NATIONAL LABOR RELATIONS BOARD EXTENDS RIGHTS IN EMPLOYER INVESTIGATIONS TO NON-UNION EMPLOYEES

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In *Epilepsy Foundation of Northeast Ohio*, 331 NLRB No. 92 (2000), the National Labor Relations Board (the "NLRB" or "Board") held that certain employees have the right to have a co-worker present during an investigatory interview conducted by or for the employer even where they are not represented by a union. This decision has potentially significant implications for non-union employers who historically have not permitted employee witnesses in investigation meetings and may have disciplined or terminated employees for failing to attend investigatory meetings without a co-worker or other advisor being present, with such investigations becoming more frequent with the adoption of policies forbidding racial or sexual harassment in employment. In *Epilepsy Foundation*, the Board overruled its prior decisions in *Sears, Roebuck & Co.*, 274 NLRB 230 (1985) and *E.I. Dupont & Co.*, 289 NLRB 627 (1988), which held that employees who are not represented by a union do not have a right to the presence of a co-worker in such meetings.

PRIOR LAW

In 1975, the Supreme Court of the United States held in *NLRB v. Weingarten*, 420 U.S. 251 (1975), that an employee represented by a union has the right to have a co-worker present at an investigatory interview which the employee reasonably believes might result in disciplinary action against him. This holding was premised upon the language of Section 7 of the National Labor Relations Act which permitted employees "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . " 29 U.S.C. § 157. The co-worker need not hold a position with the union. An interview is considered "investigatory" if its purpose is to question an employee about his conduct or to seek information in order to support a disciplinary decision. Representation is not required if the employee does not request a representative or if the purpose of the meeting is merely to announce a completed disciplinary decision.

While these rights, which came to be known as "*Weingarten* rights," were later extended to non-union employees by the NLRB in *Materials Research Corp.*, 262 NLRB 1010 (1982), the Board later reversed that holding in the 1985 decision in *Sears, Roebuck & Co.* Thus, at the time that the *Epilepsy Foundation* case was decided by the Board, only employees represented by a union had rights under the *Weingarten* doctrine.

THE FACTS OF *EPILEPSY FOUNDATION*

In *Epilepsy Foundation*, two non-union employees jointly prepared a memorandum that was critical of their supervisor. After the memorandum was sent, the executive director of the program requested that one of the employees meet with him and the supervisor he had criticized. The employee, intimidated because of an earlier reprimand, requested that the co-worker with whom he had drafted the memorandum attend the meeting with him. The employer refused to permit this and discharged the employee when he refused to attend the meeting without his co-worker.

The discharged employee filed unfair labor practice charges with the NLRB. Although the administrative law judge at the trial held that the existing law did not permit employees who are not represented by a union to assert *Weingarten* rights, in a 3-2 decision, the full Board on appeal reversed the administrative law judge's decision and held that the rationale of *Weingarten* "is equally applicable in circumstances where employees are not represented by a union, for in these circumstances the right to have a coworker present at an investigatory interview also greatly enhances the employees' opportunities to act in concert . . . ." Slip Op. at 3.

THE EFFECT OF *EPILEPSY FOUNDATION* ON NONUNION EMPLOYERS

The basic rule of *Weingarten*, as developed in hundreds of NLRB decisions over the past 25 years, is that an employer must permit a co-worker to be present at an investigatory interview, and the employee may request the co-worker's presence at any time (a request made after the meeting begins is valid). Moreover, the co-worker may be a supervisor, and the employee is entitled to a pre-meeting consultation with the co-worker before the investigatory meeting begins or resumes. The employer need not ask an employee if he or she wants a co-worker present at any time and the co-worker need not be permitted to participate actively in the meeting. The investigatory meeting need not be delayed if the requested co-worker is unavailable, unless the employer is responsible for the unavailability (such as because the co-worker is on the job).

A critical limitation in the reach of the *Epilepsy Foundation* holding is that the rights are limited to employees protected by the National Labor Relations Act, *i.e.*, supervisors and managers are excluded from the protection of the *Weingarten* doctrine. Moreover, the Board does not require employers to permit outsiders, whether they be lawyers, spouses, priests or rabbis, to be present during investigatory meetings. And even if the employer were to refuse to permit the presence of a co-worker during an investigatory meeting in violation of existing law under *Weingarten*, the employer is not subject to liability under the National Labor Relations Act for disciplining the employee under investigation so long as the discipline is for the underlying offense (*e.g.*, theft, sexual harassment, or other misconduct) and not for having exercised his

Weingarten rights. It is only in the situation where the discipline was for exercise of *Weingarten* rights that the Board will find an unfair labor practice.[1]

The *Epilepsy Foundation* decision confronts non-union employers with new issues in the enforcement of their equal employment opportunity policies prohibiting harassment in employment, and in discharging their obligations to ensure a workplace free from harassment and discrimination under civil rights statutes such as Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*. The law and many of these policies require the employer to conduct investigations upon learning of possible harassment of fellow or subordinate employees, and these investigations frequently take the form of the employer meeting individually with the protagonists, gathering facts (a true "investigatory interview," from the standpoint of the alleged harasser) and deciding whether discipline or discharge is warranted under the circumstances. Secrecy and confidentiality concerns are often paramount in these matters, with only those employees with a need to know becoming privy to the allegations, facts and identity of the accuser. Under the holding in *Epilepsy Foundation*, however, the accused employee (assuming he is not a supervisor or manager) will be entitled to obtain the presence of a co-worker even if that co-worker is also involved in the matter under investigation (*e.g.*, a fellow employee who is also being accused). The investigation may then be compromised in that the co-worker can learn the nature of the allegations against him prior to attending his own investigatory meeting, and the chances of information about the accusations leaking out to others are multiplied with the increased number of people who know of the allegations. And, in the case of a harassment investigation, the employer is effectively required by the law to conduct the investigatory meetings in order to maintain a defense to the underlying claim of harassment under the existing policies forbidding harassment, such that it is not a realistic option in these cases to forego the investigatory meeting completely and proceed to making the decision on discipline without hearing from the accused.

CONCLUSION

The election in November 2000 may result in subsequent appointments to the Board that will cause the NLRB to revert to its previous position that non-union employees have no *Weingarten* rights, as happened after the Reagan-era Board appointees took hold of the decision-making process in the mid-1980s. However, non-union employers now must be careful not to fall into the trap of discharging employees for refusing to attend investigatory meetings without

[1] Note, however, that existing Board law is subject to change through issuance of decisions in cases over time and the political views of the Board's members, and it is not possible to predict whether and under what circumstances the Board's precedents in the area of *Weingarten* may change. Indeed, the employer in *Epilepsy Foundation* acted properly under then-existing law with respect to denying the presence of a co-worker and then discharging the employee for refusing to attend the meeting on those terms, but nonetheless was held in violation of the National Labor Relations Act after the fact.

the presence of a co-worker, lest the discharged employee obtain a powerful claim for reinstatement and back wages on account of the unlawful termination.

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