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CONCERTED ACTIVITY: A CALL TO RETURN TO THE SPIRIT OF *WEINGARTEN*

Max B. Roesch*

Section 7 of the National Labor Relations Act¹ (hereinafter “the Act”) enumerates the rights of American workers to organize and engage in concerted activities for mutual aid and comfort. These rights are the cornerstone of this nation’s labor law and policy. One of the most important of those rights is the right to request and receive the aid of a coworker representative in a disciplinary meeting. The watershed Supreme Court decision in *NLRB v. Weingarten*² held that workers who reasonably believe that a meeting with their employer could lead to discipline have a right to be accompanied by a union representative.³

The National Labor Relations Board (hereinafter “the Board”), the agency charged with interpreting and administering the Act, has vacillated through the years on the question of whether that right extends to workers in workplaces without an exclusive bargaining representative.⁴

Since 2004, the Board has taken the position that unrepresented workers do not have a right to a coworker witness or representative to accompany them to investigatory meetings.⁵ However, that position is incompatible with both the *Weingarten* decision and the language of the Act itself. It follows that the Board should reverse its position and hold that an employer violates Section 8(a)(1) of the

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¹ 29 U.S.C. §§ 151–169 (2012).

² *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

³ *Id.* at 368–69.

⁴ Christine Neylon O’Brien, *The NLRB Waffling on Weingarten Rights*, 37 *LOY. U. CHI. L.J.* 111, 120–21 (2005).

⁵ *IBM Corp.*, 341 N.L.R.B. 1288, 1291 (2004).

Act by interfering with Section 7 rights by denying the right to coworker representation in an investigatory interview, regardless of whether there is an exclusive bargaining representative involved.⁶

A. Background

Prior to the Supreme Court decision in *Weingarten*, the Board was inconsistent in its interpretation of the Act with regard to the rights of union members to have a representative in disciplinary interviews. The Board first addressed the issue in *Ross Gear & Tool Co.*, which involved a manufacturing company where a union had been elected but no contract had been finalized.⁷ During the course of negotiations, the union's recording secretary, who was employed as a cam inspector, filed a grievance complaining that, while men were allowed to smoke on the factory floor, women were not.⁸ Of the eight women who worked as cam inspectors, only three had been union supporters in the election, which had caused some conflict on the shop floor. When the employer's labor relations officer decided to allow the female inspectors to smoke on the shop floor, he left it to the recording secretary to inform her coworkers, in the hopes that the good news would mend the rift between them.⁹ Unfortunately, the news only deepened the conflict, and the employer requested a meeting with the recording secretary to discuss the issue.¹⁰ The secretary requested that a fellow union member be allowed to accompany her, and when the employer denied the request, she refused to meet with employer alone and was promptly discharged for insubordination.¹¹

The Board did not specifically address the right to a representative in disciplinary meetings in the framework of Section 7 rights and held that because the subject of the meeting was a matter concerning prior dealings with the union as the exclusive bargaining representative, the employer's refusal to allow a representative

⁶ As defined by the Court in the *Weingarten* decision, an investigatory interview is one in which the employee being interviewed reasonably believes the interview could lead to discipline. *Weingarten*, 420 U.S. at 262.

⁷ *Ross Gear & Tool Co.*, 63 N.L.R.B. 1012, 1017-19 (1945).

⁸ *Id.* at 1021.

⁹ *Id.* at 1022.

¹⁰ *Id.* at 1022-24.

¹¹ *Id.* at 1028.

interfered with the union's right to bargain over changes to the terms and conditions of employment and was therefore a violation of Section 8(a)(5)¹² of the Act.¹³

The Board applied a different analysis in *Dobbs Houses*, holding that a worker had a right to a representative only in "exceptional circumstances."¹⁴ The Board failed to indicate any standard, however, to determine whether a particular circumstance is exceptional.¹⁵

In a series of cases in the late 1960s, the Board issued a series of narrow, fact-based holdings resting on Section 8(a)(5) of the Act, giving represented workers the right to a representative depending on whether the subject matter of the meeting could be characterized as a disciplinary meeting tantamount to bargaining over the worker's terms and conditions of employment, which would invoke the right to a representative, or an investigatory meeting involving only fact finding which therefore would not invoke Section 8(a)(5) protection.¹⁶

B. A Standard Emerges

That distinction proved to be meaningless because the question hinged on the proffered intent of the employer, which allowed employers to classify almost any meeting as investigatory to avoid having to deal with a representative.¹⁷ In 1969, in *Texaco Inc., Los Angeles Sales Terminal*, the Board adopted a test that rested on the objective manifestation of the employer's purpose rather than the employer's professed purpose.¹⁸ It held that if the employer's conduct was such that the worker

¹² Section 8(a)(5) of the Act is the unfair labor practice of an employer refusing to bargain with a certified labor organization.

¹³ *Id.* at 1033–34. The Seventh Circuit refused to enforce the order, holding that employees have a right to a union representative only when the meeting is held to discuss a formal grievance. *NLRB v. Ross Gear & Tool Co.*, 158 F.2d 607 (7th Cir. 1947). The Board has followed a policy of non-acquiescence with regard to Circuit Court decisions since the 1940s. See *Acme Industrial Police*, 58 N.L.R.B. 1342, 1344–45 (1944). Although this policy has occasionally been judicially criticized, neither Congress nor the Supreme Court has interdicted the policy. See Samuel Eistreich & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 681 (1989).

¹⁴ *Dobbs Houses, Inc.*, 145 N.L.R.B. 1565, 1571 (1964).

¹⁵ *Id.*

¹⁶ See *Jacobe Pearson Ford, Inc.*, 172 N.L.R.B. 594 (1968); *Chevron Oil Co.*, 168 N.L.R.B. 574 (1967); *Texaco, Inc., Hous. Producing Div.*, 168 N.L.R.B. 361 (1967).

¹⁷ Joan Terzowski, *Employee Right to Union Representation During Employer Interrogations*, 7 U. TOL. L. REV. 298, 306–07 (1975).

¹⁸ *Texaco, Inc., L.A. Sales Terminal*, 179 N.L.R.B. 976, 983 (1969).

would reasonably believe that discipline would be forthcoming, the right to a representative would materialize, and a denial of the right would violate Sections 8(a)(1) and 8(a)(5) of the Act.¹⁹

In *Quality Manufacturing*, a worker was terminated for insubordination after refusing to meet with the employer without a union representative.²⁰ The Board found that the employer had violated the Act, holding that the employer's refusal to allow a union representative violated Section 8(a)(1) because it interfered with the worker's Section 7 right to "engage in concerted activities for the purpose of . . . mutual aid or protection."²¹ The Fourth Circuit refused to enforce the decision, holding that the Board could not reverse its own precedent that located the right to a representative in Section 8(a)(5) of the Act, effectively "rearrang[ing] employer-employee relations to suit its every whim."²²

In *Mobil Oil Corp.*,²³ decided while *Quality Manufacturing* was pending before the Fourth Circuit, the Board again applied the Texaco objective rule, holding that the employer had violated Section 8(a)(1) by refusing workers access to a union representative during an investigatory meeting that uncovered information leading to termination and again failing to find a violation of Section 8(a)(5).²⁴ The Seventh Circuit refused to enforce the decision, holding that the Section 7 protections were intended only to protect organizing activities intended to economically pressure the employer and did not apply to investigatory or disciplinary meetings.²⁵

C. *The Supreme Court Upholds the Board's Interpretation*

In *J. Weingarten Inc.*, the employer, who operated a chain of lunch counters, had accused a worker of stealing approximately two dollars' worth of chicken.²⁶ After repeatedly refusing to allow a union representative at the investigatory meeting, the employer elicited a tearful confession that the only thing she had taken from the restaurant without paying was her daily free lunch, which, unbeknownst to

¹⁹ *Id.*

²⁰ *Quality Mfg. Co.*, 195 N.L.R.B. 197, 198–99 (1972).

²¹ *Id.* at 198.

²² *NLRB v. Quality Mfg. Co.*, 481 F.2d 1018, 1025 (4th Cir. 1973).

²³ *Mobil Oil Corp.*, 196 N.L.R.B. 1052 (1972).

²⁴ *Id.* at 1052.

²⁵ *Mobil Oil Corp. v. NLRB.*, 482 F.2d 842, 846–47 (7th Cir. 1973).

²⁶ *J. Weingarten, Inc.*, 202 N.L.R.B. 446, 448 (1973).

her (or any of the other workers) was contrary to corporate policy.²⁷ The Board again applied the objective test from *Quality Manufacturing* and *Mobil Oil Corp.* and easily found that because the worker reasonably believed that her job may have been in danger, her Section 7 rights had been interfered with in violation of Section 8(a)(1).²⁸

On appeal, the Fifth Circuit relied on the Seventh Circuit decision in *Mobil Oil Corp.* and the Fourth Circuit decision in *Quality Manufacturing* and refused to enforce the decision in *NLRB v. J. Weingarten, Inc.*²⁹ The Board appealed to the Supreme Court, and *certiorari* was granted in 1974.³⁰

In *NLRB v. J. Weingarten*, the Supreme Court upheld the Board's reasoning in *Quality Mfg.*, *Mobil Oil Corp.* and *J. Weingarten* that represented workers are entitled to a representative in investigatory meetings that they reasonably believe may result in discipline.³¹ Denying a representative to such a worker prevents the worker from engaging in a "concerted activity [that furthers] mutual aid and protection" and therefore "interferes with . . . the rights guaranteed in Section 7" in violation of Section 8(a)(1).³² The Court reasoned that:

An employee's right to union representation upon request is based on Section 7 of the Act which guarantees the right of employees to act in concert for "mutual aid and protection." The denial of this right has a reasonable tendency to interfere with, restrain, and coerce employees in violation of Section 8(a)(1) of the Act. Thus, it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy.³³

The Court's holding limited the right to a representative in three ways, requiring that the worker specifically request a representative, that the worker reasonably

²⁷ *Id.* at 448.

²⁸ *Id.* at 450.

²⁹ *NLRB v. J. Weingarten, Inc.*, 485 F.2d 1135, 1138 (5th Cir. 1973).

³⁰ *NLRB v. J. Weingarten, Inc.*, 416 U.S. 969 (1974).

³¹ *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975).

³² *Id.* at 256–57.

³³ *Id.*

believe that meeting could result in discipline (allowing the employer to omit the investigatory meeting from the investigation entirely), and specifically stating that the employer has no duty to bargain with the representative.³⁴ The Court emphasized that the right to request a representative was “within the literal meaning of Section 7 that [e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid and protection.”³⁵

D. Post Weingarten Application of the Right to Non-union Employment Situations

The *Weingarten* decision itself was in the context of an exclusive bargaining representative relationship. However, the holding was premised on the right to engage in concerted activities for mutual aid and comfort, a right that applies to all workers covered by The Act regardless of their representation status.

1. In 1982, the Board Ruled that Workers Can Invoke the *Weingarten* Right Regardless of the Presence of an Exclusive Bargaining Representative

The NLRB first addressed the issue of whether *Weingarten* rights apply to workers not represented by an exclusive bargaining agent in *Materials Research*,³⁶ where a worker was disciplined for demanding representation in an investigatory meeting.³⁷ The Board held that requesting representation is within the literal language of Section 7.³⁸ The Board reasoned that exercise of the *Weingarten* right by unrepresented workers serves the broader purposes of guarding against unjust or arbitrary employer action and assuring other workers that they too would be able to engage the concerted aid of their coworkers if necessary.³⁹ The Board emphasized that the Supreme Court found the locus of the right in Section 7, which applies to all workers, union or not, rather than Sections 8(a)(5) and 9(a), which apply to mandatory bargaining with exclusive representatives.⁴⁰ Because all workers, irrespective of representational status, enjoy Section 7 rights, denying exercise of the

³⁴ *Id.* at 257–59.

³⁵ *Id.* at 260.

³⁶ *Materials Research Corp.*, 262 N.L.R.B. 1010 (1982).

³⁷ *Id.* at 1011.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 1012.

right to a representative to a worker without an exclusive representative would be inconsistent with the Court's ruling in *NLRB v. Weingarten*.⁴¹

The *Materials Research* rule was applied twice by the Board in two separate cases, *E.I. du Pont & Co.*⁴² and *E.I. du Pont & Co.*⁴³ The Ninth Circuit declined to enforce *DuPont I*, holding that the activity in question did not qualify as concerted activity because the worker's request for "any" coworker to witness the meeting in question was found to be a single act by the worker rather than a collective action protected by Section 7.⁴⁴ In contrast, the Third Circuit, in reviewing *DuPont II*, held that the reasoning in *Weingarten* foreclosed the narrow reading of concerted activity adopted by the Ninth Circuit and that extending *Weingarten* rights to unrepresented workers would further the purposes of the Act by building "solidarity and vigilance among employees in the absence of a Union" and "help to eliminate the inequality of bargaining power between employees and employers."⁴⁵ DuPont filed a petition for rehearing *en banc*, and the Court requested an answer to the petition from the Board.⁴⁶

At the Board, however, the newly-appointed Chairman of the Board had stripped general counsel of the power to seek enforcement of Board decisions in federal court and had transferred that authority to the Solicitor's Office.⁴⁷ The Board then directed the Solicitor's Office to file a motion to vacate the decision that had vindicated the Board and remand the matter to the Board for further consideration.⁴⁸ The Third Circuit granted the motion, allowing the newly-appointed Board to have a "do-over" of the *DuPont* decision.⁴⁹

⁴¹ *Id.* at 1014.

⁴² *E.I. DuPont de Nemours & Co.*, 262 N.L.R.B. 1040 (1982) [hereinafter *DuPont I*].

⁴³ *E.I. DuPont de Nemours*, 262 N.L.R.B. 1028 (1982) [hereinafter *DuPont II*].

⁴⁴ *E.I. Du Pont de Nemours & Co. v. NLRB*, 707 F.2d 1076, 1080 (9th Cir. 1983).

⁴⁵ *E.I. Du Pont de Nemours & Co. v. NLRB*, 724 F.2d 1061, 1065–66 (3d Cir. 1983).

⁴⁶ *E.I. Du Pont de Nemours & Co. v. NLRB*, 733 F.2d 296, 297 (3d Cir. 1984).

⁴⁷ Vanessa Waldref, Note, *Reagan's National Labor Relations Board: An Incomplete Revolution*, 15 GEO. J. ON POVERTY L. & POL'Y 285, 293 (2008).

⁴⁸ *Id.*

⁴⁹ *E.I. Du Pont*, 733 F.2d at 298.

2. The Board Invents a “Converse Exclusivity Rule” and Applies It to Deny Workers *Weingarten* Rights if They Lack an Exclusive Bargaining Representative

A year after *Dupont II*, in *Sears Roebuck & Co.*,⁵⁰ during an ongoing union organizing campaign, one of the pro-union workers was suspected of falsifying documents to cover up theft of company time.⁵¹ When called into a meeting to discuss the documents, he requested that the international representative from the union conducting the organizing campaign be included in the meeting as his union representative.⁵² The manager refused to allow the union representative or any other witness, proceeded with the meeting, and discharged the employee at the meeting’s conclusion.⁵³

The Board held that forcing employers of unrepresented employees to allow a *Weingarten* representative would be tantamount to forcing the employer to engage with employees only on a collective basis in investigatory meetings.⁵⁴ The Board reasoned that such engagement would “wreak havoc with fundamental provisions of the Act” because “the converse of the rule that forbids individual dealing when a union is present is the rule that, when no union is present, an employer is free to deal with its employees on an individual, group, or wholesale basis.”⁵⁵ The Board cited three Supreme Court cases to support its novel theory of a converse “exclusivity rule,”⁵⁶ *Linden Lumber v. NLRB*,⁵⁷ *J.I. Case Co. v. NLRB*,⁵⁸ and *NLRB v. Jones & Laughlin*.⁵⁹ The Board was correct that all three cases discuss forbidding individual dealings with an employer regarding terms and conditions of employment when a union is present. However, the converse principle that in the absence of a union, the employer is free to deal with employees on an individual basis in all matters relating

⁵⁰ *Sears, Roebuck & Co.*, 274 N.L.R.B. 230 (1985).

⁵¹ *Id.* at 254.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 231.

⁵⁵ *Id.*

⁵⁶ *Sears, Roebuck & Co.*, 274 N.L.R.B. 231 (1985).

⁵⁷ *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974).

⁵⁸ *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

⁵⁹ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

to terms and conditions of employment, relies on a specious chain of inferences and ignores that the Court in *Weingarten* specifically held that stewards do not have a right to bargain in investigatory meetings.⁶⁰

In overruling *Materials Research*, the Board also relied on *Emporium Capwell Co. v. Western Addition Community Organization*.⁶¹ In *Emporium Capwell*, the union represented employees who were unsatisfied with the antidiscrimination procedures in their collective bargaining agreement and instituted a picket and boycott against the employer in an attempt to bargain about the issue separately from the union.⁶² The Court held that the discharges were legal despite the fact that the activities involved would have been protected concerted activity under Section 7 in the absence of an official bargaining representative because, in a unionized setting, they were disruptive to the “orderly collective bargaining process contemplated by the act.”⁶³ The Board extended the Court’s reasoning and held that the scope of Section 7 protections can vary depending on whether or not the employees are exclusively represented.⁶⁴

The Board highlighted that in workplaces with an exclusive bargaining representative, union representatives have a duty to represent the interests of the entire bargaining unit, rather than simply the employee being interviewed.⁶⁵ Therefore, the Board reasoned, placing a *Weingarten* representative in a setting without an exclusive representative would be tantamount to forcing the employer to recognize and “deal with”⁶⁶ the equivalent of an exclusive representative in contravention of the Act’s “exclusivity principle.”⁶⁷ In a footnote, the Board noted

⁶⁰ 420 U.S. at 259.

⁶¹ *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50 (1974).

⁶² *Id.* at 54–56.

⁶³ *Id.* at 69, 72.

⁶⁴ *Sears*, 274 N.L.R.B. at 231.

⁶⁵ *Id.* at 231–32.

⁶⁶ The Board considered “dealing with” to be tantamount to “bargaining with.” *Sears*, 274 N.L.R.B. at 244. The Board made no mention that the *Weingarten* decision specifically held that, even in the context of an exclusive bargaining relationship, the employer has no obligation to bargain during the investigatory process, but rather emphasized that being required to allow a representative would force the employer to “deal with” employees on a collective basis. *Id.* at 231.

⁶⁷ *Id.* at 232.

without explanation that the language of the Act compels the conclusion that *Weingarten* rights can never apply to unrepresented employees.⁶⁸

3. The Board Softens Its Position Holding that while the Act Could Be Interpreted to Allow Workers Without an Exclusive Representative the Right to Concerted Aid, Policy Concerns Weighed Against such a Plain Reading of the Act

Following the rule announced in *Sears*, the Board issued a “do-over” ruling in *DuPont II*, denying *Weingarten* rights to workers without an exclusive representative.⁶⁹ On appeal, the Third Circuit took issue with the specious reasoning in *Sears*, that the only permissible interpretation of the Act was that only represented employees have *Weingarten* rights.⁷⁰ Indeed, the Court had recently held in *DuPont II* that the *Materials Research* rule was a permissible interpretation of the Act. As such, the Third Circuit remanded *DuPont II* back to the Board.⁷¹ On rehearing, the Board reformulated the *Sears* rule, holding that while either interpretation of Section 7 would be permissible, extending *Weingarten* rights to workers without an exclusive representative would create practical difficulties in labor relations, and therefore the *Sears* interpretation was preferable.⁷²

The Board, in asserting an attempt to balance the “conflicting interests of labor and management,” reasoned that the extension of *Weingarten* rights to workers without an exclusive representative weighed more heavily against employer’s interests than the exercise of *Weingarten* rights by exclusively-represented employees.⁷³ The Board opined that the presence of a trained union representative could benefit the employer by lessening the possibility of a long and costly formal grievance procedure, whereas an untrained coworker witness would be less likely to be helpful in resolving the issue.⁷⁴ Moreover, without a collective bargaining agreement, there would be no compulsory formal grievance procedure for the parties

⁶⁸ *Id.* at 230 n.5.

⁶⁹ *E.I. DuPont & Co.*, 274 N.L.R.B. 1104, 1104 (1985).

⁷⁰ *Slaughter v. NLRB*, 794 F.2d 120, 128 (3d Cir. 1986).

⁷¹ *Id.*

⁷² *E.I. Du Pont de Nemours*, 289 N.L.R.B. 627, 630–31 (1988) [hereinafter *DuPont III*].

⁷³ *Id.* at 628.

⁷⁴ *Id.* at 629–30.

to address errors after the fact.⁷⁵ The Board also reasoned that a union representative would represent the interests of the entire bargaining unit, and thus better serve the interests of the employees than a coworker witness.⁷⁶

Finally, the Board reasoned that because the existence of the *Weingarten* right can disincentivize the employer from conducting an investigatory interview at all in order to avoid dealing with the *Weingarten* representative, unrepresented employees would lose the opportunity to tell their side of the story and have no recourse if the employer got it wrong because they typically lack any form of formal grievance structure.⁷⁷

In balancing the competing interests of the employee and the employer, the Board concluded that the advantages of the *Weingarten* right as applied to exclusively-represented workers were largely absent when applied to workers without such exclusive representation.⁷⁸ Therefore, although extension of the right to all workers would be permissible under the Act, it would be preferable for policy reasons not to do so.⁷⁹ The Board has never revived the initial *Sears* position that the Act precludes *Weingarten* rights for unrepresented workers.

4. The Board Reverts to the Position that *Weingarten* Rights Are Not Contingent on Exclusive Representation

Five years later in *Epilepsy Foundation*, the Board returned to the rule from *Materials Research*.⁸⁰ The employer had discharged two employees for refusing to meet individually to discuss a memo they had authored, asserting that they no longer required the supervision of their immediate supervisor, who they believed was disruptive to their work.⁸¹ In overruling *DuPont III*, the Board rejected as speculative the rationale that non-exclusive representatives would be less skillful (and therefore less helpful to both the fellow workers and the employer interest in efficiency), and that the right to a representative would function as a detriment to workers by disincentivizing the employer from getting the aggrieved worker's side of the story

⁷⁵ *Id.* at 629.

⁷⁶ *Id.*

⁷⁷ *Id.* at 630.

⁷⁸ *Id.*

⁷⁹ *Id.* at 631.

⁸⁰ *Epilepsy Foundation*, 331 N.L.R.B. 676, 678 (2000).

⁸¹ *Id.* at 676.

at all.⁸² The Board also noted that the *DuPont III* holding that the lack of a legal obligation to represent the entire work force meant that the representative would not be motivated to forward collective interests was purely speculative, and that the workers involved are free to strategically decide whether to request a representative.⁸³ Finally, the Board revived the rationale from *Materials Research*, holding that *Weingarten* rights derive from Section 7, which is applicable to all workers, regardless of whether they have an exclusive bargaining representative.⁸⁴ On appeal to the D.C. Circuit, the Court upheld the extension of *Weingarten* rights to workers without an exclusive representative, reasoning that the mere presence of a coworker may function to dissuade an employer from treating a worker unfairly.⁸⁵

5. The Board Holds that Because of the War on Terror, Patients Attacking Nurses, and Enron, *Weingarten* Rights Should Be Withdrawn from Non-exclusive Representative Settings

The Board reversed course yet again in *IBM Corp.*⁸⁶ The employer had received a letter from a former worker complaining of harassment and proceeded to interview three workers regarding the incident.⁸⁷ A second round of individual interviews was scheduled, and all three workers requested to have a coworker witness or lawyer present, which the employer refused.⁸⁸ The three workers were subsequently discharged.⁸⁹

The Board, emphasizing that it was choosing between two permissible interpretations, held that *Weingarten* rights do not extend to workers without an exclusive bargaining representative.⁹⁰ The Board rested its holding on the contention that employers faced an increasing number of investigatory interviews because of the proliferation of laws governing workplaces, the rising level of workplace

⁸² *Id.* at 679.

⁸³ *Id.*

⁸⁴ *Id.* at 677.

⁸⁵ *Epilepsy Foundation v. NLRB*, 268 F.3d 1095, 1100 (D.C. Cir. 2001).

⁸⁶ *IBM Corp.*, 341 N.L.R.B. 1288, 1290 (2004).

⁸⁷ *Id.* at 1288.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 1289.

violence, and the September 11, 2001 terrorist attacks.⁹¹ The Board contended that workers' ability to be assisted by a coworker in such an interview would unfairly burden the employer.⁹² It went on to reiterate the speculative considerations from *DuPont III*, reasoning that because coworker representatives do not represent the entire workforce, they cannot safeguard the collective interests of their coworkers.⁹³ The Board further held that because a coworker lacks the legal status of a union representative and possesses less "knowledge of the workplace and its politics," a coworker would not be able to further the purpose of the Act by reducing the imbalance of power between the employer and the workers.⁹⁴

The Board repeated, without addressing or responding to the criticism expressed in *Epilepsy Foundation*, the rationale that coworkers are less likely to be skilled representatives than trained union representatives, and therefore do not serve to balance the interests of the workers and the employer in the same way a trained union representative would.⁹⁵ The final factor the Board weighed was the idea that the presence of a coworker with no fiduciary duty of confidentiality could both potentially stifle the worker being interviewed from disclosing sensitive or confidential information, as well as risk disclosure of confidential information outside of the investigatory interview to third parties.⁹⁶ The Board did not discuss whether the lack of any fiduciary duty or confidentiality to the investigated employee on the part of the employer would have a similar stifling effect.

The Board held, on balance, that the above four factors weighed more heavily towards the interest of the employer's right to "conduct prompt, efficient, thorough, and confidential workplace investigations" than the worker's right to "a coworker's presence [in investigatory meetings] in the absence of a union."⁹⁷

⁹¹ *Id.* at 1291.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 1292.

⁹⁵ *Id.*

⁹⁶ *Id.* at 1293.

⁹⁷ *Id.* at 1294.

6. In Applying the *IBM* Holding, the Board Determines that Requesting a Coworker Witness Is a Concerted Activity for Mutual Aid, but that Actually Having a Witness Is Not.

In *Wal-Mart Stores, Inc.*, a worker requested a coworker witness before an investigatory meeting.⁹⁸ The employer denied the request. The worker proceeded to participate in the interview, though unhelpfully.⁹⁹ The next day, the employer again requested to interview the worker without a coworker witness.¹⁰⁰ The worker refused to attend the interview, and the employer then terminated him.¹⁰¹ In applying *IBM*, the Board remanded the case to an administrative law judge to make a factual determination as to whether the discharge was for requesting a coworker witness on the first day (which remains protected under *IBM Corp.*) or refusing to participate in the interview without a witness on the second day (which would not be protected under *IBM Corp.*).¹⁰²

On remand, the administrative law judge held that the worker's conduct was such that he would have been terminated regardless of the refusal to proceed with the interview, and therefore his termination would not be a Section 8(a) (1) violation under the *IBM* rule.¹⁰³ In reviewing the new findings from the administrative law judge, the Board decided that because both parties had relied on *Epilepsy Foundation* at the time the termination occurred, it would be manifestly unjust to apply *IBM* retroactively and that the conduct of the employer had violated Section 8(a)(1) at the time.¹⁰⁴

E. The IBM Holding Is Contrary to Weingarten, Incompatible with the Act, and Premised on Either False or Speculative Policy Considerations

Both a plain reading of the Act and fidelity to the spirit of the Act require the conclusion that the *Weingarten* decision extends to all workers without reference to

⁹⁸ *Wal-Mart Stores, Inc.*, 343 N.L.R.B. 1287, 1287 (2004).

⁹⁹ *Id.* at 1292.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1293.

¹⁰² *Id.* at 1287.

¹⁰³ *Wal-Mart Stores, Inc.*, 351 N.L.R.B. 130, 142 (2007).

¹⁰⁴ *Id.* at 131.

their representational status. As such, the policy justifications underpinning the *IBM* Board are, in addition to being baseless and irrelevant in almost any conceivable case, essentially moot.

1. A Plain Reading of the Act and the *Weingarten* Decision Requires that all Workers Have the Right to a Coworker Representative During Investigatory Interviews

The Supreme Court held in *Weingarten* that the right to a representative “falls within the literal wording of Section 7 of the Act.” Specifically, “employees shall have the right . . . to engage in . . . concerted activities for the purpose of mutual aid and protection.”¹⁰⁵ The act of representing a fellow worker in an investigatory interview is a concerted act because it involves more than one person acting in concert. It is “for the purpose of mutual aid and protection” because it deters the employer’s ability to treat the interviewee unfairly. Indeed, as the dissent noted in *IBM*, “it is hard to imagine an act more basic to mutual aid or protection than turning to a coworker for help when faced with an interview that might end with . . . being fired.”¹⁰⁶ Moreover, the collective interest of other employees is also protected because the “exercise [of] vigilance . . . make[s] certain that the employer does not initiate or continue a practice of imposing punishment unjustly.”¹⁰⁷

The holdings in *IBM* and *DuPont III* relied on the proposition that the Section 7 rights of workers need to be balanced against the interests of employers.¹⁰⁸ This reasoning turns Section 7 on its head. The Board rested its contention that Section 7 rights are balanced with employer rights by citing to dicta in *Weingarten* discussing deference to the Board.¹⁰⁹

¹⁰⁵ *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 256–57 (1975).

¹⁰⁶ *IBM Corp.*, 341 N.L.R.B. 1288, 1305 (2004) (internal quotation marks omitted).

¹⁰⁷ *Id.* at 1296.

¹⁰⁸ *Id.* at 1294; *E.I. Du Pont de Nemours*, 289 N.L.R.B. 627, 628 (1988).

¹⁰⁹ To further support its contention, the Board also cited the Supreme Court decision in *Republic Aviation Corp. v. NLRB.*, 324 U.S. 793 (1945), which held that a company rule forbidding distribution of any “handbills or posters, or any literature of any description” on company property could properly be applied to union literature as well. *Id.* at 797–98. However, the Board misreads *Republic*; the employer’s rule was permissible because it pertained to the form of the message rather than the identity of the speaker, whereas extending Section 7 rights differently based on the representational status of a worker involves exactly the identity based discrimination that the Court reviled. *Id.* at 798.

The *IBM* Board's analysis misconstrues, and is at odds with, the precedents cited. Contrary to the holdings of *IBM* and *Du Pont III*, the best reading of Section 7 is the plain meaning, which is that all workers are entitled to the protections afforded by Section 7. As such, "the sole function of the court is to enforce it according to its terms."¹¹⁰

2. Extension of the *Weingarten* Right to All Employees Regardless of Representational Status Supports the Purposes of the Act

One of the primary purposes of the Act, articulated in Section 1, is to address the "inequality of bargaining power between employees . . . and employers."¹¹¹ The Board in *IBM* arrived at the rather remarkable conclusion that *Weingarten* should not extend to unrepresented employees because a coworker lacks the legal rights of a union steward and has "less knowledge of the workplace and its politics."¹¹² The thrust of the Board's reasoning was that because a union steward has certain legal rights that a "mere" coworker lacks, the union steward is able to balance the inequality of bargaining power, but the non-steward representative cannot. However, the contrary is a far more reasonable conclusion. Because workers without an exclusive representative lack many of the protections enjoyed by workers with a collective bargaining agreement, exercise of the *Weingarten* right is one of the only protections that an unrepresented worker could have to "level the playing field."¹¹³ Simply because the non-steward representative balances the scales less does not mean that the non-steward representative does not balance them at all. Such reasoning fundamentally confuses the efficacy of the exercise of a right with its existence.

Furthermore, the Board's contention that a coworker would lack knowledge of the workplace that a union steward would possess does not stand up to scrutiny, as stewards typically are coworkers first and stewards second. Moreover, their knowledge of the workplace conditions and politics derives from their experience in the workplace.

¹¹⁰ *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

¹¹¹ 29 U.S.C. § 151 (2012).

¹¹² *IBM Corp.*, 341 N.L.R.B. at 1292.

¹¹³ *Id.*

3. *IBM* Is Based on Speculative, Inaccurate, and Misleading Premises

The policy arguments relied upon in *DuPont* and *IBM* to deny workers without an exclusive representative *Weingarten* rights rest on factual assumptions that can at best be described as speculative when applied generally and manifestly false when applied to actual events in the workplace.

a. The Societal Changes that the *IBM* Board Contended Require Removing the Impediment of the *Weingarten* Right Do Not Actually Impact Workplaces in a Meaningful Way

First, the Board asserted that because of a variety of factors, including proliferation of workplace regulation, increased workplace violence, corporate abuse and fiduciary lapses, and the September 11, 2001 attacks, the need for investigatory meetings has increased in the American workplace, and that any continued enjoyment of *Weingarten* rights by unrepresented employees would impede employers from being able to conduct efficient investigations.¹¹⁴ The Board offered no evidence, empirical or otherwise, to support the assertions that employers faced an increasing need to conduct workplace investigations, nor any plausible chain of reasoning to connect the factors asserted to workplace investigations. Contrary to the *IBM* Board's assertions, workplace violence declined by 62% in the nine-year period preceding the *IBM* decision, and a further 35% between 2003 and 2009.¹¹⁵ Furthermore, approximately 75% of workplace violence is perpetrated by non-employees and would not have an impact at all on the necessity of performing workplace investigations.¹¹⁶

Nor is the connection between the supposed need to curtail *Weingarten* rights and corporate or fiduciary lapses at all apparent. As the dissenters in *IBM* noted, the cause of the financial malfeasance the Board appears to have been referring to were "concentrated in the executive suite, not the employee cubicle of the factory floor."¹¹⁷ To cynically use such events as a reason to limit the rights of workers not only

¹¹⁴ *Id.* at 1291.

¹¹⁵ Erika Herrell, *Workplace Violence, 1993–2009*, BUREAU JUST. STAT. (Mar. 2011), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=2377>.

¹¹⁶ *Id.* at Table 5.

¹¹⁷ *IBM Corp.*, 341 N.L.R.B. at 1305.

misdirects the blame for those events but further erodes the position of those workers, who all too often are held up as scapegoats for the criminal conduct of their bosses.¹¹⁸

Finally, one can only wonder how the events of September 11, 2001 are in any way relevant to *Weingarten* rights or what the Board meant by “security concerns that are an outgrowth of our troubled times.”¹¹⁹ The holding that some sense of pervasive uncertainty regarding national security should function to restrict the ability of a worker to seek and acquire the aid of a coworker in an investigatory interview not only makes a mockery of any semblance of logical inference, it is utterly antithetical to any rational conception of American freedom.¹²⁰ Additionally, the Board’s conception that its holding was issued in uniquely “troubled times” ignores the social and political turmoil in the years leading up to the *Weingarten* decision itself, including dramatically higher crime rates, the bombing of the U.S. Capitol Building, and the seizure of the Statue of Liberty by antiwar protestors.¹²¹

b. The Exercise of *Weingarten* Rights Does Not Place an Appreciable Burden on Employers

Workers having the right to request a coworker representative would not create any sort of substantial burden on employers, as workers must still explicitly request a coworker and reasonably believe that the meeting could lead to discipline. Furthermore, since *Weingarten* was decided in 1972, there is no evidence that employers with an exclusive bargaining relationship have been appreciably impeded from conducting effective investigatory interviews. As such, there is no reason to believe that in minority union shops or non-union shops the employer’s ability to conduct investigatory interviews would be impeded.

¹¹⁸ See John C. Coffee, Jr., *Corporate Criminal Responsibility* in *Encyclopedia of Crime and Justice* 253, 260 (S.H. Kadish ed., 1983) (“Moreover, an insistence on finding a responsible individual decision-maker might produce a scapegoat system of criminal justice, in which lower echelon operating officials would probably bear the primary responsibility and risk of exposure.”).

¹¹⁹ *IBM Corp.*, 341 N.L.R.B. at 1294.

¹²⁰ See *Republic Steel Corp.*, 62 N.L.R.B. 1008 n.49 (1945) (holding that, despite an adverse affect on war production, the Act protects concerted activity as a matter of law); see also ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, Ch. XXII (“All those who seek to destroy the liberties of a democratic nation ought to know that war is the surest and shortest means to accomplish it.”).

¹²¹ Sarah Helene Duggan, *Symposium on the American Worker: The Ongoing Battle Over Weingarten Rights for Non-Union Employees in Investigative Interviews: What do Terrorism, Corporate Fraud, and Workplace Violence have to do with it?*, 20 NOTRE DAME J.L. ETHICS & PUB POL’Y 655, 661 (2006).

c. Contrary to the Holding in *IBM*, the Right to a Coworker Representative Protects a Collective Interest

The *IBM* Board reasoned that because coworkers do not have a legal duty of fair representation, they could not safeguard the collective interests of the entire bargaining unit, in part because the Board believed it was speculative to think that a coworker would look beyond the immediate issue to any collective interest.¹²² Interestingly, the Board did acknowledge that a coworker acting as a witness would lend support to the worker being interviewed, though they offer no explanation as to how that does not constitute concerted activity for the purpose of mutual aid.¹²³ Moreover, the idea that a coworker would not act to further a collective interest, as a steward would, is at least as speculative as the idea that they would. The *IBM* Board also expressed concern that the coworker witness may be a “co-conspirator” in the activity giving rise to the interview, and that co-conspirators representing each other could make it more difficult to arrive at the truth.¹²⁴ However, the same situation could as easily arise in a unionized workplace, and the Board has held that in such a case the worker requesting representation does not have an unlimited right to insist on a particular coworker.¹²⁵

d. Section 7 Protects Workers’ Rights to Engage in Concerted Activities, Not the Employers’ Interests in Efficiency

The *IBM* Board further reasoned that because coworker witnesses lack the training that union stewards receive, they would not assist in efficient resolution of disputes in investigatory meetings, which would serve neither the interest of the employer nor the worker.¹²⁶ This reasoning again turns Section 7 on its head; Section 7 protects the rights of workers, not an employer’s interest in efficient operation. Additionally, even if one were to assume that coworker witnesses would be less

¹²² *IBM Corp.*, 341 N.L.R.B. at 1291–92.

¹²³ *Id.* at 1292.

¹²⁴ *Id.*

¹²⁵ *Int’l Bhd. of Elec. Workers, Local 236*, 339 N.L.R.B. 1199, 1204 (2003). Chairman Battista, who co-authored the majority opinion in *IBM*, also co-authored the majority opinion in *Int’l Bhd. of Elec. Workers* ten months earlier, and was surely aware that the supposed problem of “co-conspirator representative” had already been resolved.

¹²⁶ *IBM Corp.*, 341 N.L.R.B. at 1292.

effective in quickly resolving disputes than union stewards, that does not mean that they would make an investigation less efficient than meeting with a worker alone.

e. The Board's Reasoning Regarding a Concern about Protection of Confidentiality Was Rejected by the Supreme Court in an Analogous Case

The Board reasoned that a coworker's lack of a fiduciary duty or duty of confidentiality would stifle the worker being interviewed from revealing confidential or sensitive information.¹²⁷ However, employers have no generalized duty of confidentiality to their employees, and if the worker being interviewed reasonably believes discipline could result from the interview, the worker would be more stifled by the manager's presence than the coworker that was chosen by the worker. Additionally, if the interview turned out to involve sensitive information, the interviewee could always withdraw the *Weingarten* invocation before continuing the meeting.

The Supreme Court has already rejected reasoning similar to the Board's in the context of federal employee labor relations in *NASA v. Federal Labor Relations Auth.*¹²⁸ The Court held that the employer's legitimate concerns regarding confidentiality did not outweigh the plain reading of the worker's right to receive assistance in a meeting the worker reasonably believes could result in discipline.¹²⁹ The court noted that the right to a representative "provides a procedural safeguard to employees under investigation . . . and the mere existence of the right can only strengthen the moral of the . . . workforce."¹³⁰

f. The *IBM* Holding is Internally Inconsistent and Unworkable

Finally, the *IBM* rule is unworkable. When the Board applied *IBM* in *Wal-Mart Stores Inc.*, it was forced to reach the incongruous conclusion that a worker is protected by Section 7 when requesting a coworker witness, but that the employer need not accede to such a request.¹³¹ The holding that requesting assistance is a protected concerted activity under Section 7 but actually receiving assistance is not

¹²⁷ *Id.* at 1293.

¹²⁸ *NASA v. Fed. Labor Rels. Auth.*, 527 U.S. 229 (1999).

¹²⁹ *Id.* at 244.

¹³⁰ *Id.*

¹³¹ *Wal-Mart Stores, Inc.*, 343 N.L.R.B. 1287, 1299–1300 (2004).

is a logical construct that is incredibly bizarre, nonsensical, and out of step with any rational or orderly labor policy.

F. Conclusion

The right of workers to engage in “concerted activities for . . . mutual aid or protection” is a cornerstone of American labor law and policy.¹³² No other right is as important a counterbalance to the economic power possessed by employers over their workers. The *Weingarten* decision makes clear that requesting and receiving the aid of a coworker in a disciplinary interview is a quintessential exercise of that right.¹³³ In contrast, the current position of the Board embraces a variety of demonstrably incorrect and irrelevant considerations to deny workers who lack a certified bargaining representative the exercise of that right. It follows that the Board should revisit its position in *IBM*, and conform it to the plain language of the Act and the Supreme Court’s *Weingarten* holding, thereby returning the basic protections of Section 7 to the vast majority of the American working class.

¹³² NLRB v. Weingarten, 420 U.S. 251, 251 (1975).

¹³³ See NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).