer could not have tolerated a delay which, in the view of the majority, would not have exceeded forty minutes.

While avoidance of delay and interference in investigatory or disciplinary procedures is certainly a legitimate employer prerogative, a proper analysis requires that it be balanced against the countervailing statutory interest in favor of limiting an employer's discretion to control with whom an employee may engage in concerted activity for mutual aid or protection. Assuming the availability of the requested representative, the employee's choice should control. Therefore, in situations where an employee presents legitimate reasons for objecting to representation by the representative provided by the employer, it is only reasonable to require that the employer justify its denial of the employee's choice in terms of a burden on its processes which is actual, rather than presumed and which outweighs the employee's statutory interests. The Board's decision in Pacific Gas & Electric, however, requires no such justification on the part of the employer where an alternative, but undesired, representative is present and suggests that any delay is an impermissible interference with a legitimate employer prerogative. Thus, to the extent the Board has balanced the competing interests of the em-

200. Id. at 1144.

201. See, e.g., Good Samaritan Nursing Home, Inc., 250 N.L.R.B. 207 (1980). There, the employer unlawfully refused an employee's request for a witness telling the employee that inasmuch as a supervisor was present to witness the meeting, the employee did not need a witness. Id. at 208. See also Illinois Bell Tel. Co., 251 N.L.R.B. 932, 934 (1980) (Board found that the employer could not deny an employee's request to be represented by a fellow employee as opposed to the employee's union steward), enforced as modified, 674 F.2d 618 (7th Cir. 1982).

202. See Newport News Shipbuilding and Dry Dock Co., 254 N.L.R.B. 375, 390 (1981), enforced mem., 673 F.2d 1314 (4th Cir. 1982) (Board found that an employer acted lawfully when it provided as a representative an employee different than the one requested, without making any attempt to determine the location or availability of the requested employee). Cf. Coca-Cola Bottling Company, 227 N.L.R.B. 1276 (1977) and Roadway Express, 246 N.L.R.B. 1127 (1979) (no inquiry was made as to the employer's
ployer and the employee, the balance has been struck heavily in favor of the employer.

C. **The Representative**

The Supreme Court's decision in *Weingarten* represents an interpretation of the scope of the section 7 right of employees to engage in concerted activity for mutual aid or protection; specifically, that the section 7 right encompassed a right to union representation. However, given the nature of the right affirmed therein, the *Weingarten* decision left open a number of issues as to the type of representative guaranteed by section 7. Does the right to engage in concerted activity for mutual aid or protection, a right not generally dependent on representative status, also inure to unrepresented, as well as represented employees? Assuming that there is a request for union representation, what status must the union enjoy before a right to representation by its agents will be guaranteed? In a series of post-*Weingarten* decisions, the Board has answered both of these questions.

1. **The Representative Status of the Employee and/or Representative**

   In their dissenting opinion in *Weingarten*, Justices Powell and Stewart noted that the majority's holding that the section 7 right to engage in concerted activity guaranteed the right to union representation had broader implications:

   While the Court speaks only of the right to insist on the presence of a union representative, it must be assumed that the § 7 right today recognized, affording employees the right to act "in concert" in employer interviews, also exists in the absence of a recognized union.203

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203. 420 U.S. at 270 n.1 (Stewart, J., dissenting). Cf. NLRB v. Washington Alumi-
In *Glomac Plastics*, the Board expressed agreement with the dissenting justices' logical assumption, stating:

We conclude that Section 7 rights are enjoyed by all employees and are in no wise dependent on union representation for their implementation. The Court's *Weingarten* and *Quality* decisions are clearly grounded on Section 7 of the Act which guarantees employees rights and guarantees, in particular, the right of employees "to engage in ... concerted activities for ... other mutual aid or protection." We do not believe the Court's decisions command us to interpret Section 7 in a manner which is clearly restrictive of its broad scope or does violence to its purposes.

... [T]he Court's primary concern was with the right of employees to have some measure of protection against unjust employer practices, particularly those that threaten job security. These employee concerns obtain whether or not the employees are represented by a union.

The Board has adhered to its interpretation that the section 7 right to representation affirmed in *Weingarten* applies to represented and unrepresented employees alike. Thus, in *Anchortank, Inc.*, the Board noted that, not only were the statutory concerns underlying the *Weingarten* right unaffected by the absence of a collective bargaining representative, but that the role of the representative as envisioned by the *Weingarten* Court was likewise unaffected:

Indeed, the union representative's role is limited to assisting the employee and possibly attempting to clarify the facts or suggest other employees who may have knowledge of them. Thus, the union representative is not permitted to use the powers conferred upon the union by its designation as collective-bargaining agent, and, in essence, may do no more during the course of the interview than could a fellow employee.

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204. 234 N.L.R.B. 1309 (1978), enforced, 600 F.2d 3 (2d Cir. 1979).
205. 234 N.L.R.B. at 1311.
206. 239 N.L.R.B. 430 (1978), enforced as modified, 618 F.2d 1153 (5th Cir. 1980).
207. Id. at 430-31. As the Court noted in *Weingarten*:

[T]he employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview. The Board said in *Mobil [Oil]*, we are not giving the Union any particular rights with respect to predis­

420 U.S. at 259 (citation omitted).
In *Illinois Bell Telephone Co.*,[208] the Board relied on *Glomac* and *Anchortank* and found that, given the section 7 right of employees to act in concert, an employer could not deny an employee's request to be represented by a fellow employee and require that the employee be represented by a union agent.[209]

While at least two courts of appeals[210] have indicated their agreement that *Weingarten* rights inure to unrepresented employees, the Board's holding in this regard has been recently criticized from within. In *Materials Research Corp.*, the two most recent appointments to the Board, Chairman Van de Water and Member Hunter, separately dissented from the Board's reversal of an administrative law judge's conclusion, notwithstanding *Glomac* and *Anchortank*, that *Weingarten* rights did not apply to unrepresented employees.[212]

In their dissents, Chairman Van de Water and, particularly, Member Hunter, focused on the Supreme Court's finding that a request for union representation amounted to concerted activity for mutual aid or protection since the union representative not only safeguarded the interests of the particular employee but also the interests of the entire bargaining unit. They argued that a fellow employee could not claim such status.[213] Member Hunter also focused on the Court's discussion of the protection provided by a "knowledgeable union representative" who "could assist the employer by eliciting favorable facts, and save the employer production time by

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208. 251 N.L.R.B. 932 (1980), enforced as modified, 674 F.2d 618 (7th Cir. 1982).
209. *Id.* at 933-34. The Board noted that concerted activity for mutual aid or protection, when engaged in by represented employees, cannot be in derogation of their bargaining agent's status. *Id.* at 933. See also Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975). The Board found however, that nothing in the operative collective bargaining agreement required the presence of a union representative at investigatory interviews; that the employer and union had no oral understanding as to the procedure for representation at such; and that the employee's request for a fellow employee occurred at a time when no union agent was present at the site. 251 N.L.R.B. at 933. *Accord* Los Angeles Water Treatment, 263 N.L.R.B. No. 22, 1982-83 NLRB Dec. (CCH) ¶ 15,109, at 25,386 (Aug. 9, 1982).
210. *See* Anchortank, Inc. v. NLRB, 618 F.2d 1153 (5th Cir. 1980); NLRB v. Columbia Univ., 541 F.2d 922 (2nd Cir. 1976).
212. *Id.*, 110 L.R.R.M. at 1406 (Chairman Van de Water, dissenting); *Id.*, 110 L.R.R.M. at 1410 (Member Hunter, dissenting). As *Glomac*, *Anchortank*, and *Illinois Bell* all involved requests for representation made by represented employees, their discussion in the cases regarding the rights of unrepresented employees was dicta. *Materials Research*, on the other hand, was the first case which squarely presented the issue. *Id.*, 110 L.R.R.M. at 1401-02.
213. *Id.*, 110 L.R.R.M. 1409 n.39 (Chairman Van de Water, dissenting); *Id.*, 110 L.R.R.M. at 1411 (Member Hunter, dissenting).
getting to the bottom of the incident."214 Thus, the dissenters reasoned that the right to representation found in Weingarten was grounded in the Supreme Court's view of obligations and functions of a collective bargaining representative.215

The majority answered both contentions. First it noted that the Weingarten Court's discussion of the status and function of a union representative constituted an explanation of why a request for union representation constituted concerted activity for mutual aid or protection and did not determine that only a request for such representation fell within the literal wording of section 7.

An employee's request for the assistance of his union representative constitutes concerted activity for mutual aid or protection, whether or not the union representative is a fellow employee. In a represented unit, the union is the embodiment of the concerted activity of all unit employees and, as the Court noted, the representative serves a common interest as well as that of the individual employee. However, a request for the assistance of a fellow employee is also 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


215. In support of this contention, Chairman Van de Water argued that the right involved in Weingarten was the right "to be free from employer interference which deprives employees of the representation of their duly chosen agent." 262 N.L.R.B. No. 122, 110 L.R.R.M. at 1408 n.36 (Chairman Van de Water, dissenting) (emphasis added). In so characterizing the right, Chairman Van de Water relied heavily on the pre-Weingarten, Texaco line of cases in which the Board had found a right to union representation at disciplinary interviews as a function of the collective bargaining obligation. While the Chairman was correct in his view of the holding of Texaco, he mischaracterized the nature of the Board's holding in Mobil Oil and Quality Mfg., wherein the Board extended to investigatory interviews the right to a union representative on the basis of a wholly different section 7 right—the right to engage in concerted activity for mutual aid or protection—a right which does not require a collective bargaining relationship for its exercise. See 196 N.L.R.B. at 1052; 195 N.L.R.B. at 198.

Chairman Van de Water's view of a Weingarten "representative" as a collective bargaining representative led him to conclude that a request for representation by a fellow employee might constitute a seeking of mutual aid or protection under section 7 of the Act. 262 N.L.R.B. No. 122, 110 L.R.R.M. at 1410. He argued nonetheless, however, that section 7 did not require the employer to grant such a request inasmuch as doing so would require an employer to "recognize" and "deal with" a "representative" not chosen by a majority of unit employees. Id. Central to this position was the Chairman's view that "Congress has declared that the means by which employees are to redress [the imbalance of economic power existing between employer and employee] is utilization of the Act's processes for majority selection of an exclusive collective-bargaining representative." Id., 110 L.R.R.M. at 1408 n.37. That view, however, is of doubtful validity. See NLRB v. Washington Aluminum Co., 370 U.S. 9, 14-18 (1962).
be assured that they can too can avail themselves of the assistance of a coworker in like circumstances, "as nobody doubts."216

Second, the majority reiterated what it had stated in Glomac and Anchortank: A Weingarten representative was not present as a collective bargaining representative and, therefore, a fellow employee need not be a union representative to render assistance and protection contemplated by the Court:

Furthermore, the type of assistance that any individual can provide in the situation outlined in Weingarten is limited and can certainly be performed by a fellow employee. A coworker can assist by eliciting favorable facts and even, perhaps, save production time by helping to get to the bottom of the problem that occasioned the interview. Certainly, that an employee is not part of a represented unit does not alter the real possibility that a single employee, confronted by an employer investigating conduct which may result in discipline, may be too fearful or inarticulate to describe accurately the incident being investigated, or too ignorant to raise extenuating factors as was noted in Weingarten... Moreover, a coworker who has witnessed employer action and can accurately inform coemployees may diminish any tendency by an employer to act unjustly or arbitrarily.

It is for the employee himself to determine whether the presence of a coworker at an investigatory interview provides some measure of protection. Here, [the employee], apparently believed it did. We would not substitute our judgment for that of employees who have shown that they believe that the presence of a co-

216. 262 N.L.R.B. No. 122, 110 L.R.R.M. at 1405. In concluding that a request for union representation constituted concerted activity for mutual aid or protection, the Weingarten Court found that the common interest served by a union representative made such activity, in terms of the applicability of section 7, analogous to that found in NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503 (2d Cir. 1942). The Weingarten Court stated that

[w]hen all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a 'concerted activity' for 'mutual aid or protection,' although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts.

420 U.S. at 261 (quoting NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 505-06 (2d Cir. 1942)).

To argue that the same does not apply to unrepresented employees turns on its head the rationale for Weingarten's holding that a request for union representation falls within the ambit of section 7.
worker lends a measure of meaningful protection.\textsuperscript{217}

2. The Status of the Union

The \textit{Weingarten} Court's holding that the representation or assistance rendered by a union agent to an employee constitutes concerted activity for mutual aid or protection is, as noted above,\textsuperscript{218} predicated on the union’s agent’s serving not only the interests of the particular employee, but the interests of all employees in the bargaining unit. It therefore follows that, before section 7 obligates an employer to accede to a request for union representation, the union must be in a position to claim the right to serve the entire bargaining unit. In both \textit{Glomac} and \textit{Anchortank}, the Board determined the applicability of section 7 to a request for union representation at a time when the employer was denying or challenging the union's status as the representative of unit employees.

In \textit{Glomac}, the union had been certified by the Board and recognized by the employer. In the context of unlawful, bad faith bargaining, however, the employer denied an employees request for union representation, informing the employee that she did not have a union and that the employer did not recognize one.\textsuperscript{219} In adopting the administrative law judge's finding that the employee nevertheless had a section 7 right to union representation, the Board noted that this right could not be dependent on the employer's refusal to acknowledge the union's status as the employees' chosen representative.

We do not draw a distinction between union-represented employees and employees who have chosen union representation but have been deprived of the benefits of that representation as a result of the employer's refusal to bargain in good faith with their designated representative.

The national labor policy of encouraging good-faith collective bargaining would be undermined if an employer were to be

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\item \textsuperscript{217} 262 N.L.R.B. No. 122, 110 L.R.R.M. at 1405-06. The section 7 right of “employees” to engage in concerted activity for mutual aid or protection should not guarantee a right to representation by an individual not an employee of the employer solely on the grounds that such individual is an employee of someone. Unlike the non-employee union agent, such individual cannot claim to represent the interests of the unit as a whole. Further, an employer's property rights should not, on balance, be required to give way to the presence of a non-employee where there exist other employees of the employer capable of fulfilling the request for a representative. \textit{See supra} note 107. \textit{See also} Sentry Investigation Corp., 249 N.L.R.B. 926, 936 n.20 (1980).
\item \textsuperscript{218} \textit{See supra} text accompanying note 68.
\item \textsuperscript{219} 234 N.L.R.B. at 1311.
\end{itemize}
\end{footnotesize}
allowed to defeat its employee’s right to have a representative present by engaging in unlawful bad-faith bargaining which the employer could then rely on to assert that no recognized union representative exists. To permit the Respondent’s own misconduct thus to reduce or eliminate the employee’s right to have a union representative present is to allow the Respondent’s unlawful action to determine the reach and applicability of Section 7 rights. We cannot reward the wrongdoer for conduct which violated Section 8(a)(5) of the Act.\textsuperscript{220}

In \textit{Anchortank}, the Board again found that it was the union’s actual status as the chosen majority representative of the employee’s that was determinative of the section 7 right to union representation. There, the union had won a representation election but, unlike \textit{Glomac}, had not yet been certified by the Board or recognized by the employer.\textsuperscript{221} The administrative law judge had found that, inasmuch as the employer was under no obligation to bargain with the union at the time of the interview, employees had no section 7 right to the assistance of the union.\textsuperscript{222} In reversing the administrative law judge, the Board found that, given the employee’s selection of the union, its lack of certification or recognition was irrelevant.

The central issue of the \textit{Weingarten} decision was whether the employee’s Section 7 right to engage in concerted activity extended to the encounter between employee and employer in an interview which could reasonably result in disciplinary action. In that case, the concerted activity took the specific form of a request for assistance from a statutory representative. However, the Court and the Board placed the emphasis upon the employee’s right to act concerted for protection in the face of a threat to job security, and not upon the right to be represented by a duly designated collective bargaining representative.

\textbf{... Here, [the employees] requested union representation at a time when the Union had been selected by a majority of employees in a Board-conducted election, but had not yet been certified as bargaining representative. Their request was an exercise of the right guaranteed to them by Section 7 to act in concert for mutual aid or protection. In these circumstances, the status of the requested representative, whether it be that of a union not yet certified or simply that of fellow employee, does not operate to deprive the employees of the rights which they enjoy by virtue of the}

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\item \textsuperscript{221} 239 N.L.R.B. at 431.
\item \textsuperscript{222} \textit{Id}. at 434.
\end{itemize}
plain mandate in Section 7.223

The statement of the Board in Anchortank regarding the status of the requested representative as being either a noncertified union or a fellow employee leaves open the question of whether a lack of certification or recognition would deprive an employee of the representation of a nonemployee union agent. For in balancing the interests of employers and employees under section 7, the Board has accorded greater weight to an employer's property rights when the activity of nonemployee union agents is involved.224 The Board has yet to be faced squarely with a case involving the denial of a request for representation by a nonemployee agent of a union not yet certified. However, it would appear that employees' choice of the union as the representative, an act which allows the union to claim the right to represent the interests of all the bargaining unit members, would still be the determinative factor and at least one federal appeals court has so found.

In enforcing, with modifications,225 the decision of the Board in Anchortank, the Court of Appeals for the Fifth Circuit held that an employee had no right to union representation by a nonemployee union agent before the union wins a representation election.226 The court also found, however, that an employer acts at its peril if, following a representation election won by the union, it denies a request for representation by a nonemployee union agent.227 The court reasoned as follows:

The situation is radically altered, however, after a representation election is held, and the union is victorious, even if that victory is challenged. At that point, the request of the employee for union representation takes on an entirely different character; the nature of the activity changes. No longer is the employee asking for the participation of a nonemployee who is in a position to rep-

224. See generally NLRB v. Babcock and Wilcox Co., 351 U.S. 105 (1956) (employers can restrict non-employee union organizers' access to employer property in situations where it would be improper to so restrict employee union organizers).
225. The Fifth Circuit remanded to the Board the issue of whether a particular interview involved in the case fell within the Board's decision in Baton Rouge Water. Anchortank, Inc. v. NLRB, 618 F.2d 1153, 1169 (5th Cir. 1980).
226. Id. at 1163. The same would seem to hold true regarding a request for representation by a fellow employee acting in the capacity of a union agent. Since a Weingarten representative, however, does not perform the role of a collective bargaining representative, the distinction is of no practical importance.
227. Id. at 1162.
resent only the employee's individual interest . . . . After the union has won the election, the employee quite properly perceives his request to be one for the concerted mutual aid and protection of his fellow employees, for the union then stands in for all the unit employees. 228

The court further contended that:

We believe that this situation is analogous to that in which the employer, in the face of a union's challenged election victory, unilaterally changes conditions of employment that are mandatory subjects of bargaining. In such a situation, prior to resolution of the election challenge, the employer may assert his prerogative to manage his plant without interference at the risk that his conduct will violate section 8(a)(5) if the union has indeed won the election and is later certified. 229

To the extent that the Fifth Circuit opinion in Anchortank holds that an employee's right to union representation stems from the union's status as the chosen representative of unit employees, it is consistent with the Supreme Court's view of the union representative as serving the interests of the entire bargaining unit. On that basis, the finding that the employer may exclude nonemployee union agents until the union obtains such status represents a reasonable accommodation between employer property rights and the employee's right to seek and engage in concerted activity for mutual aid or protection. Further, since it is the union's status as the chosen representative, that gives rise to the right to union representation, it is likewise proper to hold that the employer only act at its peril if it denies a request for representation by a nonemployee union agent, and not to be found to have restrained section 7 rights if, ultimately, the union's election victory is overturned. 230

However, a representation election is not the sole method for determining employee choice of a representative. Under NLRB v. Gissel Packing Co., 231 the Board will look to a union's designation

228. Id.
229. Id. at 1164-65.
230. As the court noted, this principle is supported by Board law holding that an employer acts at its peril if, following an election but prior to the union's certification, the employer unilaterally changes terms and conditions of employment. See Mike O'Connor Chevrolet-Buick-GMC, Inc., 209 N.L.R.B. 701 (1974).

As the court also pointed out, the protected nature of the employee's request does not depend on whether or not the union is ultimately certified because in making the request, the employee is nonetheless initiating group action. Anchortank, Inc. v. NLRB, 618 F.2d 1153, 1165 n.22 (5th Cir. 1980).

231. 395 U.S. 575 (1969). See also Peaker Run Coal Co., 228 N.L.R.B. 93 (1977);
pursuant to authorization cards in circumstances where an employer's unfair labor practices have rendered invalid an election a union has lost and, depending on the seriousness of those unfair labor practices, will order bargaining based on the union's designation through authorization cards. Since, in *Gissel*-type cases, the union is found to be the chosen representative on the basis of authorization cards, the right to union representation should also attach, in the same circumstances, on the basis of the card designation. Thus, if the Fifth Circuit's opinion in *Anchortank* is read always to require a union election victory before representation by a nonemployee union agent is guaranteed, *Gissel*-type situations would be ignored and the right to union representation would be overly restricted.

3. The Role of the Representative

The Supreme Court noted that the nature of the section 7 right affirmed in *Weingarten* required certain limitations on the assistance or representation provided by the *Weingarten* representative. The most significant limitation is that the employer need not bargain with any representative who may attend the interview and that the representative may not "use the powers conferred upon the union by its designation as collective-bargaining representative."232 The *Weingarten* Court also noted that the exercise of the right could not interfere with legitimate employer prerogatives and that the employer was under no obligation to proceed with an interview in the face of a request for representation.233 The Court therefore recognized that, through the exercise of its legitimate prerogatives, an employer could restrict the activity of the representative: "The representative is present to assist the employee, and attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's account of the matter under investigation."234 A third limitation on the role of the representative stemmed from the Court's view of investigatory interviews as being preliminary to the disciplinary process and presenting, therefore, the opportunity only for informal, nonadversarial exchange:

A single employee confronted by an employer investigating

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232. *See supra* text accompanying note 208.
233. 420 U.S. at 258.
234. *Id.* at 260.

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 facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. Certainly his presence need not transform the interview into an adversary contest.\textsuperscript{235}

The Court's view of the role of the representative, especially in terms of the employer's ability to affect that role by limiting the interview, led dissenting Justices Powell and Stewart to comment that the right to representation as defined by the Court appeared to be of little value to the employee, perhaps limited to that of a silent witness.\textsuperscript{236} Nevertheless, it is clear that, in describing the assistance that a \textit{Weingarten} representative could render,\textsuperscript{237} the Court did envision some active role. Further, the essence of \textit{Weingarten} is that, to the extent an employer chooses to conduct an interview, it is obligated upon request to allow for the exercise of concerted activity between the employee and his representative.\textsuperscript{238}

In \textit{Southwestern Bell Telephone Co.},\textsuperscript{239} the Board held that an employer could not, at the outset of interview, restrict the role of the \textit{Weingarten} representative to that of a mere witness.\textsuperscript{240} There, the employer demanded that the requested union representative not speak during the interview and argued that the restriction was permitted by the Supreme Court's \textit{Weingarten} statement that the employer was "free to insist that he is only interested, at the time, in hearing the employee's own account of the matter under investigation."\textsuperscript{241} Nevertheless, the Board found that this employer right had to be balanced against the employee's right to the assistance and

\begin{itemize}
\item \textsuperscript{235} \textit{Id.} at 262-63.
\item \textsuperscript{236} \textit{Id.} at 273 n.5 (Powell & Stewart, JJ., dissenting).
\item \textsuperscript{237} \textit{Id.} at 263-64.
\item \textsuperscript{238} While the silent presence of the representative could be construed as concerted activity for mutual aid or protection, the issue is whether the employer's exercise of legitimate prerogatives may restrict the concerted activity of the representative and employee to silent presence only.
\item \textsuperscript{239} 251 N.L.R.B. 612 (1980), \textit{enforcement denied}, 667 F.2d 470 (5th Cir. 1982).
\item \textsuperscript{240} \textit{Id.} at 613. \textit{Accord United Technologies Corp.}, 260 N.L.R.B. No. 196, 110 L.R.R.M. 1017 (1982); \textit{Texaco Inc.}, 251 N.L.R.B. 633, \textit{enforced}, 659 F.2d 124 (9th Cir. 1981). In enforcing \textit{Texaco, Inc.} the Ninth Circuit adopted the Board's view. 659 F.2d at 126. In denying enforcement of \textit{Southwestern Bell}, the Fifth Circuit found, on the facts, that the representative had been allowed to participate during the interview. 667 F.2d at 473. The Fifth Circuit expressly distinguished its view of the facts in \textit{Southwestern Bell} from those presented in \textit{Texaco, Inc.}, where it was found that the representative was not allowed any participation. \textit{Id.} at 474 n.3.
\item \textsuperscript{241} 251 N.L.R.B. at 613 (quoting \textit{Weingarten}, 420 U.S. at 260).
\end{itemize}
counsel of the representative. 242 For it was through this right that the employee and representative engaged in concerted activity for mutual aid or protection and to preclude any assistance by the representative was, in effect, to preclude the exercise of the Weingarten right. The Board therefore found that the employer's legitimate prerogative to regulate the role of the representative could not extend beyond a reasonable prevention of collective bargaining or an adversary confrontation, both of which were viewed by the Supreme Court as outside the permissible role of the representative and the context in which the interview took place. 243 Since the employer had attempted to silence the representative at the outset of the interview, its actions could not be construed as being reasonably related to avoiding either collective bargaining over possible discipline or avoiding an adversary contest. The Board therefore found the restriction to constitute unwarranted interference with the employee's section 7 right to representation. 244

The exact nature of reasonable prevention of collective bargaining or an adversary conflict has not yet been addressed by the Board but would, of course, depend on the particular circumstances of each case. Southwestern Bell does, at least, stand for the proposition that an employer must allow some active role for the representative by which the representative assists the employee while not necessarily speaking for him. 245

D. Waiver of the Right

The Weingarten Court recognized that the right to representation, as an individual section 7 right, could only be exercised if invoked by the employee. 246 The Court also held that once invoked,

242. 251 N.L.R.B. at 613.
243. Id.
244. Id.
245. Id. at 615. In denying enforcement of Southwestern Bell, the Ninth Circuit found that the employer had allowed the representative to participate at the end of the interview. Southwestern Bell Tel. Co. v. NLRB, 667 F.2d 470, 473 (5th Cir. 1982). It could be argued that restricting the representative's participation until after the employee has given "his own account of the matter under investigation" unduly restricts the employee's right to assistance and representation. While the representative may be prevented from speaking for the employee, an employee who is either "too fearful or inarticulate to relate accurately the incident being investigated" would be better served by assistance that is rendered to him prior to or during the giving of his own account and that aids him in presenting that account. See Pacific Tel. And Tel. 262 N.L.R.B. No. 127, 110 L.R.R.M. 1411 (1982); Climax Molybdenum Co., 227 N.L.R.B. 1189, 1189-90 (1977), enforcement denied, 584 F.2d 360 (10th Cir. 1978).
246. 420 U.S. at 257.
the right could be waived by the employee.\textsuperscript{247} Thus, the Court noted that the employer could offer the employee a choice of an interview without representation or no interview at all and, if the employee chose the former, he would forgo any benefit that might be derived from the interview.\textsuperscript{248} In post-\textit{Weingarten} cases, the Board has decided what constitutes a valid waiver of the right to representation, finding that the waiver must be made not only knowingly, but also voluntarily.

In \textit{Super Valu Xenia},\textsuperscript{249} the Board adopted an administrative law judge's decision rejecting the employer's contention that an employee waived his right to representation by attending the interview after the request for representation had been denied. The administrative law judge noted that, under \textit{Weingarten}, an employer could not conduct an interview after denying the employee's request for representation without first affording the employee the choice of an interview without representation or no interview at all.\textsuperscript{250} Absent the offering of such choice, the employee could not be presumed to either have been aware of it or have made it:

The fact that [the employee] stayed, and answered the questions put to him, did not make his participation voluntary or constitute a waiver of his right to union representation. It should not be requisite to the continued maintenance of the properly asserted right of union representation that the lone employee further antagonize the employer and jeopardize his job by walking out of the meeting or by refusing to answer questions.\textsuperscript{251}

In \textit{Postal Service},\textsuperscript{252} the Board held that a waiver of \textit{Weingarten} rights could not be inferred from an express waiver of "\textit{Miranda}" rights,\textsuperscript{253} inasmuch as the \textit{Weingarten} right to representation has a different foundation and purpose than the constitutional right against self-incrimination. The Board again noted that, unless the employee is offered the choice of an interview without representation

\begin{itemize}
\item \textsuperscript{247} \textit{Id.} at 257.
\item \textsuperscript{248} \textit{Id.} 420 U.S. at 258.
\item \textsuperscript{249} 236 N.L.R.B. 1581 (1978), \textit{enforcement denied}, 627 F.2d 13 (6th Cir. 1981).
\item \textsuperscript{250} \textit{Id.} at 1591.
\item \textsuperscript{251} \textit{Id.} In denying enforcement of the Board's finding that the employer violated section 8(a)(1) by conducting the interview, the Sixth Circuit held that the employee had, in fact, waived his \textit{Weingarten} rights by proceeding with the meeting. \textit{Super Valu Xenia v. NLRB}, 627 F.2d 12, 13 (6th Cir. 1980). Such holding in inconsistent with the \textit{Weingarten} decision itself, where the employee likewise failed to exercise self-help by refusing to participate in the interview. \textit{See} 420 U.S. at 254.
\item \textsuperscript{252} 241 N.L.R.B. 141 (1979).
\item \textsuperscript{253} \textit{Miranda v. Arizona}, 384 U.S. 436 (1966).
\end{itemize}
or not interview at all, a waiver of the right will not be found.254

Similarly, in *Montgomery Ward & Co.*,255 the Board adopted an administrative law judge's finding that the following signed statements were insufficient to waive *Weingarten* rights: “I agree that representatives of Montgomery Ward Co., Inc., may interview me, commencing from the time designated below, on matters relating to company business. It is fully understood that I am free to leave this interview at any time I so desire.”256

The administrative law judge noted that although an employer was under no burden to inform an employee of his right to union representation, an alleged waiver which did not specifically refer to union representation lacked the specificity to render it effective.257

In *Southwestern Bell*,258 a Board majority found that an employee must waive his right to representation voluntarily.259 There, employees were told in response to their requests for representation that, inasmuch as granting the requests would require that higher management officials be called in, more severe discipline might be meted out.260 The Board concluded that the employees' subsequent attendance at the interviews did not indicate a voluntary waiver of their rights, but rather one which resulted from unlawful coercion:

*Weingarten* does not require that after having made his request, an employee must remain adamant in the face of predictions of dire ultimate consequences. The Employer's threat that the exercise of the right to representation would lead to more severe discipline or that the employee's fate would be in more capricious and hostile hands is no less interference and restraint than an outright denial of his right.261

Indeed, as the majority noted, to “conclude that an employer may play upon these fears to dissuade an employee from remaining firm in his request would defeat the right *Weingarten* protects.”262

While the employee may waive his individual section 7 right to engage in concerted activity, the Board has yet to decide whether a

254. 241 N.L.R.B. at 141.
256. Id. at 828.
257. Id. at 831.
259. Id.
260. Id.
261. Id.
262. Id.
union can, by contract, waive the right on behalf of employees. While the issue has been raised in a number of cases, the Board has either found that it was not necessary to decide it or that the alleged waivers involved were not, in any event, clear and unmistakable. While the Supreme Court did not address the issue in Weingarten, at least one federal appeals court has found that a contractual waiver did operate to deny the employees their right to union representation. In Prudential Insurance Co. of America v. NLRB, the Fifth Circuit found, contrary to the Board, that the union had, in fact waived the employees' right to union representation. The court further found that such waiver was effective:

Identifying the Weingarten right as an individual right does not mean that it cannot be contractually waived by the union. A union is allowed a great deal of flexibility in serving its bargaining unit during contract negotiations. It makes concessions and accepts advantages it believes are in the best interest of the employees it represents. This includes the right of the union to waive some employee rights, even the employee's individual statutory rights. Courts which have invalidated a clear contractual waiver of an employee's individual statutory right have done so only when the waived right affects the employee's right to exercise his basic choice of bargaining representative.

In light of the Fifth Circuit's opinion, the Board is currently reconsidering its decision in a second case involving the same parties and the same contractual provision, and presumably will state its position on the effect of contractual waivers of Weingarten rights. In light of the pending issue before the Board, it would not be appropriate to indicate whether I would agree or disagree with that court's view of a union's authority in this regard. I note, however, the issue that I perceive to be involved.

A union has no statutory right to be present at a Weingarten

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263. In a pre-Weingarten case, former Chairman Miller indicated that he believed a union could waive an employee's Weingarten right. See Western Elec. Co., 198 N.L.R.B. 1623, 625 (1972).
266. See 420 U.S. at 275 n.8 (Powell, J., dissenting).
267. 661 F.2d 398 (5th Cir. Unit B 1981).
268. Id. at 400.
269. Id. at 400-01 (citations omitted).
RIGHT TO REPRESENTATION

interview and, therefore, has no right to waive on its own behalf. Nevertheless, the exercise of the *Weingarten* right requires that the requested representative be willing to assist the employee. It could therefore be that a union does have the power to agree, during the course of collective bargaining, that it will not provide the assistance of its agents and, in this sense, the union can be said to have waived the employees' right to union representation. Such an agreement, however, is not actually a waiver of the employees' section 7 right to engage in concerted activity for mutual aid or protection. An employee's request for union representation still falls within the protection of section 7 and his failure to obtain such assistance results only from the union's refusal to provide it and not from any waiver of his statutory right to seek it.

The more important question raised by alleged contractual waivers of the *Weingarten* right is whether a union has the power to waive the employee's statutory right to engage in concerted activity for mutual aid or protection. If so, the union could not only deny an employee the right to union representation but the right to representation or assistance by fellow employees as well. The above quoted language from the *Prudential Insurance* decision would, of course, support an argument that a union has such authority. However, while a union's waiver of the employees' right to engage in concerted activity for mutual aid or protection as it relates to union representation may not "affect the employee's right to exercise his basic choice of bargaining representative," it may be that the same does not hold true in the case of the union's waiver of the right as it relates to the representation and assistance provided by fellow employees. In each instance that a union restricts the right of employees to engage in concerted activity for mutual aid or protection apart from the union, such restriction benefits the union *qua* union. This is so because as a result of the restriction, employees are thereby locked into the union as the sole vehicle by which they may engage in concerted activity for mutual aid or protection and are denied the opportunity to test the benefits of unionism against whatever benefits they might gain by concerted action without a union. To this extent, the union's waiver of the employees' section 7 right to the representation and assistance of fellow employees *does* affect employee choice in regard to whether employees would choose to be represented at

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270. See *supra* text accompanying note 270.
271. 661 F.2d at 401. See *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974); *NLRB v. Mid-States Metal Prods., Inc.*, 403 F.2d 702 (5th Cir. 1968).
Even if it were assumed that a union does have the power to waive the employees' right to representation by a fellow employee, the waiver of such a fundamental right is not lightly inferred. Therefore, a contractual clause which purports to waive union representation should not operate to waive the right to representation by fellow employees, and the effect of such waiver of union representation only should be no more than to deny the employee the assistance of nonemployee union agents.

E. The Scope of the Right

As discussed in the first section of this article, the Supreme Court's decision in Weingarten affirmed the Board's interpretation of the scope of the section 7 right to engage in concerted activity for mutual aid or protection as set out in Quality Manufacturing and Mobil Oil that section 7 guaranteed the right not only to insist upon, but to have, union representation at investigatory interviews at which the reasonable fear of discipline obtained. The right to engage in concerted activity, however, guarantees more than just the specific rights affirmed in Weingarten. As Materials Research illustrates, the right is not limited to union representation but applies to representation by fellow employees as well. Under Baton Rouge Water, the right is not necessarily limited to purely investigatory interviews. Further, as illustrated by Quality Manufacturing, section 7 protects not only the employee who requests or insists upon representation; attempts that are likewise concerted activity for mutual aid or protection.

Two important post-Weingarten decisions made by the Board...
indicate the broad scope of the right to engage in concerted activity as it relates to interviews to which the reasonable fear of discipline obtains. In Climax Molybdenum, a Board majority held that the right to engage in concerted activity for mutual aid or protection guarantees an employee a right to consult with his representative before the interview. The majority noted that the Supreme Court’s discussion of a knowledgeable representative in Weingarten dictated that the right to representation include a right to prior consultation:

[T]he representative’s aid in eliciting the facts can be performed better, and perhaps only, if he can consult with the employee beforehand. To preclude such advance discussion . . . seems to us to thwart one of the purposes approved in Weingarten. Nothing in the rationale of Weingarten suggests that, in its endorsement of the role of a “knowledgeable union representative,” the Supreme Court meant to put blinders on the union representative by denying him the opportunity of learning the facts by consultation with the employee prior to the investigatory-disciplinary interview. Knowledgeability implies the very opposite. The right to representation clearly embraces the right to prior consultation.

The majority also rejected the contentions of the dissenters that allowing for a consultation between the employee and his Weingarten representative would impede the investigation process and transform the interview into an adversary contest contrary to the Supreme Court’s admonition:

The greater knowledgeability acquired by prior consultation obviously does not alter the nature of the interview but only advances the fact finding process. Nor will prior consultation, as the dissent suggests, cause unions to bring “pressures to bear on an employee to withhold the facts.” [T]he fact remains that a union representative so inclined could engage in such conduct about as effectively at the interview as in talks with the employee prior to the interview. If we had to speculate, we would guess that lack of prior

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279. 227 N.L.R.B. 1189 (1977), enforcement denied, 584 F.2d 360 (10th Cir. 1978).
280. Member Jenkins, former Chairman Murphy and former Member Fanning composed the majority. Former Members Penello and Walther dissented. In his concurring opinion, former Member Fanning stated that prior consultation was “not something different than, [sic] nor superior to, the act of representation itself; it is simply an aspect of that function which enables the representative to fulfill its role,” 227 N.L.R.B. at 1191 (Member Fanning, concurring). He further pointed out that since “consultation” was likewise concerted activity for mutual aid or protection, it mattered not, once the request for representation was granted, whether the employee or representative sought the consultation. Id. at 1191-92.
281. Id. at 1190.
consultation would strongly incline an employee representative to those obstructionist tactics as a precautionary means of protecting employees from unknown possibilities. Perhaps all we are suggesting is that knowledge is a better basis . . . for the successful carrying out of labor-management relations. 282

Recently, in Pacific Telephone & Telegraph Co., 283 a Board majority 284 held that the right to prior consultation includes a right to be informed as to the subject of the interview as well. 285 Without such information, the employee and representative have nothing about which to consult and, therefore, the right to consultation found in Climax Molybdenum, 286 in effect, would be denied. In response to a dissent by Member Hunter, 287 the Board majority took occasion to reaffirm the holding of Climax Molybdenum:

Prior consultation, and the knowledge which results therefrom, enables the representative to "assist the Employer by eliciting favorable facts and save the Employer production time by getting to the bottom of the incident." At the same time, it enables the representative to counsel and assist the employee . . . [and] provide the aid or protection which the employee seeks.

. . . Indeed, the act of "consultation" is no less "concerted activity for mutual aid or protection" than the act of representation itself. It is likewise activity aimed at countering employer action which threatens the employee's terms and conditions of employment. Moreover, it need not interfere with legitimate employer prerogatives any more than the act of representation. When faced with an employee's insistence on concerted action, the Employer is still free to reject the collective course and forego the interview. Further, the Employer controls the manner, form, and timing of its investigatory and disciplinary process and can take steps to protect its legitimate interests while at the same time give

282. Id.
284. Members Jenkins, Zimmerman and Fanning composed the majority.
286. In denying enforcement of Climax Molybdenum, the Tenth Circuit relied on the fact that the employees involved were aware of the interviews 17 1/2 hours in advance, but had not sought to consult with the representative on their own time; that the employees had not requested representation; and that the union had an express policy of informing employees not to cooperate in such interviews. Climax Molybdenum Co. v. NLRB, 584 F.2d 360, 362-65 (10th Cir. 1978). These facts were not present in Pacific Tel. & Tel. See 262 N.L.R.B. No. 127, 110 L.R.R.M. at 1412 n.5.
287. 262 N.L.R.B. No. 127, 110 L.R.R.M. at 1413 (Member Hunter, dissenting).
due regard to the exercise of Section 7 rights.288

In response to Member Hunter’s assertion that finding a right to prior consultation and information transformed investigatory interviews into formalized adversarial contests with all the attributes of full-scale criminal proceedings, the majority outlined certain limitations on those rights:

All Climax requires is that, as a function of an employee’s right to engage in concerted activity for mutual aid or protection, a preinterview consultation with his Weingarten representative be permitted. This consultation need be nothing more than that which provides the representative an opportunity to become familiar with the employee’s circumstances. To require that the Employer inform the employee as to the subject matter of the interview does not dictate anything resembling “discovery.” The Employer does not have to reveal its case, the information it has obtained, or even the specifics of the misconduct to be discussed. A general statement as to the subject matter of the interview, which identifies to the employee and his representative the misconduct for which discipline may be imposed, will suffice.289

The Board’s interpretation of the scope of section 7 in Climax Molybdenum and Pacific Telephone represents the same balancing of interests which resulted in the Weingarten right. Essential to the striking of that balance is the Board’s view that prior consultation and information regarding the subject of the interview enables the representation contemplated by Weingarten to take place,290 conceivably aids the employer,291 and is only a limited burden on the employer’s investigatory process.292 Any burden, in fact, is really no more than the burden caused by representation itself. As such, it is a balance struck “in the light of the mischief to be corrected and the

288. Id., 110 L.R.R.M. at 1412 (footnotes omitted). Pacific Tel. & Tel. involved an investigation of two employees for a single incident of theft. In his dissent, Member Hunter argued that allowing for prior consultation with the union representative before each employee’s separate interview could defeat the employer’s legitimate interest in preventing the employees, through the single representative, from fabricating consistent accounts of their activities. Id., 110 L.R.R.M. at 1415 (Member Hunter, dissenting). Such interest on the part of the employer, however, could be readily served by providing a different representative for each employee. Such would be a reasonable restriction on the employees’ choice of representative, in light of the circumstances of the investigation, and would serve both the employees’ right to representation and the employer’s legitimate interests in conducting its investigation.

289. Id., 110 L.R.R.M. at 1413 (footnote omitted).

290. Id., 110 L.R.R.M. at 1412.

291. Id.

292. Id.
end to be attained." 293

When an employee requests or insists upon representation at a Weingarten interview, he is attempting to engage in concerted activity for mutual aid or protection and, therefore, the request is protected by section 7. 294 However, conduct which would otherwise amount to protected activity may lose the protection of the Act depending on the manner in which it is carried out. In a number of post-Weingarten decisions, the Board has passed on the protected nature of certain employee actions aimed at enforcing Weingarten rights.

In Spartan Stores, Inc., 295 the Board held that section 7 protected an employee's attempts to obtain his union steward at the outset of an investigatory interview. There, the employee was summoned to his supervisor's office and questioned as to the reason for his leaving an employee meeting earlier that day. The employee, believing that he was to be disciplined, walked out of the office, stating that he was going to get his union steward. Despite supervisory requests that he remain, the employee obtained the steward and returned to the office, whereupon he was discharged for refusing to obey orders. 296 The Board concluded that the employee's actions amounted to a refusal to participate in a Weingarten interview absent representation and was therefore protected. 297 The Board, noting that the employee returned within two minutes, heavily relied upon the fact that, contrary to established practice, the employee's supervisors neither summoned the steward nor gave the employee any indication that they would do so. 298

In General Electric Co., 299 the Board indicated that an employee's attempts to exercise self-help by obtaining his steward would not be protected where, unlike Spartan Stores, the supervisor indicated that he would summon the steward for the employee. By indicating that the steward would be called, the supervisor had, in fact, granted the employee's request. The Board therefore concluded

293. Id.; 420 U.S. at 262. The Board has found, however, that Weingarten does not encompass a request to produce witnesses at an investigatory interview. Coyne Cylinder Co., 251 N.L.R.B. 1503, 1504 n.6 (1980).
296. Id. at 522.
297. Id. at 522-23. Similarly, the Board has held that an outburst by an employee in the course of insisting on representation was protected by section 7. Roy H. Park Broadcasting, 255 N.L.R.B. 229, 230-34 (1981).
298. 235 N.L.R.B. at 522.
299. 240 N.L.R.B. 479 (1980).
that the employee’s self-help, in direct contravention of his supervisor’s order, could not be in furtherance of his right to refuse to participate in the interview without representation.300

In Roadway Express,301 a Board majority found that an employee’s refusal to leave the plant floor to attend a Weingarten interview was unprotected. There, the employee was directed to his supervisor’s office following an altercation, but refused to report absent his union steward.302 The majority concluded that the employer’s right to maintain discipline on the plant floor privileged its disciplining of the employee for his refusal:

In Weingarten, it was the Supreme Court’s design that, on the one hand, an employee not be compelled to participate in an investigatory interview in the absence of union representation while, on the other hand, exercise of the employee’s right may not interfere with legitimate employer prerogatives. The two concepts are not mutually exclusive, of course, and we do not believe that preservation of the former must necessarily result in the derogation of the latter. Simply stated, we find that an employee’s Weingarten rights, with all its attendant safeguards, matures at the commencement of the interview, be it on the production floor or in a supervisor’s office. If the Employer chooses to initiate its investigation in a work area, then it is bound to comply immediately with an employee’s request for representation there. If, however, the Employer as here, asks the employee to leave the production area and go to an office or some other location where further discussion is contemplated, then the employee acts at his or her peril if she declines to do so.303

Member Jenkins and I dissented, arguing that the majority’s creation of a distinction between refusals to leave the plant floor and refusals to attend Weingarten interviews absent representation amounted to an arbitrary, procedural pitfall which seriously undermined the exercise of the Weingarten right.304 As we viewed the matter, the employee’s refusal to report to the office absent his steward constituted an insistence upon representation at the upcoming interview and, absent some disruptive conduct accompanying that insistence,305 could not be rendered unprotected by section 7 merely

300. Id. at 481.
301. 246 N.L.R.B. 1127 (1979). Former Members Penello, Murphy and Truesdale composed the majority.
302. Id.
303. Id. at 1128. See also Chrysler Corp., 241 N.L.R.B. 1050, 1053-55 (1979).
304. 246 N.L.R.B. at 1131 (Member Jenkins and Chairman Fanning, dissenting).
305. See Chrysler Corp., 241 N.L.R.B. 1050, 1052 n.8.
on the grounds of the employer's right to maintain discipline and order. In this regard, we noted that, if the employer's concern was merely to remove the employee from the plant floor and not to deny his request for representation, it could have so assured the employee or ordered the employee off the premises without an interview. Absent assurances, we saw no reason to place the burden of sorting out the employer's intentions on the employee, the individual least responsible for any ambiguity in that regard. Rather, we found that the employee could, under the circumstances, reasonably believe that reporting to the office would result in his being questioned without representation:

The only discernible employer interest involved in being able to force an employee off the plant floor in this instance is that the Employer be given yet another chance to understand the illegality of its rejection of the Weingarten request. The majority's "preinterview discussion," during which an employer belatedly might attempt to respond lawfully to the employee's request, embodies a mere speculation, and an ill-founded one, in view of the majority's recognition that the employee need not repeat his request at the actual interview. From the employee's perspective on the plant floor, there is no reason for him to believe that the Employer will relent from its unlawful stance once he leaves his work area, particularly where the site of the interview is but a few feet away. Accordingly, it is manifest that the majority requires the employee to do a futile act in order to preserve his right to assistance. Such a holding seriously undercuts the protection of Weingarten.306

In failing to require an employer to assure an employee who refuses to report to a meeting without representation that leaving the production area will not result in a denial of his request, the majority opinion in Roadway Express accords absolute protection to an employer's interest in avoiding disruption, while giving no weight to the employee's right to representation. Conversely, requiring an employer, in such circumstances, to assure an employee that his rights will be preserved is a minimal intrusion into an employer's right to maintain discipline and, therefore, would reasonably accommodate the interests of both sides. In this regard, Roadway Express is contrary to Spartan Stores and General Electric, where the protected nature of employee self-help in furtherance of the Weingarten right was found to be dependent on the absence of assurances that the em-

306. 246 N.L.R.B. at 1131.
ployee’s request for representation would be granted.\textsuperscript{307}

Recently, a Board majority seriously restricted the scope of section 7 protections as they relate to concerted activity aimed at obtaining union representation. In \textit{Bridgeport Hospital}\textsuperscript{308} the employer, following several incidents of vandalism, called a meeting of its security guards to discuss the problem. At the meeting, three guards insisted that their union representative be present and walked out of the meeting when their request was denied. The administrative law judge reasoned that, inasmuch as the meeting was not one to which \textit{Weingarten} rights attached, the guards had no right to a \textit{Weingarten} representative and, therefore, no right to refuse to participate in the meeting absent such representation.\textsuperscript{309} The majority adopted the administrative law judge’s conclusion that the guards had been lawfully disciplined for insubordination in walking out of the meeting, finding that their right to act in concert to obtain the presence of the union representative was no broader than their statutory right thereto.\textsuperscript{310}

Member Jenkins and I dissented.\textsuperscript{311} While \textit{Weingarten} may have been inapplicable to the meeting inasmuch as it did not concern possible discipline,\textsuperscript{312} we noted that the statutory right to engage in concerted activity for mutual aid or protection is not limited to situations where the activity is aimed at enforcing a statutory right. Thus, while the employer in \textit{Bridgeport Hospital} could lawfully deny the request for the presence of the union agent and conduct the meeting without him,\textsuperscript{313} that fact did not preclude the employees from engaging in a concerted walkout to obtain the presence of the representative. As we viewed the matter, the presence of the union agent at

\begin{itemize}
\item \textsuperscript{307} See supra text accompanying notes 296-301. Likewise, the Board has found that employer assurances that a particular interview would not result in discipline are a significant factor in determining whether an employee has a reasonable fear of discipline in regard to the interview. See supra note 64. \textit{Roadway Express} recently has been interpreted as involving a refusal to comply with a directive that resulted in a disruption or disturbance challenging supervisory authority. See E. I. Du Pont De Nemours, 262 N.L.R.B. No. 123, 110 L.R.R.M. 1417, 1419 n.5 (1982). The broad holding of \textit{Roadway Express}, therefore, may be limited.
\item \textsuperscript{308} 265 N.L.R.B. No. 54, 1982-83 NLRB Dec. (CCH) ¶ 15,371, at 26,142 (Nov. 17, 1982). Chairman Van de Water, Member Zimmerman and Member Hunter composed the majority.
\item \textsuperscript{309} Id., 1982-83 NLRB Dec. at 26,143.
\item \textsuperscript{310} Id., 1982-83 NLRB Dec. at 26,142.
\item \textsuperscript{311} Id., 1982-83 NLRB Dec. at 26,144 (Members Fanning & Jenkins, dissenting).
\item \textsuperscript{312} See Northwest Eng’g, 265 N.L.R.B. No. 26, 1982-83 NLRB Dec. (CCH) ¶ 15,311, at 26,013 (Oct. 22, 1982).
\item \textsuperscript{313} An action that the existence of the statutory right to representation does not allow.
such a meeting was related to the interests of employees and a term and condition of employment. It was therefore a proper subject for concerted activity for mutual aid protection. In short, the walkout amounted to a strike for which the employees could not be disciplined.

In Bridgeport Hospital, the majority refused to view the employer's lawful denial of the request for the presence of the union agent as a term and condition of employment which could be the subject of a protected protest. This refusal was the direct result of a failure to discern the full scope of the section 7 right to engage in concerted activities for mutual aid or protection apart from the Weingarten context. For in finding that the existence of the Weingarten right determined the protected nature of the employees' walkout, the majority ignored the fact that the Weingarten right is no more than one application of section 7 as it relates to a specific set of circumstances. That such circumstances may not be present in a particular case does not, however, end the inquiry and determine the scope of section 7. It was the majority's failure to look beyond the Weingarten context in Bridgeport Hospital which led it to interpret section 7 in a manner “restrictive in its broad scope” and one which did “violence to its purposes.”

F. Remedy

When an employee is disciplined because of an insistence upon or request for representation at a Weingarten interview, the discipline is for the exercise of section 7 rights and the appropriate remedy is restoration of the status quo ante, including expungement of the disciplinary record as well as reinstatement and backpay where applicable.

However, not all discipline occurring in Weingarten situations is

314. 265 N.L.R.B. No. 54, 1982-83 NLRB Dec. at 26,144 (Members Jenkins and Fanning, dissenting).
315. See NLRB v. Washington Aluminum Co., 370 U.S. 9, 14-17 (1962). Of course, the employees in Bridgeport Hospital were no more entitled to the presence of their union agent than the employees in Washington Aluminum were entitled to a heated workplace, but the fact that an employer could lawfully resist such demands did not render the walkout in Bridgeport Hospital any less protected than the walkout in Washington Aluminum.
316. 265 N.L.R.B. No. 54, 1982-83 NLRB Dec. at 26,144.
motivated by the employee's attempt to exercise section 7 rights. In many cases, discipline which follows a Weingarten-violative interview is for the underlying misconduct or performance which is the subject of the interview. In such alleged just cause discipline cases, it can be argued that the disciplinary decision is neither in response to the employee's exercise of Weingarten rights nor affected by the underlying unlawful denial of representation. If so, restoration of the status quo ante would put the employee in a better position than he enjoyed before the unlawful interview and, therefore, would be inappropriate. Moreover, where discipline is suspension or discharge, any make-whole remedy for the underlying Weingarten violation must be consistent with section 10(c) of the Act which provides: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."319

However, to the extent that a disciplinary decision which follows a Weingarten-violative interview is based at all on that interview, the discipline is not, in fact, for cause. Rather, the disciplinary decision has been tainted by the unlawful denial of representation, had for the employee been accorded his statutory rights, the decision might have been different. Nor should an employer be allowed to benefit from its derogation of an employee's statutory rights. Thus, on this theory, the Board, in several cases, ordered reinstatement and backpay for discharges viewed as the results of unlawful interviews.320 The discharge was considered to be outside the remedial restrictions of section 10(c) in that, as a result or effect of the unlawful interview, it came within the scope of the Board's remedial authority to wipe out the effects of unfair labor practices through restoration of the status quo ante.321

The Board's result-of-one interview approach to the appropriateness of make-whole remedies properly attempted to identify, as the basis for the remedy, a causal relationship between the underlying unfair labor practice and the discipline. However, not all disci-

plice which follows an unlawful interview can be termed a result thereof. An interview may neither add to nor serve as confirmation of what the employer has learned independently. Although the fact that the interview was conducted cannot be erased from the employer's decisionmaking process, its contribution to the disciplinary decision may be insignificant. In short, while the interview may be a link in a causal chain which culminates in discipline, it is not a cause of the discipline in the sense that it is a factor in the decision or that the decision was based thereon. To exclude such interviews from application of a make-whole remedy requires a standard of causality which avoids a per se application by distinguishing between unlawful interviews which serve as an actual basis for discipline and those which do not.

In Kraft Foods, Inc., a Board majority focused on the employer's reliance on information obtained in a Weingarten-violative interview as the critical factor in determining whether or not there existed a direct causal relationship between interview and discipline sufficient to justify a make-whole remedy:

In determining the appropriate remedy for a respondent's violation of an employee's Weingarten rights, the Board applies the following analysis. Initially, we determine whether the General Counsel has made a prima facie showing that a make-whole remedy such as reinstatement, backpay, and expungement of all disciplinary records is warranted. The General Counsel can make this showing by proving that Respondent conducted an investigatory interview in violation of Weingarten and that the employee whose rights were violated was subsequently disciplined for the conduct which was the subject of the unlawful interview.

In the face of such a showing, the burden shifts to the Respondent. Thus, in order to negate the prima facie showing of the appropriateness of the make-whole remedy, the Respondent must demonstrate that its decision to discipline the employee in question was not based on information obtained at the unlawful interview. Where the Respondent meets its burden, a make-whole remedy will not be ordered. Instead, we will provide our traditional cease-and-desist order in remedy of the 8(a)(1) violation.

322. 251 N.L.R.B. 598 (1980).
323. Id. Former Members Penello and Truesdale and Chairman Fanning composed the majority. Member Jenkins dissented from this aspect of the decision. He argued that, once a Weingarten-violative interview is followed by discipline, "it becomes virtually impossible to determine whether the disciplinary decision was based upon 'information' obtained at the unlawful interview." Id. at 599. For Member Jenkins, the "impossibility" of the employer meeting its burden stemmed not as a result of the alloca-
The *Kraft Foods* requirement that the employer has the burden of establishing that the discipline was not based on information obtained during the unlawful interview recognizes the fact that it is the employer's wrongdoing that puts into issue what part, if any, the interview plays in any disciplinary decision. Accordingly, it is for the wrongdoer to sort out the matter by showing that what is otherwise the appropriate remedy for an unfair labor practice is, in fact, inappropriate. However, the analysis makes it clear that, to the extent discipline is presumed to result from a prior unlawful interview, such a presumption is rebuttable.

Under *Kraft Foods*, an employer may establish that an interview was not a cause of subsequent discipline by establishing that it did not base the discipline upon information it obtained during the interview, and therefore, that the discipline would have occurred abs...
sent the interview. In this regard, however, information should not be read as limited to affirmative or tangible evidence. Rather, it is the existence of a direct causal relationship between interview and discipline that determines the appropriateness of the make-whole remedy. Reliance on statements, tangible evidence, or other affirmative information is not the only way a direct causal relationship can exist. For example, it might be established in a particular case that the employer construed an employee's silence as an admission of guilt or was similarly persuaded on the basis of the employee's demeanor. In such a case, the degree to which discipline was based on what transpired during the interview may be no less than the case wherein actual information is obtained and relied upon. In fact, the causal link may be stronger.

In *Ohio Masonic Homes* 326 a Board panel recognized this fact. There, an employee was subjected to a *Weingarten*-violative investigatory interview following various complaints regarding her performance and, subsequently, she was suspended. The Board concluded that the employer had failed to meet its burden of establishing that discipline was not based on information obtained during the interview. Rather, the Board found that the employee "was suspended because she did not have a satisfactory explanation in response to the complaints, rather than merely because there had been some complaints." 327 The Board therefore recognized that an employee's failure to offer a satisfactory explanation during an interview may constitute information upon which a disciplinary decision is based. 328

The *Ohio Masonic* holding that an employee's failure to offer a satisfactory explanation may constitute "information" upon which discipline could be based should not be construed broadly. For to presume always that an employee's inability to exculpate himself during any unlawful interview is information upon which the disciplinary decision is based represents an adoption of the *per se* approach to make-whole remedies that *Kraft Foods* sought to avoid. Inherent in any decision to discipline is the fact that the employee has been unable to convince the employer that the discipline is unwarranted. Employers do not generally discipline employees who have proffered satisfactory explanations or presented mitigating factors. Thus, to the extent that a disciplinary decision is presumed to

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326. 251 N.L.R.B. 606 (1980).
327. *Id.* at 607.
328. *Id.*
have been predicated on the employee’s failure to offer a satisfactory explanation for the conduct under investigation, it is impossible for the employer to meet the *Kraft Foods* burden by establishing that it did not base discipline on information obtained during the unlawful interview.\(^{329}\) *Ohio Masonic* should therefore be strictly limited to situations where it has been affirmatively established that the employee’s inability to proffer a satisfactory explanation was a determinative factor for the employer in establishing the employee’s guilt.\(^{330}\) In this sense only can the employee’s failure be properly construed as a direct cause of the discipline and one which precludes the employer from establishing that discipline would have occurred even absent the unlawful interview.

The imposition of a make-whole remedy does not forever preclude an employer from disciplining the employee for conduct that was the subject of the unlawful interview. All that the remedy effects is restoration of the *status quo ante*. The employee is still faced with the prospect of discipline just as he was prior to the unlawful interview. Therefore, the employer can discipline the employee after an investigatory interview conducted in accordance with the employee’s section 7 rights to impose discipline without an interview on the basis of evidence gathered independently of the unlawful interview.\(^{331}\)

The Board’s application of the make-whole remedy to discipline following *Weingarten*-violative interviews has been criticized by several courts of appeal, particularly the United States Court of Appeals for the Eighth Circuit. In denying enforcement of a make-whole remedy in *NLRB v. Potter Electric Signal Co.*\(^{332}\) that court found that section 10(c) of the Act barred restoration of the *status quo ante* in any case where the discharge was not in retaliation for the exercise of *Weingarten* rights, but rather, based on the underlying misconduct which was the subject of the investigation:

> While the Board has broad authority to restore the *status quo* and make whole any losses suffered by the employees because of unfair labor practices, . . . it does not have the power to order reinstatement or back pay for employees’ discharged for obvious

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330. The burden of going forward with evidence to show that the employer affirmatively relied upon the employee’s failure to offer a satisfactory explanation thus rests with the Board’s General Counsel, who must rebut the employer’s evidence that the discipline would have occurred absent the unlawful interview.
332. 600 F.2d 120, 124 (8th Cir. 1979).
personal misconduct, because to do so would violate Section 1(c) as interpreted by the Supreme Court in Fibreboard.333

While the Eighth Circuit appears to be of the opinion that restoration of the status quo ante is barred absolutely by section 10(c), the Seventh Circuit has taken a less restrictive view. In Illinois Bell Tele-


Fibreboard involved the application of a make-whole remedy ordering reinstatement of employees laid-off pursuant to a decision to subcontract unit work. The lay-off decision violated the employer's duty to bargain in good faith with the union. The Supreme Court rejected the employer's contention that the layoff nonetheless was for cause and therefore outside the scope of the Board's remedial authority as limited by section 10(c). 379 U.S. at 217. The Supreme Court found that the layoff stemmed directly from the unfair labor practice and was, therefore, within the scope of the Board's remedial authority. Id. In distinguishing Fibreboard, the Eighth Circuit relied on the Supreme Court's view that section 10(c) was designed to preclude the Board from reinstating individuals discharged for misconduct. 664 F.2d at 1097. The Supreme Court in Fibreboard expressed this view by quoting a report of the United States House of Representatives. The Court said:

The House Report states that the provision was intended to put an end to the belief, now widely held and certainly justified by the Board's decision, that engaging in union activities carries with it a license to loaf, wander about the plants, refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct.

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379 U.S. at 217 n.11 (quoting H. R. REP. No. 245, 80th Cong., 1st Sess., 42 (1947)). The Conference Report notes that under § 10(c) employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activities, or for other cause [interfering with war production] . . . will not be entitled to reinstatement.


As expressed in the above footnote, the legislative history of section 10(c) indicates the concern of Congress that union activity not be a shield against that which is otherwise a discharge or suspension for cause. It recognizes the obvious fact that a discharge or suspension for cause does not entail an illegal motive or constitute an unfair labor practice. Section 10(c) would also appear to bar reinstatement for discharges or suspensions for cause which, because of their impact on organizational rights, could be interpreted as unfair labor practices. This may occur where an employee's union activity also constitutes misconduct and where the discharge or suspension of a union activist for what would otherwise be cause is, nonetheless, viewed as restraint and coercion of the section 7 rights of other unit employees solely by virtue of the activist's removal from the workplace. In neither case does the discipline "[stem] directly from an unfair labor practice . . . ." 379 U.S. at 217. Discipline, however, which is based on information obtained during a Weingarten-violative interview does stem directly from an unfair labor practice and therefore falls within the scope of the Board's remedial authority as interpreted in Fibreboard. The Eighth Circuit's holding that section 10(c) bars reinstatement in all cases where discipline is for cause based on personal misconduct represents an overly restrictive reading of Fibreboard and an overly broad reading of the legislative history of section 10(c).
phone & Telegraph Co.,\textsuperscript{334} that court remanded the reinstatement issue to the Board for the purpose of determining whether the discipline of the employee stemmed solely from the unlawful interview.\textsuperscript{335} The court reasoned that restoration of the \textit{status quo ante} would be inappropriate where the employer could establish that the discipline "is and was supported by other independent evidence which was available to the Company at the time of the discharge."\textsuperscript{336}

The Court of Appeals for the Sixth Circuit has apparently adopted the Seventh Circuit's analysis. In \textit{General Motors Corp. v. NLRB},\textsuperscript{337} the court refused to enforce a make-whole remedy on the grounds that evidence gathered before an unlawful interview represented independent evidence of good cause for the discharge and that, while the employer had not discharged the employee on the basis of that evidence alone, it could have.\textsuperscript{338}

Unlike the Eighth Circuit, the Sixth and Seventh Circuits do not treat section 10(c) as an absolute bar to a make-whole remedy for discipline based on \textit{Weingarten}-violative interviews. However, holding that such a remedy is inappropriate where there exists independent evidence which could otherwise support the discipline severely restricts the Board's authority to remedy the effects of unfair labor practices. Given that information obtained during an unlawful interview is a determinative factor in the discipline, the necessary causal relationship between the unfair labor practice and the discipline exists. The information need not be the sole basis. Given a disciplinary decision based on information obtained during an unlawful interview, it matters not whether there exists other information upon which the employer could have relied, since such evidence cannot alter what is, in fact, a causal relationship between the interview and the discipline. However, what is relevant, in terms of establishing whether the causal relationship exists at all, is whether the employer would have relied on such independent evidence as a basis for the discharge in the absence of the unlawful interview. Thus, under a proper analysis, it is insufficient for the employer to prove that the discipline did not stem solely from the interview. To the

\begin{itemize}
\item \textsuperscript{334} 674 F.2d 618 (7th Cir. 1982).
\item \textsuperscript{335} \textit{Id.} at 623.
\item \textsuperscript{336} \textit{Id.}
\item \textsuperscript{337} 674 F.2d 576 (6th Cir. 1982).
\item \textsuperscript{338} \textit{Id.} at 578. Former Member Truesdale took a similar view. \textit{See} Texaco Inc., 251 N.L.R.B. 633, 638 (1980) (former Member Truesdale, dissenting); Southern Bell Tel. & Tel. Co., 251 N.L.R.B. 1194, 1194 (1980) (former Member Truesdale, dissenting in part), \textit{enforcement denied in part}, 676 F.2d 499 (11th Cir. 1980).
\end{itemize}
contrary, the employer’s burden should be to prove that the discipline stemmed solely from the independent evidence; meaning that the discipline would have occurred, in fact, absent the unlawful interview. In only this sense can it be established that the unfair labor practice was not a cause of the discipline.339

IV. CONCLUSION

As the Supreme Court recognized in Weingarten, section 7 of the National Labor Relations Act is designed to “redress the perceived imbalance of economic power between labor and management,”340 by guaranteeing employees, inter alia, the right to act in concert for mutual aid or protection. Situations in which employees seek the aid of their designated bargaining representative or fellow employees in order to protect or advance their job interests and economic well being vis-a-vis their employer are limitless. The Weingarten right constitutes an interpretation of section 7 designed to address only one of these situations—where the employee reasonably fears that discipline will result from an interview or meeting with his employer.

While the section 7 right to engage in concerted activity for mutual aid or protection is, by its terms, a broad right, its application necessarily entails a balancing of the countervailing interests of employers and employees. In Weingarten, that balance was struck in favor of the interests of employees in a manner which gave full recognition to the statutory policies underlying section 7. In applying the Weingarten right as enunciated by the Supreme Court, I believe that the Board has fared well by continuing to interpret section 7 to its full scope as it relates to requests for representation at meetings or interviews in which the reasonable fear of discipline obtains. Materials Research,341 Pacific Telephone,342 and Climax Molybdenum,343 all entail interpretations of the scope of section 7 which are consistent with and fully serve its underlying statutory policy. They

339. See Montgomery Ward & Co., 254 N.L.R.B. 826 (1981), enforcement denied in part, 664 F.2d 1095 (8th Cir. 1981). There, a Board panel found that the employer had failed to meet its burden under Kraft Foods. Id. Inasmuch as the employee admitted to theft at the unfair labor practice hearing, however, the panel majority composed of Chairman Fanning and Member Jenkins found that the employee had forfeited his right to reinstatement and ordered backpay only up until the date of his admission. Id.

340. 420 U.S. at 262 (quoting American Ship Building Co. v. NLRB, 380 U.S. 300, 316 (1965)).

341. See supra notes 212-18 and accompanying text.

342. See supra notes 284-94 and accompanying text.

343. See supra notes 280-83 and accompanying text.
provide employees, through concerted action, a measure of protection against employer action which threatens job tenure.

The Board has had difficulty, however, in applying Weingarten to the particular circumstances which arise in various cases. In Coca-Cola, 344 Pacific Gas & Electric, 345 and Roadway Express, 346 the Board, in balancing the competing interests of the employer and employee under the facts of each case, struck the balance so heavily in favor of the employer's interests that it totally denied the employee any right to seek protection against action harmful to his job interests. That, on occasion, the Board has erred in striking the balance between employers and employees in its application of Weingarten is understandable. Weingarten cases hardly ever present the same set of facts. Thus the Board is called upon to continually weigh the interests of employers and employees and adjust the balance undertaken in Weingarten where it feels that such adjustment is required by the particular circumstance of any case. That the Board has done so is nothing more than an exercise of its "special function of applying the general provisions of the Act to the complexities of industrial life." 347 And it is those complexities which, at times, make the Weingarten right a difficult one to grasp.

344. See supra notes 177-86 and accompanying text.
345. See supra notes 197-203 and accompanying text.
346. See supra notes 187-92 and accompanying text.
347. 420 U.S. at 266.